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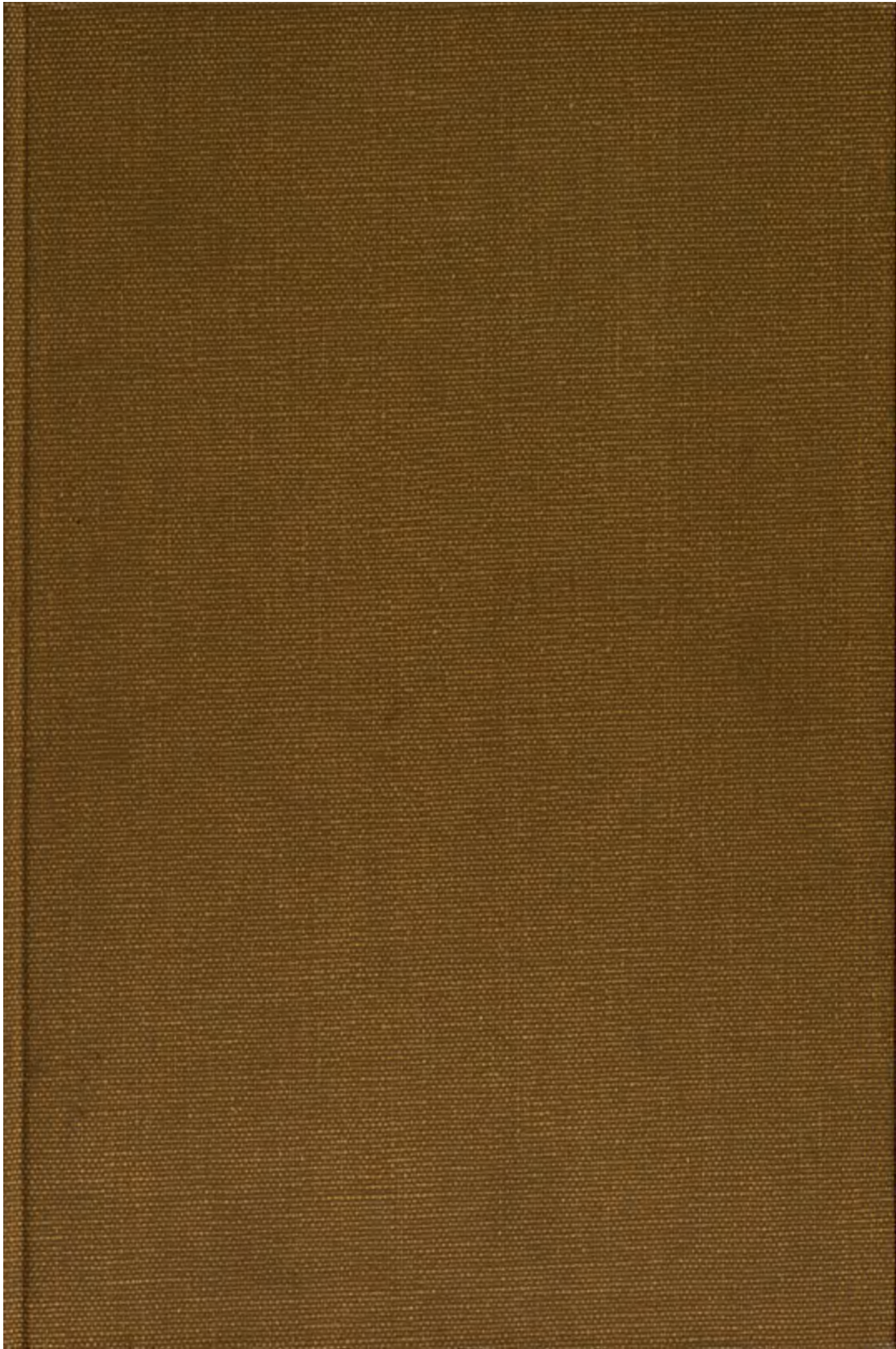
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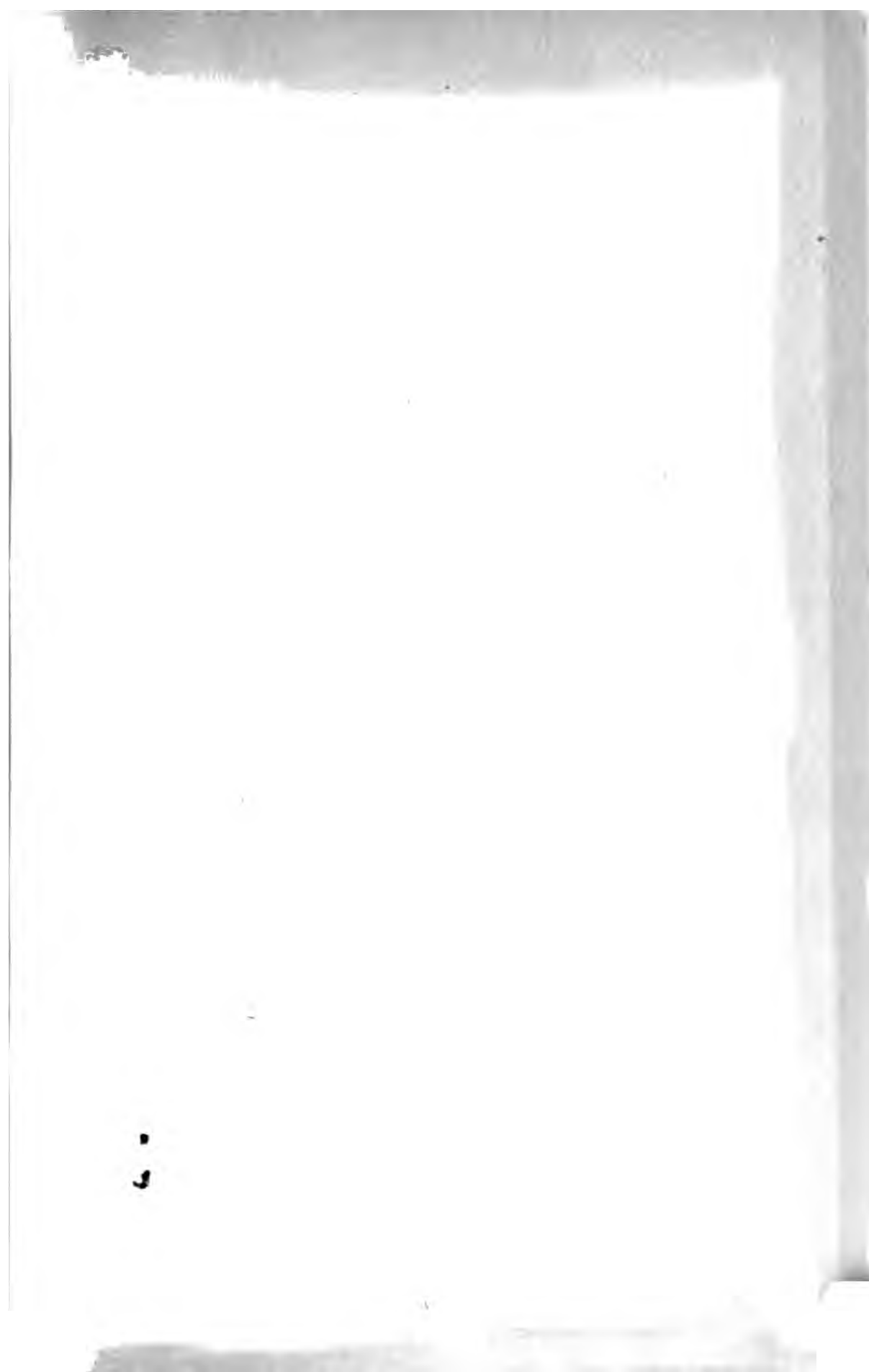
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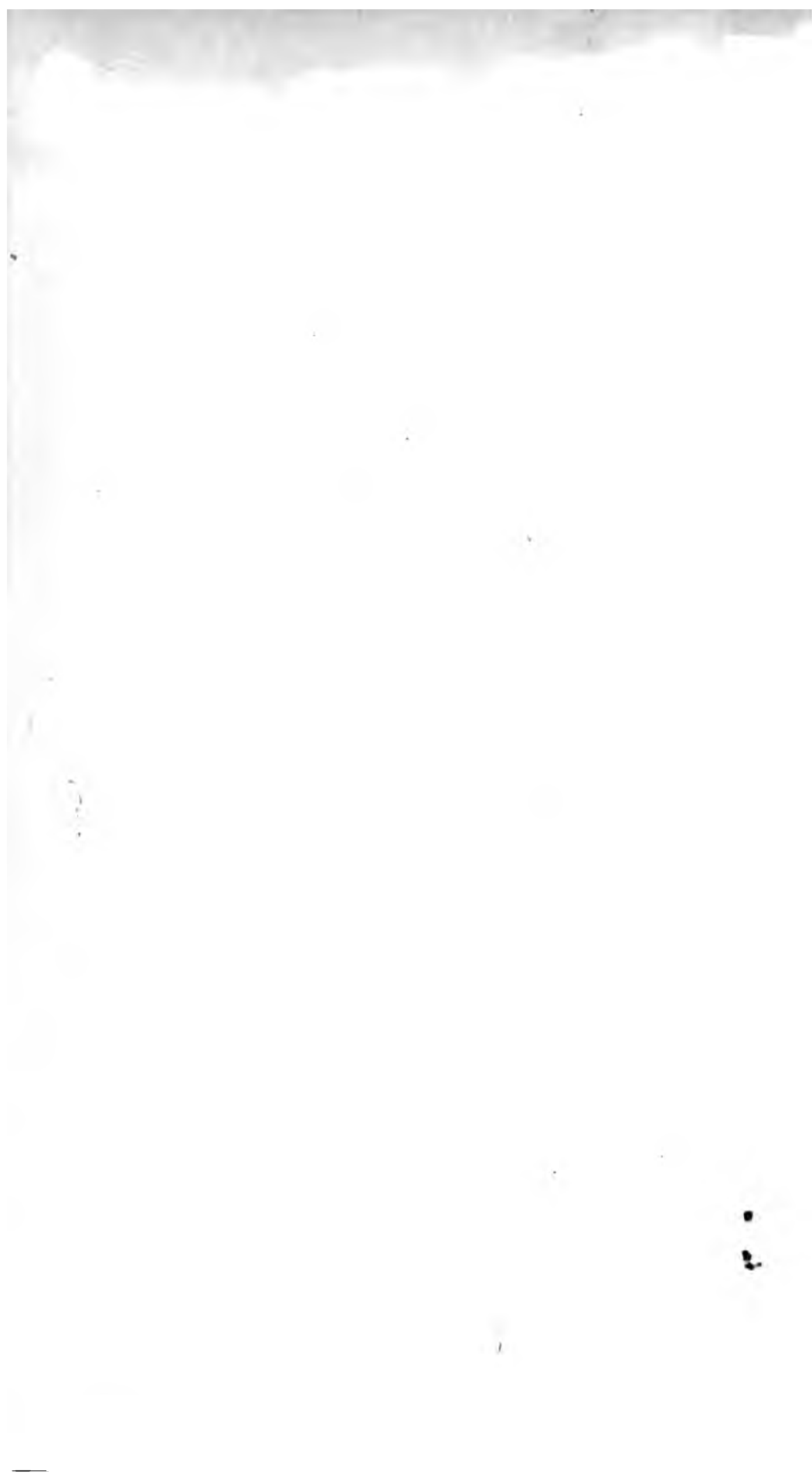
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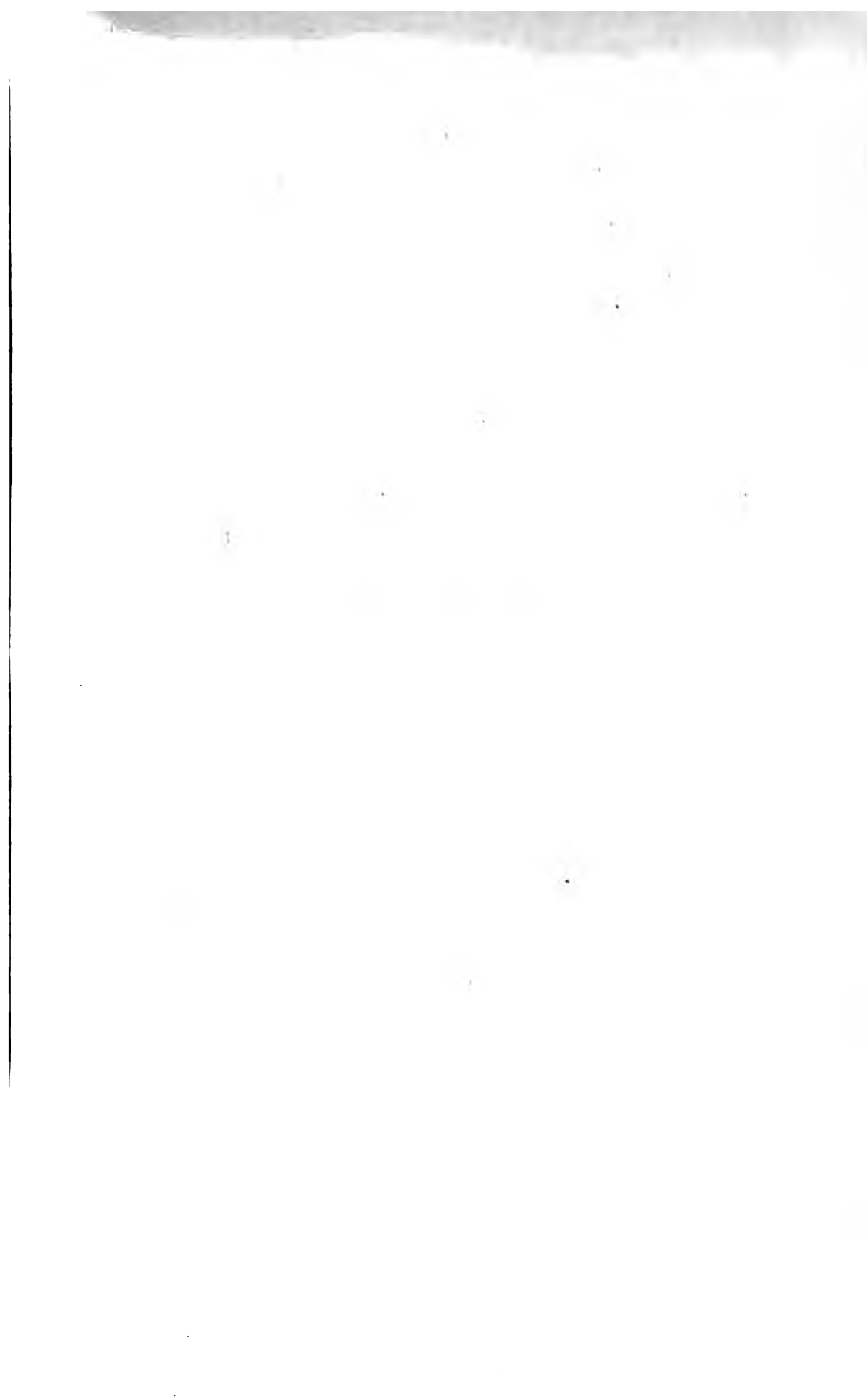




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A
GENERAL DIGEST
OF THE
LAW OF CORPORATIONS:
PRESENTING
THE AMERICAN ADJUDICATIONS
UPON
PUBLIC AND PRIVATE CORPORATIONS
OF EVERY KIND.
WITH A FULL SELECTION OF ENGLISH CASES.

BY
BENJ. VAUGHAN ABBOTT AND AUSTIN ABBOTT.

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PREFACE.

THE steady extension, throughout the United States, of the policy of creating incorporated bodies, the magnitude of the enterprises conducted by them and of the interests intrusted to their charge, and the variety, intricacy and difficulty of the litigations to which their affairs give rise, seem to warrant the preparation of a DIGEST OF THE LAW OF CORPORATIONS.

PLAN OF THIS WORK.

The work is not a treatise, but a *Digest*; that is, it presents the adjudications of the courts, as they are found in the reports, and not the views of the authors upon what the law is, or ought to be. Care has been taken not to embarrass the text with cases which have been overruled, or reversed, or have lost authority by subsequent changes in the law; and where decisions have been affirmed, the general method has been to take the rule of law from the case in the appellate court, and to treat the decision below as merged in that above. But the aim has been to present the existing and authoritative decisions; leaving to each reader the task of deducing the conclusions appropriate to his particular purpose.

The work presents cases of *general application*, rather than those of local authority only. Every practitioner will rely, for the jurisprudence of his own State, upon the text-books and digests appropriate to that State, as his best guides to its reports and laws. The design of this work is, chiefly, to give the cases which are or may be of general interest and application, outside the jurisdiction in which they were decided; to present to the lawyer of each State such

decisions of *English* courts, of *United States* courts, and of *courts of other States than his own*, as are adapted to be useful in his own State. Every reader of American jurisprudence observes how often the courts of one State follow the decisions of other jurisdictions; how frequently the legislature of one State enacts a statute copied from one which has been tried and approved in England, or in a sister State of the Union. The progress of our civilization is rendering this comparison of the different systems of jurisprudence which are established in different parts of the country,—this resort to the settled laws of one State to determine questions arising for the first time in another,—more and more important. Yet the voluminous accumulation of books of reports and statutes, and the rapid multiplication of new volumes, renders the labor of investigation beyond the means and leisure of most practitioners. The effort, in this volume, is to relieve this labor, in respect to the subject embraced, by an exhibition of the substance of the authorities, so fully and accurately stated, and with such details of all requisite collateral information, that, in this comparative study of jurisprudence, the Digest may be useful either as a guide through the original reports, or as a substitute for them, where access to them cannot be had. The object, throughout, is, to give to the practitioner in each State a knowledge of whatever has been established as law throughout England or America which can elucidate or illustrate the American law of Corporations.

The work embraces *all branches* of the law of corporations. Under the titles of the various specific corporations, such as *Banks, Insurance, Manufacturing and Mining Companies, Municipal Corporations, Railroad Companies, Religious Corporations, Savings Banks, Telegraph and Turnpike Companies, &c.*, the law more particularly applicable to them each is presented. Municipal corporations, the leading kinds of companies organized for business purposes, and the religious and benevolent societies, thus have their places, respectively, in the volume. And those general subjects which affect all the different corporations, such as *Charters, Powers, Agents, Officers, Seal*, are distinctively treated.

PREFACE.

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METHOD.

The marginal notes of the reporters are not in any sense the basis of this work. It is founded upon an original examination of each case. In general we have aimed to give, in addition to the point decided, some indication of the reasoning upon which the decision is founded. Subject to the necessity of retrenchment, we have preferred to retain the language of the court; but the necessity of compression has often forbidden this to a full extent.

It will be observed that a liberal selection of English cases is presented, in addition to American decisions.

Statutes, relative to corporations, which have any general application, are not numerous. Some such, for instance, the national banking law, and the New York free banking law, are given under **BANKS**. The leading provisions of the State constitutions governing legislation over corporations, are found in the chapter **CONSTITUTIONS**.

CLASSIFICATION.

In determining the arrangement of subjects and the scope of each title, philosophical classification has always been held subordinate to the practical convenience of the reader. Subject to this principle, the following rules have been adopted:

1. Although a decision was made with reference to a particular class of Corporations, it is placed under that general topic of the law to which it relates, rather than under the title of the particular class of Corporations, unless it is so peculiar to that class as to throw no light upon the rules relating to other classes.

2. A matter which relates equally to a power of Corporations and to the agent or actor through whom such power is executed, is treated under the title of the power in preference to that of the agent.

3. Matters relating equally to the act or instrument, and to the subject of the act, are treated under the title of the subject rather than under that of the act or instrument.

4. Matters relating equally to the right and to the remedy for the violation of the right, are treated under the title of the right in preference to that of the remedy.

5. Regulations imposed by charters, articles of association, or by-laws concerning subjects which form separate titles in the work, are treated in connection with the title of their subject in preference to the titles CHARTER, BY-LAWS, &c.

Whenever a topic has presented difficulties of classification, we have stated the principle adopted, and the scope and extent of the subject as prepared, in a note at the head of the chapter.

In naming the titles, the terms applied to different kinds of Corporations are employed as follows, so far as is not inconsistent with settled usage :

1. "Society" designates an organization for the assistance or benefit of *members*.

2. "Association" is applied to an organization formed to promote the improvement, welfare, or advantage of the *public*.

3. "Company" designates an organization for the purpose of carrying on a *business for profit*.

4. "Corporation" is used as a general term for all incorporated bodies, and (in deference to settled usage) in the generic titles, such as "MONEYED CORPORATIONS," "MUNICIPAL CORPORATIONS," and the like.

The preparation of this work was commenced under favorable circumstances, and has been pursued under so many facilities extended to the enterprise by professional friends and others who have deemed it important, and has met with so much unexpected encouragement from those under whose notice it has come, that we part from it in the hope that it may, indeed, become a useful addition to the library of the bar.

BENJ. VAUGHAN ABBOTT,
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ABBOTTS' DIGEST
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ACADEMIES.

[The term "academy," in its original sense, denotes a class of associations formed for mutual improvement and to advance science or art; e. g. Academy of Natural Sciences, "Academy of Design." Such adjudications as there are, relative to corporations of this character, will be placed, in this Digest, under the title LYCEUMS. General laws, authorizing the incorporation of educational institutions of a grade between the common school and the college, under the name of "academies," exist in many of the States, particularly Delaware, Florida, Illinois, Michigan, Minnesota, New York, and Ohio. Similar institutions exist under special charters, in States which have no general acts authorizing them. The word "academy" is used, in this work, to designate this species of school.

For the most part, the special functions of academies are regulated by provisions of local statutes; or by principles of law applicable to other educational institutions, and which will be found stated under such titles as COLLEGES; SCHOOLS; SEMINARIES; UNIVERSITIES.]

1. Power of trustees of William and Mary College to discontinue a grammar school in that institution. See *Bracken v. William and Mary College*, 1 *Call*, 161; 8 *Call*, 573.

2. "Grammar Schools," existing upon ancient English charitable foundations, enabled to extend their systems of education to embrace new subjects. Visitation of such schools regulated. *Stat. 8 & 4 Vict. ch. 77*.

3. For the application of this statute to particular cases, see *Attorney General v. Grocers' Company*, 6 *Beav.* 55; *Attorney General v. Haberdashers' Company*, 3 *Russ.* 531; *At-*

torney General v. Dixie, 3 *Russ.* 534; *Attorney General v. Gascoyne*, 2 *Mylne & K.* 647; *Solicitor General v. Mayor &c. of Bath*, 18 *Law J. N. S. Chancery*, 275; *In re Rugby School*, 1 *Beav.* 457.

4. Funds left by will for the support of a school "for the instruction of youth" may be applied to support a school for both sexes; the trustees are not bound to confine the school to boys alone. *Mass. Supreme Ct.* 1848, *Nelson v. Cushing*, 2 *Cush.* 519.

5. When a general visitatorial power is conferred upon the selectmen of a town in the capacity of trustees of an academy, the selectmen are not accountable to the town, as town officers, for their acts as visitors; nor can they in such acts be controlled by the town. *Id.*

6. The courts will not interfere with the action of selectmen, in such a case, until they have finally acted, and in a manner contrary to law, or to their trust. *Id.*

For the law protecting Gifts of property to support eleemosynary corporations, including academies, see BEQUESTS; DEVISES; TRUSTS.

For the powers and duties of Visitors of academies and other eleemosynary corporations, see VISITATION.

For rules applicable to other Educational corporations, see COLLEGES; SCHOOLS; SEMINARIES.

AGENTS.

[The various classes of persons by whom the affairs of a corporation are practically conducted are, in this work, designated as—1. Officers; being those who are parts of the corporate organization;—2. Agents; who are not parts of the organization, but represent it to the public;—and 3. Servants; who do not even represent it, but only labor to advance its objects. This chapter embraces the rules applicable to the second of these classes, together with general principles applicable to all three. Under the titles OFFICERS and SERVANTS, and the special titles to which reference is there made, the other classes are treated.]

The chapter contains so much only of the law of agents as is common to corporations in general. Qualifications peculiar to a particular species of corporations, and inapplicable to others, are placed under the name of that corporation; thus the rules relating particularly to cashiers and tellers should be sought under BANKS—to insurance agents under INSURANCE COMPANIES—to conductors, station-masters &c. upon railroads, under RAILROAD COMPANIES.]

I. APPOINTMENT AND POWERS.

1. How agents of corporations may be constituted.
2. Evidence of their appointment.
3. Construction of express powers.
4. Implied powers.
5. How agency is determined.

II. MODE OF EXECUTING THEIR POWERS.

1. In general.
2. Sealed instruments.
3. Negotiable instruments.

III. LIABILITIES OF THE CORPORATION.

1. Towards the agent.
2. Towards third persons, upon acts or omissions of agent.

I. APPOINTMENT AND POWERS.

1. Who may be agent. That where charter prescribes that particular persons only shall be agents, they only can be made such. See *Washington & Pittsburgh Turnpike Co. v. Crane*, 8 *Serg. & R.* 521.

For Election and Powers and duties of officers, see ELECTIONS; OFFICERS; and titles of particular officers.

2. Member of corporation not disqualified. It is no objection to the validity of an auction sale by a corporation that the auctioneer whom they employed was a member of the company, and that the memorandum of sale was signed by him as agent for the purchaser. A corporation may employ one of its own members as agent, and his corporate interest does not disqualify him from acting as agent for the purchaser. *Md. Ct.*

of Appeals, 1830, *Stoddert v. Vestry of Port Tobacco Parish*, 2 *Gill & J.* 227.

3. Agent of English joint stock company not precluded from suing the company for services in obtaining the act of incorporation by the fact he is a member of the company. Form of declaration. See *Garden v. General Cemetery Co.* 5 *Bingh. N. C.* 253; 7 *Scott*, 97; 7 *Dowl. Pr. Cas.* 275; 1 *Arn.* 508; 3 *Jur.* 24. But compare *Holmes v. Higgins*, 1 *Barn. & C.* 74; *Goddard v. Hodges*, 1 *Crom. & M.* 83; *Parkin v. Fry*, 2 *Carr. & P.* 311.

4. Seal not requisite to appointment. The rule is well settled, in America, that, in general, whatever may be the purpose of the agency, a valid appointment of an agent, by a corporation, may be made without affixing the corporate seal.* *U. S. Supreme Ct.* 1813, *Bank of Columbia v. Patterson*, 7 *Cranch*, 299.

For cases determining the proper mode and the validity of appointment of agents of Particular kinds of corporations; *e. g.* BANKS, INSURANCE COMPANIES, MUNICIPAL CORPORATIONS, and the like, see the titles of the various classes of corporations.

5. A corporation may appoint an agent by parol; and that it has done so may be inferred from its adoption of its agent's acts. *Mich.*

* The strict rule of the ancient English law, requiring acts of a corporation to be done by a sealed instrument, was very early relaxed as respected the appointment of corporate agents, so far as to permit an agent to be appointed without deed, in cases where the service was unimportant or ordinary, where haste was required, &c., though it has been more strictly retained where the agency affected real property interests or matters of an important character. On the history of the modern relaxation of this rule in England, consult *Horn v. Ivy*, 1 *Ventr.* 47; *Cary v. Matthews*, 1 *Salk.* 191; *Willmot v. Mayor &c. of Coventry*, 1 *Younge & C.* 518; *Dumpry v. Symes*, *Cro. Eliz.* 815; *Cooper v. Gooderich*, *Cro. Eliz.* 882; *Balliffs &c. of Ipswich v. Martin*, *Cro. Jac.* 411; *Erneley v. Walrond*, *Dyer*, 102 d; *East London Water Works Co. v. Bailey*, 4 *Bingh.* 288; *Edwards v. Grand Junction Canal Co.* 1 *Myline & C.* 669, 672; *Murray v. East India Co.* 5 *R. & Ald.* 204; *Arnold v. Mayor of Poole*, 4 *Mann. & G.* 898; *Smith v. Cartwright*, 6 *Boch.* 927; 6 *Eng. L. & Eq.* 528.

Early rules relative to the mode of appointing an agent to demand rent for a corporation, and to distress for non-payment. See *Knap v. Jeweloh*, 1 *Brownl.* 138; case of *Master &c. of Emanuel College*, 3 *Brownl.* 175; *Year B.* 1 *Edw.* 5, fol. 5, pl. 10; *Id.* 2 *Rich.* 3, fol. 7, pl. 13; 7 *Hen.* 7, fol. 10, pl. 2.

Bank of England may authorize a person to sign notes, by mere vote. See *Rex v. Bigg*, 3 *P. Wms.* 4119; 1 *Strange*, 18.

Where the act of incorporation empowers the directors to appoint and displace any of the officers of the company, the appointment of an attorney to the company need not be under seal. See *Reg. v. Cumberland (Justices)*, 5 *Rathw. Cas.* 382; 5 *Dowl. & L.* 481; 12 *Jur.* 1026; 17 *Law J. Q. R.* 102.

Supreme Ct. 1843, *City of Detroit v. Jackson*, 1 *Dougl.* 106; *N. H. Supreme Ct.* 1858, *Nicholas v. Oliver*, 36 *N. H.* 218; and see *Elysville Manuf. Co. v. Okisko Co.* 1 *Md. Ch. Decd.* 392; *Randall v. Van Vechten*, 19 *Johns.* 60; *Perkins v. Washington Ins. Co.* 4 *Cow.* 645.

See also RATIFICATION.

6. Where a corporation has power to do some act, and, as incident to that act, to render itself liable for representations made in and about the doing of that act, it can appoint an agent to do the act; and from the mere fact of such appointment the same powers will flow to the agent as if he had been appointed by an individual; provided only that the powers so flowing could have been exercised by the corporation itself. *N. Y. Supreme Ct.* 1863, *Sharp v. Mayor &c.* of New York, 40 *Barb.* 256; 25 *How. Pr.* 389.

7. No formal resolution of the board of directors of a corporation is required to appoint an agent or define his powers. A contract may be implied against a corporation, and it may affirm the acts of an assumed agent, and thus be bound by them. [22 *Wend.* 348; 20 *Id.* 91; 4 *Cow.* 645; 2 *Kent's Com.* 288; *Ang. & A.* 172, §§ 7, 8.] *N. Y. Supreme Ct.* 1844, *Bank of Lyons v. Demmon, Hill & D. Supp.* 398.

8. The authority from a corporation to its agent to order tenants to quit, need not be under seal. *Pa. Supreme Ct.* 1840, *Wolf v. Goddard*, 9 *Watts*, 544.

9. Where one has the actual charge and management of the business of a corporation, with the knowledge of the members and the directors, this is evidence of his authority, without showing any vote or other corporate act constituting him the agent of the corporation; and the company will be bound by his contracts, made on their behalf, within the apparent scope of the business thus intrusted to him. *N. H. Superior Ct.* 1857, *Goodwin v. Union Screw Co.* 84 *N. H.* 378.

10. Appointment of agent either by a power under seal, or by resolution, or by course of business, allowable. See *St. Andrew's Bay Land Co. v. Mitchell*, 4 *Fla.* 192; *Bank of Middlebury v. Rutland & Washington R. R. Co.* 80 *Vt.* 159.

11. Cannot be appointed by delegation. An agent appointed by the corporation, and

authorized to make a particular contract, or to do a certain piece of business, cannot delegate his trust, unless specially empowered so to do; the personal confidence of the principal in the agent being the supposed motive of the selection and appointment of the latter. Therefore a by-law, giving to the directors the general superintendence and control, charges them with the exercise of discretion, and does not authorize them to delegate such discretion to agents. And the corporation will not be bound by a contract entered into by sub-agents appointed by them.* *N. H. Superior Ct.* 1850, *Gillis v. Bailey*, 1 *Post.* 149.

12. A general agent of a manufacturing company cannot delegate authority to another person employed by the company to settle with and give a new note for the balance due a creditor of the company. *Mass. Supreme Ct.* 1834, *Brewster v. Hobart*, 15 *Pick.* 302.

13. The ancient doctrine that a corporation acts only through the instrumentality of its common seal, has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a board of directors. The acts of such board, evidenced by a written vote, are as binding upon the corporation, and as complete authority to their agents, as the most solemn acts under the corporate seal. *U. S. Supreme Ct.* 1823, *Fleckner v. Bank of the United States*, 8 *Wheat.* 338. Followed in 1840, *Bank of Metropolis v. Guttschlick*, 14 *Pet.* 19.

14. A power of attorney is not necessary to authorize the officer of a corporation, executing a deed in behalf of the corporation, to affix the corporate seal to the deed. The common-law rule with regard to natural persons, that an agent, to bind his principal by deed, must be empowered by deed himself, cannot in the nature of things be applied to corporations aggregate. These beings have a mere legal existence, and their boards, *as such*, are, literally speaking, incapable of a personal

* But compare cases in which the board has been considered not as a body of trustees not competent to delegate their trust, but as the representative of the corporation, empowered to declare its will; and in which its appointment of agents has been sustained. *Exp. Company*, 4 *Pike*, 359; *Dana v. Bank of U. S.* 5 *Watts & S.* 223; *Palmer v. Yates*, 2 *Sandf.* 175.

act. They direct or assent by vote; but their most *immediate* mode of *action* must be by agents. If the corporation, or its representative, the board, can assent primarily by *vote* alone, to say that it could constitute an agent to make a deed *only by deed*, would be to say that it could constitute no such agent whatever; for, after all, who could seal the power of attorney but one empowered by *vote*? *Tenn. Supreme Ct.* 1843, *Hopkins v. Gallatin Turnpike Co.* 4 *Humphrey*, 403; *S. P. Va. Ct. App.* 1846, *Burr v. McDonald*, 3 *Grattan*, 215. See *Savings Bank v. Davis*, 8 *Conn.* 191.

15. **Some authority from corporation, necessary.** No individual member can represent the corporation in their aggregate capacity, but in consequence of their consent. The requisite evidence of this, at common law, was a deed under the seal of the corporation. Aggregate corporations established by statute are not restricted to that formality. They have powers given them to order their affairs, and to appoint and employ agents by vote; or in such other manner as the corporation may by their by-laws direct. But no person is an agent for them, who proceeds without any authority, either by letter of attorney or by a corporate vote, or who acts beside the authority given him; that is, his acts will not charge them, unless subsequently assented to by some act of the corporation. Thus a claim for work done on a turnpike is not supported where the plaintiffs cannot prove any request by an authorized agent of the corporation; but only that their men were seen at work upon the road by different members of the corporation, and by an agent who was authorized to contract on its part, but in writing only. *Mass. Supreme Ct.* 1813, *Hayden v. Middlesex Turnpike Co.* 10 *Mass.* 397; *Vt. Supreme Ct.* 1839, *Burdick v. Champlain Glass Co.* 11 *Vt.* 19. See also, *Williams v. Pigott*, 5 *Eng. Railw. Cas.* 544; 2 *Exch.* 201; *Nevins v. Henderson*, 5 *Eng. Railw. Cas.* 684; *Spottiswood's case*, 39 *Eng. Law & Eq.* 520; *Cox v. Midland Railway Co.* 18 *Law J. N. S. Exch.* 345.

16. The doctrine that no person, whether natural or artificial, can be compelled by legislative enactment to become a party to, or subjected to liability upon, a contract, without his consent, must receive the same application to a municipal corporation as to a pri-

vate corporation, or to an individual, when it is sought to visit a pecuniary liability *ex contractu*, upon a town by the ordinary means of a suit at law. So far as a municipal corporation is endowed by law with the power of contracting, and as such, is made capable of acquiring, holding, and disposing of property, and subject to the liabilities incident to the exercise of such power and capacity (thus being invested with legal rights as to property and contracts, and made subject to legal liabilities in respect thereto, to be ascertained and enforced by suit in the ordinary judicial forums, upon the same principles, and by the same means as in case of a private corporation) such municipal corporation must stand on the same ground of exemption from legislative control and interference as a private corporation. As to third persons who seek to enforce pecuniary liabilities against towns, arising upon contract, such towns are merely private corporations or individuals, and in this respect they are not affected by the purely municipal, public and political features that appertain to their corporate existence, in virtue of and in reference to which alone they are subject to the absolute control of legislation. *Vt. Supreme Ct.* 1858, *Atkins v. Town of Randolph*, 31 *Vt.* (2 *Shaw*), 226.

17. Neither a remittance of money to one as the agent of a bank by another party, and his consent to receive it as such, nor his admissions, nor the fact that he is a director of the bank, have any tendency to prove that he is the agent of the bank. The consent of the bank that he should so act is necessary. *Ala. Supreme Ct.* 1847, *Holman v. Bank of Norfolk*, 12 *Ala. N. S.* 869.

2. Evidence of their Appointment.

18. **Judicial notice.** That courts cannot judicially notice that a particular board of the corporation is authorized to appoint agents, where the evidence of such authority is not introduced,—see *Haven v. N. H. Asylum*, 13 *N. H.* 532.

19. **Production of the record of appointment.** The ordinary and proper proof of the appointment and authority of an agent of a corporation is made by the production of the records or books of the corporation, containing the entry or resolution of appointment; the records being proved to be the

records of the corporation.* *N. C. Supreme Ct.* 1835, *Buncombe Turnpike Co. v. McCarrson*, 1 *Dev. & B.* 306.

20. Where a corporation brings a bill, and alleges therein that certain acts were done by committees thereof, whereby a resulting trust in certain land, conveyed to a third party, was raised in favor of the corporation, it cannot prove the authority of the committees to act therefor, by parol evidence; their power to act can be shown only by its records. *Ms. Supreme Ct.* 1845, *Methodist Chapel Corporation v. Herrick*, 25 *Ms.* (12 *Shep.*) 354.

21. In order to establish an agency in behalf of a corporation it is not indispensable to show a written authority, or a vote or resolution of the corporate authorities. *Mo. Supreme Ct.* 1860, *Williams v. Christian Female College*, 29 *Mo.* (8 *Jones*), 250.

22. In an action upon the case against a corporation for injury done by their agent, it is not necessary to prove that the agent had authority under the corporate seal, nor under an order entered upon the books of the corporation. *Circ. Ct. D. C.* 1802, *Hoe v. Mayor &c. of Alexandria*, 1 *Cranch C. Ct.* 90.

23. Under a bill filed by an incorporated railway company for the specific performance of a contract for the purchase of land entered into by their agent, it was objected that the contract lacked mutuality, as it did not appear that the agent was authorized under the corporate seal, and his act was therefore not binding on the company. *Held*, that as the company had, before bill filed, acted on the contract by entering into possession of the land, and making a railroad over it, they had become bound by it. It could be enforced against them, and therefore might be in their favor. *Chancery*, 1840, *London & Birmingham Railway Co. v. Winter*, 1 *Craig & P.* 57.

24. Parol evidence. Where, in a suit against a corporation on a bill of exchange accepted by one, in behalf of the corporation, as its treasurer, notice was given by the plaintiff to the corporation to produce its records for the purpose of proving the ap-

pointment or election of the treasurer, and the production of the records was refused, the testimony of a witness was admitted that he had seen the records, and that it appeared therein that the person accepting the bill was duly elected treasurer, as competent proof of his appointment and authority. *Mass. Supreme Ct.* 1841, *Narraganset Bank v. Atlantic Silk Company*, 8 *Metc.* 282.

25. Where the act of incorporation does not require that the appointment of an agent or the making of a contract should be by a written instrument, and it does not appear to have been so made, it may be proved by parol. *Ind. Supreme Ct.* 1857, *Richardson v. St. Joseph Iron Co.* 5 *Blackf.* 146; *Hamilton v. Newcastle &c. R. R. Co.* 9 *Ind.* 359.

26. Authority may be proved by "facts and circumstances." See *Elysville Manf. Co. v. Okisko Co.* 5 *Md.* 152; *Northern Central R. R. Co. v. Bastian*, 15 *Md.* 494.

27. The authority of an agent of a corporation may be shown by acts and the general course of business. *Ms. Supreme Ct.* 1847, *Badger v. Bank of Cumberland*, 26 *Maine* (13 *Shep.*) 428.

28. Authority inferred. The appointment of an agent of a corporation may be inferred from the adoption of his acts. *Ala. Supreme Ct.* 1856, *Alabama &c. R. R. Co. v. Kidd*, 29 *Ala. N. S.* 221; *S. C. Ct. of Appeals*, 1856, *Planter's Bank of Fairfield v. Bivingsville Cotton Manuf. Co.* 10 *Rich. Law*, 95. And see *Regina v. Grimshaw*, 16 *Law J. N. S. Q. B.* 385.

29. Jury may infer authority given to an agent who committed an act of conversion, from an adoption of the conversion, *e. g.* from the corporation having received the proceeds. See *Smith v. Birmingham & Staffordshire Canal Co.* 1 *Ad. & E.* 526; *Mayor &c. of Baltimore v. Norman*, 4 *Md.* 352.

30. To a very great extent, corporations are held bound, by presumed or implied authority to those who are held out or permitted to act for them in their usual course of dealing within their charter powers. *Ill. Supreme Ct.* 1855, *Ryan v. Dunlap*, 17 *Ill.* 40.

31. — from course of dealing. If the directors of a corporation by vote authorize their treasurer to indorse notes of the corporation to a third person, or if such treasurer is suffered to draw and accept drafts, to in-

* See also, *Owings v. Speed*, 5 *Wheat.* 424; *Thayer v. Middlesex Mut. Ins. Co.* 10 *Pick.* 326; *Narraganset Bank v. Atlantic Silk Co.* 8 *Metc.* 282; *Clark v. Benton Manf. Co.* 15 *Wend.* 256; *Methodist Chapel Corporation v. Herrick*, 25 *Ms.* 354; *Haven v. N. H. Asylum*, 18 *N. H.* 583; *Miller v. Ewer*, 27 *Ms.* 509.

dorse notes payable to the corporation, and to do other similar acts whereby he is held out to the public as having the general authority implied from his official name and character, the corporation is bound by his acts, due within the scope of such implied authority. And an indorsement and transfer, by such treasurer, of a negotiable instrument belonging to the corporation, made in pursuance of such express or implied authority, will pass a valid title to the indorsee. *Mass. Supreme Ct.* 1861, *Lester v. Webb*, 1 *Allen*, 84.

82. Though the by-laws of a corporation do not confer on its general agent the power of accepting bills, yet if the agent has been in the habit of accepting bills which the company has paid, it will be bound by an acceptance given by him under like circumstances. *N. Y. Supreme Ct.* 1818, *Munn v. Commission Co.* 15 *Johns.* 44; *S. P.* 1841, *Com. Bank of Lake Erie v. Norton*, 1 *Hill*, 501; 1853, *Exchange Bank v. Monteath*, 17 *Barb.* 171.

83. The directors of a railroad corporation relinquished the management of the road for a period of years to the president, allowing him to buy property for the use of the corporation, and to give the notes of the corporation for the price; and when, at the end of the three years, the managers again resumed the discharge of their appropriate duties, they took possession of the road and of all the property thus procured by the president, and continued to use such property for several years, without question as to the manner in which it had been obtained. *Held*, that under such circumstances, the acts of the assumed agent could not be repudiated. The powers of an agent of a corporation are such as he is allowed by the directors or managers of the corporation to exercise, within the limits of the charter; and the silent acquiescence of the directors or managers may be as effectual to clothe the agent with power, as an express letter of attorney. *N. Y. Ct. of Appeals*, 1863, *Olcott v. Tioga R. R. Co.* 27 *N. Y.* 546.

84. To show that the president of a corporation had authority to draw, in the name of the corporation, the note in suit, evidence is admissible that he had, on various occasions, as well after as before, executed similar bills and notes which had been paid, and the sums thus expended entered into the accounts

of the corporation, which were before its managers for years without objection. *Id.*

85. **Presumed.** If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as the cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts as cashier will bind the corporation, although no written proof is, or can be, adduced of his appointment. *U. S. Supreme Ct.* 1827, *Bank of United States v. Dandridge*, 12 *Wheat.* 79. See also, *Burgess v. Pue*, 2 *Gill*, 254; *McCullough v. Annapolis and Elkridge Railroad Co.* 4 *Gill*, 58.

86. The agent of a bank, without objection that parol evidence was not competent to prove his authority, swore that he was authorized to transfer certain promissory notes held by the bank; it was presumed that he was authorized to make the transfer, by a resolution of the directors, as required by the statute. *N. Y. Supreme Ct.* 1860, *Warner v. Chapell*, 32 *Barb.* 309.

87. No presumption that a sale of corporate property ordered by a director was made by authority of the company. See *Moody v. London & C. Railway Co.* 1 *Best & S.* 290.

88. No presumption that corporate agents have exceeded their authority, or made representations without sufficient authority. See *Carey v. Cincinnati & C. R. R. Co.* 5 *Clarke (Iowa)*, 357.

89. **Established by estoppel.** The obligor in a bond given to a corporation for the price of land, reciting the contract of the corporation to convey, is estopped from questioning the authority of the agent who made the contract, if the corporation have done no act indicative of a design to repudiate it. *Me. Supreme Ct.* 1853, *Augusta Bank v. Hamblet*, 35 *Me.* (5 *Red.*) 491.

8. Construction of express powers.

40. A general appointment as "an agent," duly authorized to do a specified thing, gives the limited powers only. See *Wilson v. Genesee Mut. Ins. Co.* 14 *N. Y.* (4 *Kern.*) 418.

41. **Making contract.** Power to borrow money on the credit of a town to rebuild a bridge, may imply power to bind the town by contract for building. See *Simonds v. Heard*, 23 *Pick.* 120.

42. **Making negotiable instruments.** Power to advance money for a corporation will not authorize signing a note for them. See *Webber v. Williams College*, 23 *Pick.* 302.

43. A committee appointed by a town to "lay out" money voted to be raised for the repair of a highway, not empowered to bind the town by a promissory note. See *Savage v. Rix*, 9 *N. H.* 263.

44. Power to give a "company note," may authorize a bill of exchange on a person who had no funds. See *Tripp v. Swanzey Paper Co.* 13 *Pick.* 291.

45. An authority to the president of a corporation to make all contracts &c. "under the direction of the board," not an authority to accept a bill *without* direction of the board. See *Lazarus v. Shearer*, 2 *Ala. N. S.* 718.

46. Power "to accept a bill not exceeding" a specified sum, will authorize accepting such sum. See *Thompson v. Wesleyan Newspaper Association*, 8 *C. B.* 849; 19 *Law J. N. S. C. P.* 114.

47. **Conveying.** A vote authorizing an officer to "sell and convey" a tract of land, empowers him to execute a bond, binding the corporation to convey. The authority to sell implies a power to negotiate and make a bargain prior to conveying, if this be necessary. *Me. Supreme Ct.* 1853, *Augusta Bank v. Hamblet*, 35 *Maine* (5 *Red.*) 491.

48. A vote authorizing an agent to convey lands, must specify the tract to be conveyed, or give some description by which it can be ascertained. The power ought to be as certain as it is necessary for the deed to be which is to be executed under it. *N. H. Superior Ct.* 1835, *Lumbard v. Aldrich*, 8 *N. H.* 31.

49. An agent of a bank clothed "with full power to dispose of the interest of the bank in certain property, real and personal, and in the name of the bank and for their benefit to make &c. any deed or deeds of all or any portion thereof, and in general to manage and dispose of the interest of the bank in said property, at his best discretion,"—*Held* authorized to sell and convey the same, and to take notes therefor and a mortgage as security,

to himself for the benefit of the bank, and competent to make the oath required by law in the case of mortgages. See *Lathrop v. Blake*, 3 *Foster (N. H.)* 46.

50. Power "to sell" does not enable agent to pledge for his own debt. See *Whitney v. State Bank*, 7 *Wis.* 620.

51. **Employing sub-agents.** Power to a town treasurer to "borrow," not an authority to employ a broker at expense of the town to negotiate a loan. See *Butterfield v. Inhabitants of Melrose*, 6 *Allen*, 187.

52. Power to agents of a town to prosecute an action, includes power to employ an attorney. See *Buckland v. Conway*, 16 *Mass.* 396.

53. Power to "take measures to obtain possession" of land devised, and "to choose agents to institute or defend any suit or suits, and act anything relative thereto," will authorize the agents to make an entry on the land, on which to found a writ of entry. See *Sutton v. Cole*, 3 *Pick.* 232.

54. The by-laws of a corporation, giving to the directors "a general superintendence and control over the affairs of the corporation," with power to sell lands and tenements on such terms as they may deem advantageous, though they doubtless give the directors power to lease, give them no authority to delegate to an attorney power to lease in his discretion. *N. H. Superior Ct.* 1850, *Gillis v. Bailey*, 1 *Fost.* 149.

4. Implied Powers.

55. **In general.** An agent's authority, however generally expressed, if capable of being executed in a lawful manner, is never to be extended by construction to embrace acts prohibited by law, so as to render his principal liable to a criminal prosecution, or to a statute penalty. *N. Y. Superior Ct.* 1854, *Clark v. Metropolitan Bank*, 3 *Duer*, 241.

56. The powers conferred on an agent are not restricted by being expressed to be subject to the direction of the board of directors, unless they interpose to limit them. *Me. Supreme Ct.* 1855, *Whitney v. South Paris Manuf. Co.* 39 *Me* (4 *Heath*), 316.

57. The agent of a manufacturing corporation was empowered by its by-laws to manage the affairs of the corporation committed to his care, and to exercise the powers commit-

ted to him according to his best ability and discretion, and promptly to collect all assessments and other sums that should become due to the corporation, and to disburse them according to the order of the board of directors, who were made a board of control over him. *Held*, that the agent, if the board of directors did not interpose to control his proceedings, had authority to employ workmen to carry on the business of the corporation, and to pay them with its funds, or, not being in funds, to give the notes of the corporation in payment. *Mass. Supreme Ct.* 1848, *Bates v. Keith Iron Co.* 7 Met. 224.

58. **Stockholders not liable for agent's fraud.** The agent of a corporation is not the agent of the individual stockholders, so as to make them responsible for his frauds, or to vitiate a contract made by an individual stockholder for the sale of his own stock. *Chancery*, 1838, *Moffat v. Winslow*, 7 Paige, 124.

59. **"General agents:" Power to convey land.** Although general powers of management are conferred upon an agent by the directors of a company, yet they must be understood to be limited to correspond with the duties to be performed, and the business to be transacted. Thus the general agent of a manufacturing corporation is not authorized, merely as such, to transfer by deed the real estate of the company. It may be incidental to his powers as agent to borrow money, give promissory notes, and do many similar acts, in the ordinary course of business of the company; but to empower him to sell or convey its real estate, a specific authority is necessary. *Conn. Sup. Ct.* 1828, *Stow v. Wyse*, 7 Conn. 214.

60. — **to mortgage machinery.** An agent of a corporation, appointed by the directors for the purpose of superintending and carrying on its business, has no authority, in virtue of such agency, to pledge or mortgage the machinery used by the company, for the security of a loan. *N. H. Superior Ct.* 1841, *Dispatch Line of Packets v. Bellamy Manuf. Co.* 12 N. H. 205.

61. — **to transfer assets in trust.** A general agent, who has the entire superintendence and management of the business of a lumber company, the members of which live abroad, has authority in good faith to make a transfer of lumber in trust to pay off the

hands in the employ of the company. The creditors of the company cannot avoid such a transfer, on the ground of a previous agreement by the members of the company with a third person, to deliver all the lumber to him to be disposed of for the company; certainly not, where such third person recognizes the right of him to whom the transfer is made, and does not insist that he himself has any right or claim. *Mo. Supreme Ct.* 1852, *Taylor v. Labeaume*, 17 Mo. 388.

62. But when a mining concern was carried on by an agent in Cornwall, and distress warrants were issued by the justices of the peace, in consequence of the wages of the workmen not having been paid,—*Held*, that the agent had no power to borrow money, and pledge the credit of his principals, in order to prevent the warrants being put in force. *Exch.* 1841, *Hawtayne v. Bourne*, 7 Mees. & W. 595; 5 Jur. 118.

63. — **to make contracts.** Where the general agent of a corporation makes a contract in the ordinary course of business, the company may be held liable upon it in a proper case, upon general principles of the law of agency. It makes no difference that the defendants were a corporation; for it is settled that they may be bound by the acts of their agents, in the same manner as private individuals. *N. Y. Supreme Ct.* 1818, *Munn v. Commission Co.* 15 Johns. 44.

64. A surgeon who has amputated the limb of a passenger, injured by the moving of a truck upon the railway, under directions given by the station agent, in consequence of which the surgeon performed the operation, cannot recover of the company for his services. It is not incident to the employment of a station agent, to bind the company by such a contract. If, however, the company have ratified similar contracts made by this same agent, this may be evidence tending to show that they have given this particular servant authority to make such or similar contracts; but not that they have given authority to all their servants to do so. *Exch.* 1849, *Cox v. Midland Counties Railway*, 3 Exch. 268; 13 Jur. 65; 18 Law J. Exch. 65. *N. Y. Superior Ct.* 1853, *Stephenson v. N. Y. & Harlem Railway*, 2 Duer, 341.

65. The engineer of a railroad corporation was charged by the corporation with the duty of engrossing a certain contract and pro-

curing the signatures of the contractors; but no particular time was prescribed within which he should do this. *Held*, that his giving his consent to a delay of a month in executing the contract was within the scope of his authority, and that the corporation could not repudiate the contract on account of such delay. *N. Y. Ct. of Appeals*, 1860, *Pratt v. Hudson River R. R. Co.* 21 *N. Y.* 805.

66. An agent of an incorporated company cannot bind it for a debt contracted by the company before it was incorporated, without an express authority by a vote of the corporation; especially where the corporation includes some members who were not members of the original company. *Mass. Supreme Ct.* 1822, *White v. Westport Cotton Manufacturing Co.* 1 *Pick.* 215.

67. — to make notes. One who is proven to have been "the agent" of a manufacturing corporation is not presumed to have been authorized to make a note on behalf of the corporation. To render such a note valid as against the company, the powers of the agent must be shown. *N. Y. Supreme Ct.* 1818, *Benedict v. Lanting*, 5 *Den.* 288.

68. Proof that a person was agent of a company, "and had charge of the business and property of said company," at a certain place, not sufficient to show him authorized to draw a bill or note in behalf of the company. See *Atkinson v. St. Croix Man. Co.* 11 *Shap.* 171.

69. — to negotiate notes. The general agent or treasurer may negotiate notes or bills taken in the name of his office. See *Perkins v. Bradley*, 24 *Vt.* 66.

70. — to waive notice. The general agent of a manufacturing company, having charge of its financial affairs, and, in the usual course of its business, procuring loans and giving and indorsing negotiable paper, has power to waive notice to it of non-payment, and to make agreements to procure delay of payment in cases of necessity, of which necessity he is the judge. *Ma. Supreme Ct.* 1855, *Whitney v. South Paris Manuf. Co.* 39 *Me.* (4 *Heath*), 316.

For many cases upon the powers of General agents of INSURANCE COMPANIES; MANUFACTURING COMPANIES; and other classes of corporations, see the titles of the various companies.

71. — to give receipt "in full." Gen-

eral agent to receive money, may give a receipt in full, which will bind the company. See *Patterson v. Ackerson*, 2 *Edw. Ch.* 427.*

72. Agent to purchase may bind company by his representations as to the solvency of his principal. See *Hunter v. Hudson River Iron Machine Co.* 20 *Barb.* 498.

73. Agent authorized to buy on credit not necessarily empowered to give the note of the corporation for the price. See *Emerson v. Providence Manuf. Co.* 12 *Mass.* 237.

74. Agent to sell not, necessarily, an agent to purchase goods for the purpose of sale. See *Kidder v. Knox*, 48 *Me.* 551.

75. Contractor. For the purpose of exercising the rights conferred by the charter upon the company, the contractor for the execution of public works must be deemed an agent of the company. *Ill. Supreme Ct.* 1852, *Lesher v. Wabash Nav. Co.* 14 *Ill.* 85.

76. Power to bind the corporation by declarations. That the declarations of agents of a corporation, made within the scope of their authority, may bind the corporation, on the same general principles and to similar extent, as the declarations of an agent for an individual may bind him—see *Magill v. Kauffman*, 4 *Serg. & R.* 317; *Covington & Lexington R. R. Co. v. Ingles*, 15 *B. Monr.* 687; *Franklin Bank v. Steward*, 37 *Me.* 519; *Burnham v. Ellis*, 39 *Id.* 319; *Franklin Bank v. Cooper*, *Id.* 543; *Glidden v. Unity*, 38 *N. H.* 577; *Henderson v. Railroad Co.* 17 *Tex.* 560.

77. The plaintiffs were a corporation owning a toll-bridge, through which was a draw for the passage of vessels, the charter requiring them to keep a draw-tender and to open the draw for vessels desiring to pass through. A general statute required vessels passing through any such draw to warp through and not to sail through, and imposed a penalty for the violation of the act. The defendant, in passing with his vessel through the draw, which had been opened by the draw-tender for him to pass, sailed through instead of warping through, and in so doing was driven against the side of the draw and injured it. In an action brought by the company for the damage, the defendant claimed that the plaintiffs had by long use licensed vessels to sail through, and offered evidence of declara-

* Master of English college giving an acquittance (without the college seal) for rent due to the college, does not bind the corporation. See *Magdalen College case*, 11 *Coke*, 73.

tions made by the draw-tenders at various times, when vessels were passing through under sail, that they preferred to have them go through in that manner. *Held*, that evidence of these declarations was admissible, as the declarations of the agents of the company while in the discharge of their duties as such agents. Such declarations of an agent of a corporation as to the matter in his charge, accompanying his acts as agent, stand on the same ground with the acts themselves, and both go to show what has been the conduct of the corporation in the matter to which they relate. *Conn. Supreme Ct.* 1862, *Toll Bridge Co. v. Betsworth*, 80 *Conn.* 380.

78. That such declarations do not bind the corporation when not made within the scope of the agent's duty,—see *Barnes v. Pennell*, 2 *H. of L. Cas.* (*Clark & F. N. S.*) 497; *Stiles v. Western Railway*, 8 *Metc.* 44; 1 *Am. Railw. Cas.* 397.

79. The stockholders of a corporation cannot be bound by the declarations of a foreman of the company, after it has ceased business. *N. Y. Supreme Ct.* 1861, *Strong v. Wheaton*, 38 *Barb.* 616.

80. Instances. In an action against a railroad company for damages for an injury alleged to have been occasioned by the bad condition of their road, the declarations of the engineer of the company, made while actually engaged upon the work, and in respect to its proper construction, are a part of the *res gesta*, and therefore admissible in evidence. *N. Y. Supreme Ct.* 1861, *Brehm v. Great Western Railway Co.* 84 *Barb.* 256.

81. Statements of engineer relative to accident which happened through his carelessness. *Held* not admissible against railroad company. See *Robinson v. Fitchburg & Worcester R. R. Co.* 7 *Gray*, 92.

82. Statements of baggage-master and conductor relative to loss of trunk. *Held* admissible against railroad company. See *Morse v. Conn. River R. R. Co.* 6 *Gray*, 450.

83. Declarations of clerk of manufacturing company evidence against the company, in favor of a firm in which the very clerk was a partner. See *Shaw v. Stone*, 1 *Cush.* 228.

84. Agent cannot deal for himself. The rule that an agent cannot deal for himself applied to agents of corporations. *Conn. Supreme Ct.* 1841, *Church v. Sterling*, 16 *Conn.* 388; *N. Y. Supreme Ct.* 1851, *Cumberland*

Coal Co. v. Sherman, 30 *Barb.* 553; 1861, *Abbot v. American Hard Rubber Co.* 33 *Barb.* 578; 21 *How. Pr.* 193.

85. Instances. Where a bank has become bound to pay off and discharge a mortgage, so as to relieve the property of a third person from a sale under foreclosure, and such a sale is had, one who is cashier and agent of such bank cannot bid off the property on his own account, thereby rendering the bank liable to indemnify the owner for the loss of it. *N. Y. Chancery*, 1842, *Torrey v. Bank of Orleans*, 9 *Paige*, 649.

86. A sale by trustees of the property of the beneficiary of the trust to a third person, who within a short period—*e. g.* three days, exclusive of a Sunday—reconveys a portion of the property to such trustees for their own benefit, is deemed conclusively fraudulent. No evidence that the latter conveyance was not meditated at the time of the sale to such third person, is of any avail to rebut this inference. It is not a presumption of evidence, but a necessary rule of law. *N. Y. Supreme Ct.* 1861, *Abbott v. American Hard Rubber Co.* 33 *Barb.* 578; 21 *How. Pr.* 193.

87. A manufacturing corporation of which A was a member, voted to sell its property, consisting of real estate and machinery. The property was purchased at the sale by A, not for himself, but for such members of the corporation as should, within a short time, pay their proportion of the debts of the corporation and the purchase money. A large majority of such members formed a new association, assumed the debts of the corporation, and paid the purchase money. *Held*, on a bill in chancery, that as a majority of the members of the corporation, acting as agents for all, were, in fact, both sellers and buyers, the sale was void. *Conn. Supreme Ct.* 1830, *Banks v. Judah*, 8 *Conn.* 145.

88. The fact that such a sale was made in such a manner that all members of the original corporation might come in, would be important upon an inquiry for actual fraud; but it cannot relieve the transaction from the objection that it is of a character that may be made use of for fraudulent purposes, and that it therefore cannot be tolerated, although there is no actual fraud. *Id.*

89. The president and treasurer of a railroad corporation, as the agents of the corporation, purchased a piece of land with a view to obtain a supply of gravel for the

road, and took a deed of it to themselves, but paid a small portion of the purchase-money out of the funds of the corporation, and gave their own note for the balance, secured by a mortgage on the land. It appeared that the company had taken gravel from the land, and had paid the interest on the note up to a certain time, when, by direction of the company the land was sold, and the proceeds as far as needed applied to the payment of the note. *Held*, that although these officers could not *ex officio* bind the corporation for the purchase of land, yet the facts amounted to a ratification of their act by the corporation, and that the agents must account in equity as trustees to the corporation for the balance of the purchase-money and land in their hands. *Conn. Supreme Ct.* 1841, *Church v. Sterling*, 16 *Conn.* 388.

90. Station agent of railroad company cannot discharge claim for freight by delivering goods without requiring payment, contrary to rules of company, and charging himself with the amount, in account with the company. See *Judd v. Littlejohn*, 11 *Wis.* 176.

91. Exceptions. The agent of a company being also a member of a firm, and the fact being known to the company without any objection on their part, is competent to bind the company in an agreement of novation of a debt due from them to the firm. *U.S. Circuit Ct.* 1851, *Bradley v. Richardson*, 23 *Vt.* (8 *Washb.*) 720.

92. Thus, the treasurer of a manufacturing company, if he is also its general fiscal agent, empowered to borrow money and to pay debts, has power to pay a debt of the company due to a dissolving firm, by obtaining a release from such firm and having the debt charged against the company on the books of a new firm succeeding the former. The fact that the treasurer was a member of both firms, if it was known to the company, does not affect his power to act for them in transferring the indebtedness. *Id.*

93. The rule that where one acts in the purchase or sale of property in a fiduciary relation the law will not permit him at the same time to act in such transaction for his individual benefit, does not prevent the general financial manager of a bank, in whom is vested all the ordinary authority of a board of directors, from purchasing for his own

benefit property that was pledged to the bank to secure payment of a debt. He discharges his duty when he secures the sale for a price sufficient to discharge the lien. He does not stand as trustee for the bank for any profit he may realize by buying at such price; provided he acts in good faith. *N. Y. Ct. of Appeals*, 1860, *Smith v. Lansing*, 22 *N. Y.* 520.

94. Real estate was mortgaged to a bank, and was afterwards offered for sale under a prior mortgage. The general financial manager of the bank, in whom was vested under its organization the power ordinarily possessed by a board of directors, purchased the property in his own name, for the purpose of holding it to secure himself and others who were sureties for the bank for moneys deposited. At the time of this purchase the bank was solvent, and was not contemplating insolvency; but it subsequently failed. *Held*, that its receiver could not compel a conveyance of the land purchased, without first indemnifying the sureties. The manager had power, while the bank was solvent, to use the funds of the bank to indemnify such sureties, and to purchase property which it held as security, in his own name, for that purpose. *Id.*

95. Agent acting for both parties. No person can act as the agent of both parties to a contract, although he may himself have no interest on either side; nor can he act as agent in regard to a contract in which he has any interest, or to which he is a party, on the side opposite to his principal. It is not necessary for the principal in such cases to show that the agent has acted unfairly, or that he himself has sustained any injury. The act of the agent is deemed to be unauthorized, and the contract is void. *N. Y. Ct. of Appeals*, 1862, *Clafin v. Farmers' & Citizens' Bank*, 24 *How. Pr.* 1; 25 *N. Y.* 293.

Applications of this rule to agents of Particular classes of corporations will be found under the titles of the various kinds of corporations.

96. The president of a bank having a general authority to certify checks, certified his own check when he had no funds in bank; and it was transferred to a purchaser for value and without notice of the want of funds. *Held*, that the bank was not liable to the purchaser. The certificate was beyond the president's authority. And the purchaser

could not claim the right of a *bona-fide* holder, because the face of the check gave him notice that it was drawn and certified by the same person. It was not necessary he should have notice that the drawer had no funds. *Id.*

97. A person may be the servant or agent of a corporation for one purpose and of other persons for another purpose, respecting the same property at the same time. *Me. Supreme Ct.* 1848, *Bangor Boom Corp. v. Whitney*, 29 *Me.* 564.

5. How agency is determined.

98. A power of attorney given by the directors of a bank, may be executed after the term for which the directors were appointed has expired, since the constituent, to wit, the corporation, still continues in existence.* *Mass. Supreme Ct.* 1814, *Northampton Bank v. Pepoon*, 11 *Mass.* 288, 294.

99. So held where the power was given by an unincorporated association. *U. S. Supreme Ct.* 1816, *Anderson v. Longden*, 1 *Wheat.* 85.

100. But the dissolution of the corporation, whether by limitation of time, or forfeiture of charter, terminates the authority of its agents. *Md. Ct. of Appeals*, 1827, *Union Bank of Maryland v. Ridgeley*, 1 *Harr. & G.* 324.

II. MODE OF EXECUTING THEIR POWERS.

1. In general.

101. The mode prescribed must be followed. It is a general rule that a corporation can only act in the manner prescribed by law. When its agents do not clothe their proceedings with those solemnities which are required by the incorporating act, to enable them to bind the company, the informality of the transaction is itself conducive to the opinion, that such act was rather considered as manifesting the terms on which they were willing to bind the company, as negotiations preparatory to a conclusive agreement, than as a contract obligatory on both parties. An individual has an original capacity to contract and bind himself in such manner as he pleases; but with these bodies which have only a legal existence, it is otherwise. The

act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated. *U. S. Supreme Ct.* 1804, *Head v. Providence Ins. Co.** 2 *Cranch*, 127. Followed *Conn. Supreme Ct.* 1825, *N. Y. Firemen Ins. Co. v. Ely*, 5 *Conn.* 560; *Ill. Supreme Ct.* 1831, *Betts v. Menard*, *Breese, App.* 10.

102. The place where an agent of a corporation enters into a contract is not material; a contract may be made out of the State where the corporation is situated. *Ind. Supreme Ct.* 1858, *Wright v. Bundy*, 11 *Ind.* 398.

103. Joint agents must all act. Where a corporation gives an authority jointly to three or more persons, all the agents must act in order to bind the principals. *N. H. Superior Ct.* 1834, *Jewett v. Alton*, 7 *N. H.* 258.

104. Thus where the select men, three in number, of a town, were authorized to make a note in the name of the town, and a note was given signed by two of them only. Held, in an action upon the note, that the authority was not pursued, and the note was void. *Id.*

105. A power conferred by statute upon "the vestry men of, &c. or the major part of them," can be exercised only by a majority of all present. If thirty-five are present, it is not sufficient that sixteen vote "aye," and eleven only vote "no," the remaining eight taking no part. *Q. B.* 1857, *Regina v. Overseers of Christ Church*, 40 *Eng. L. & Eq.* 145.

106. — of municipal corporation. A municipal corporation, having a claim against the defendant, appointed H. and R. its agents to settle it with the defendant. R. without the concurrence of H. effected an arrangement with the defendant, by which the latter turned out to R. certain real estate and securities in satisfaction of the claim. The plain-

* See also, 2 *Rolls Abr.* 12; *Bac. Abr.* tit. Authority, E.

* This case, if it be understood to hold that where the charter expressly enables the corporation to use a particular mode or instrumentality for manifesting its acts, it is precluded thereby from adopting or being bound by any other, is not sustained by the later authorities. The opinion was rendered by Ch. J. Marshall, and seems to be based in part upon the ancient doctrine to which he adhered after it was abandoned by the other members of the court [12 *Wheat.* 64], that a corporation cannot act by parol.

tiff, on being informed of the arrangement, promptly repudiated it, and directed the securities to be returned to the defendant. *Held*, that the plaintiff was not bound by this settlement. *N. Y. Supreme Ct.* 1856, *Mayor &c. of Auburn v. Draper*, 23 *Barb.* 425.

107. A signature of the name of a corporation, made by their secretary, presumptively their act. See *Frye v. Tucker*, 24 *Ill.* 180.

108. Personal liability. The mere fact that an agent, after subscribing his name to a contract, adds the designation of an office or agency which he holds in or for a corporation, is not enough to render it the contract of the corporation and so relieve him from personal liability. Such an addition may be read as a mere description of the person. If, however, upon the whole face of the instrument it is doubtful whether the agent individually or the corporation was intended to be bound, evidence of the circumstances attending the transaction is admissible, to resolve this question. *Ala. Supreme Ct.* 1841, *Lazarus v. Shearer*, 2 *Ala. N. S.* 718; 1858, *Drake v. Flewellen*, 33 *Ala. N. S.* 106.

109. In Alabama, one who defends an action upon a contract upon the ground that he entered into it on behalf of a corporation and did not personally contract, is bound to show that the corporation had authority to make such a contract. *Ala. Supreme Ct.* 1838, *Gillaspie v. Wesson*, 7 *Port.* 454; 1846, *Harwood v. Humes*, 9 *Ala. N. S.* 659; 1858, *Drake v. Flewellen*, 33 *Ala. N. S.* 106.

110. The defendant contracted as attorney of a railway company; and was sued personally upon the contract. There was no actual proof that any company existed, and if it did, all its concerns were managed by defendant. *Held*, however, that as the parties had acted throughout as if there were a company, the defendant could not be personally charged, in the absence of affirmative evidence that he was really a principal. *Com. Pl. at N. P.* 1847, *Russel v. Reece*, 2 *Carr. & K.* 669.

111. Treasurer of company who brought in its stock, *Held* not personally liable if he acted for the company, but liable if in fact he acted for himself, although he signed as treasurer. See *Haynes v. Hunnewell*, 42 *Me.* 276.

For the rule that contracts made in behalf of a corporation, by one who assumes to be agent but who has not authority to charge

the corporation, may be enforced against the agent personally, see *CONTRACTS*.

2. Sealed instruments.

112. Corporate seal requisite. It is well settled that an agent or attorney of a corporation, in executing a deed in its name, must, in order to make it the act and deed of the corporation, affix thereto the corporate seal. *Conn. Supreme Ct.* 1830, *Savings Bank v. Davis*, 8 *Conn.* 191.

113. A deed made by the committee men of a town and sealed with their individual seals, cannot be construed to be the deed of the inhabitants. Whether a town can contract by seal,—*query?* *Mass. Supreme Ct.* 1824, *Damon v. Granby*, 2 *Pick.* 345, 353.

114. Personal liability. An officer of a corporation who, by its direction, executes an instrument not competent to bind the corporation,—*e. g.* a sealed instrument, but without the corporate seal,—is not, therefore, personally liable thereon. He is not an agent acting without authority, within the rule that enforces a contract so made against the agent personally. *N. Y. Supreme Ct.* 1858, *Episc. Church of St. Peter v. Varian*, 28 *Barb.* 644.

3. Negotiable instruments.

115. What execution will bind corporation. A note signed with the addition of agent of a designated corporation, though its terms be that of an individual promise, may be regarded as the note of the corporation if the agent had authority to execute it, or if its execution was ratified by the corporation. *N. H. Superior Ct.* 1841, *Dispatch Line of Packets v. Bellamy Manuf. Co.* 12 *N. H.* 205; *S. C. Ct. of Appeals*, 1856, *Planters' Bank v. Bivingsville Cotton Co.* 10 *Rich. Law.* 95; *N. Y. Com. Pl.* 1856, *Bruce v. Lord*, 1 *Hill.* 247.

116. Where an agent gave a promissory note, in the body of which were the words, "I promise to pay," the signature being "A., agent for the M. M. Company," and it appeared in evidence that A. was in the constant habit of signing notes in this manner, which the company regularly paid,—*Held*, that he was not personally liable. When an agent, duly authorized, subscribes an engagement, in such manner as to manifest an intent not to bind himself, but to bind the principal, and when, by his subscription, he has actually

bound the principal, then the contract cannot be binding on him personally. No precise form of words is required to be used in the signature; every word must have an effect, if possible; and the intention must be collected from the whole instrument taken together. *Conn. Supreme Ct.* 1818, *Hovey v. Magill*, 2 *Conn.* 680.

117. Bills were drawn by an agent of the corporation and accepted by the president, in the name of H. G. & Co. that being the style of his copartnership, merely as a convenient mode adopted by the corporation for raising funds. *Held*, that the company was liable upon them. Evidence that such was the object of the mode of acceptance is admissible in such case. A corporation is bound by the acts of its authorized agent, although the agent contracts in his own name, and does not disclose his principal, if the credit be not given exclusively to the agent. *N. Y. Supreme Ct.* 1851, *Conro v. Port Henry Iron Co.* 12 *Barb.* 27.

118. Where the words of the note were, "I promise," and it was signed with the words for the company prefixed to the name of the agent,—*Held* that it was the note of the company, and not of the agent. *Mass. Supreme Ct.* 1815, *Emerson v. Providence Hat Co.* 12 *Mass.* 237.

119. A note in the terms "The O. M. Co. promise to pay &c." signed "J. H., Trustee," imports an intention to bind the company only; and cannot be enforced against the agent personally. *Cal. Supreme Ct.* 1862, *Shaver v. Ocean Mining Co.* 21 *Cal.* 45.

120. A bill dated at the office of the corporation, signed with the name of the president, with the addition of his title of office, abbreviated, and directing the contents to be charged "to motive power and account,"—*Held*, to be on its face the bill of the corporation, and not that of the signer individually. *N. Y. Ct. of Appeals*, 1863, *Olcott v. Tioga R. R. Co.* 27 *N. Y.* 546.

121. What will bind agent. A note in the words "I promise to pay &c. signed by an individual with his own name, may be treated as a contract binding him personally, notwithstanding he adds to his signature, a designation of a corporate office held by him,—*e. g.* "Trustee," or "President" of the company. Such description is treated as merely a description of the person. *Mass.*

Supreme Ct. 1859, *Fiske v. Eldridge*, 12 *Gray*, 474. Followed, 1861, *Haverhill Mut. Fire Ins. Co. v. Newhall*, 1 *Allen*, 120.

122. A note in the form, "We, the prudential committee for and on behalf of the B. Church in L.," signed by individuals without qualifying words added to their signatures, will sustain an action against them personally. *Mass. Supreme Ct.* 1862, *Morrell v. Codding*, 4 *Allen*, 403.

123. The acceptor of a draft, drawn upon him personally, and accepted by him with the addition to his name of the words "Treasurer Neuvitas M. Co." is *prima facie* personally responsible for the acceptance. Such an addition is only a description of the person, and does not absolve him from personal responsibility. *N. Y. Com. Pl.* 1856, *Bruce v. Lord*, 1 *Hilt.* 247.

124. A bill drawn by the Empire Mills against H. was presented for acceptance to H. who wrote across it—"accepted; Empire Mills by H. treasurer." *Held*, that this was not a sufficient acceptance to bind H. It did not purport to be an acceptance by H. individually. And it could not be brought within the rule, that if the agent does not bind the principal he binds himself, without affirmative proof that H. had no authority, in fact, to bind the Empire Mills. *N. Y. Ct. of Appeals*, 1854, *Walker v. Bank of State of N. Y.* 9 *N. Y.* (5 *Seld.*) 582.

III. LIABILITIES OF THE CORPORATION.

1. Towards the agent.

125. For compensation. Where labor has been performed for a corporation with the knowledge of the directors and general managers, the corporation will be bound to pay a *quantum meruit*, in the absence of any express contract under which the labor was performed. *N. H. Supreme Ct.* 1859, *Goodwin v. Union Screw Co.* 34 *N. H.* 378.

126. Where the law requires a corporation to appoint a clerk, and its records show his appointment, but do not show that any fixed salary is provided for him, he may recover what his services are worth. *Ky. Ct. of Appeals*, 1880, *Waller v. Bank of Kentucky*, 3 *J. J. Marsh.* 206.

127. Even though a statute requiring the amount of his remuneration to be determined upon at a general meeting of the company

has not been complied with. *Each.* 1856, Bill v. Darenth Valley R. R. Co. 1 *Hurlst. & N.* 305; 37 *Eng. L. & Eq.* 539.

128. A stockholder in a joint-stock company, who acts as trustee and agent of the company, is entitled to a reasonable compensation for his services as such. *Ala. Supreme Ct.* 1836; Spence v. Whitaker, 3 *Port.* 297.

129. Agent's cause of action against English joint-stock company after it is formed, for services in obtaining act, rendered on request of the projectors of the enterprise before the company was formed. See Tilson v. Warwick Gas Light Co. 4 *Barn. & C.* 962; 7 *Dowl. & R.* 376.

130. Agents of a corporation may recover fair value of the use of their property loaned to the company in good faith. See Rider v. Union India Rubber Co. 5 *Bow.* 85.

131. — under special agreement. One employed at a fixed rate of compensation, cannot demand extra pay for services rendered in that capacity, although they were not anticipated at the time of his appointment. *Pa. Supreme Ct.* 1855, Carr v. Charter, 25 *Pa. St.* (1 *Casey*), 337.

132. The plaintiff wrote to the defendant as follows: "I agree to accept the appointment of secretary of the Lancashire Cotton Mill Company upon the following terms, viz.: first, a salary of £300 per annum, commencing at the present date, if the company be completely registered and put into operation; if not, I shall be satisfied with any remuneration for my time and labor you may think me deserving of and your means can afford." The defendant wrote in answer accepting the terms, and adding, "It is distinctly agreed and understood that if the company is not formed and carried out, that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right as compensation for labor done in the event of the company not being carried out." The plaintiff rendered some service, but the company was never formed. *Held*, that there was no contract upon which the plaintiff could recover any part of the salary. *Each.* 1859, Roberts v. Smith, 4 *Hurlst. & N.* 315.

133. Manager employed at a salary "to commence from the completion of a contract with R."—*Held* entitled to recover salary;

the contract referred to being deemed, under the circumstances, to have been completed. See Browning v. Great Central Mining Co. 5 *Hurlst. & N.* 855.

134. Forfeiture. A. was employed by a railroad company to procure subscriptions to stock, and in the exercise of such agency, without the knowledge of the company, received reward from persons subscribing lands for stock, for procuring their lands to be taken by the company. *Held*, that the agency in behalf of the subscribers was inconsistent with the agency for the company, was an act of bad faith, and worked a forfeiture of all right to compensation from the company. *Ind. Supreme Ct.* 1860, Cleveland & St. Louis R. R. Co. v. Pattison, 15 *Ind.* 70.

135. Dissolution. A corporation cannot, by proceeding to close up its affairs and giving notice to the governor that they had done so, and that the charter is surrendered, cannot so dissolve itself as to terminate a contract by which it bound itself to pay for the services of an agent. So far as a member's rights, duties, and obligations, as a corporator, are concerned, he is doubtless bound by the acts of the majority. But his rights under a contract, in which he is one party, and the corporation the other, cannot be taken away by the votes and acts of the corporation. *Mass. Supreme Ct.* 1834, Revere v. Boston Copper Co. 15 *Pick.* 351.

136. When a manufacturing corporation, whose duration was not limited by its charter, agreed with a stockholder, that, during the time for which the corporation was established, he should devote his whole time and skill to its service, in carrying on the business of the company, and be paid a yearly salary so long as he should perform such service; and that on his death, or refusal to perform the service, the corporation should be discharged from its obligation to employ him. The agent commenced his services under this agreement, but the business proving unprofitable, a majority of the stockholders, after the lapse of more than four years, voted to dissolve the corporation. The agent was accordingly dismissed, and the corporate property transferred to trustees, who were authorized to pay debts, and distribute the surplus amongst the stockholders, and notice was given to the governor, under the statute,

that no further interest was claimed in the charter. *Held*, that the agent was released from his obligation to serve the company, but that he was entitled to an indemnity for the loss sustained by its refusal to employ him. *Id.*

137. Disbursements. When an agent—*a. g.* trustees of a village—is put to expense—*a. g.* by being subjected to costs, not taxable, in defending a suit—by reason of what he has done while acting in good faith, and without fault, in the service of his principal, the law implies a promise on the part of the principal to reimburse him. *N. Y. Supreme Ct. 1822, Powell v. Trustees of Newburgh, 19 Johns. 284.*

138. Agent entitled to reimbursement for judgment against him for an act done under instructions of corporation,—see *Howe v. Buffalo, New York, & Erie R. R. Co. 38 Barb. 124.*

139. For injuries. The principal is not liable to one of his agents, or servants, for injury which he has sustained in consequence of the misfeasance or negligence of another of his agents or servants, when both are engaged in the same general business or employment. *Ct. of Appeals, 1851, Coon v. Syracuse & Utica R. R. Co. 5 N. Y. (1 Seld.) 492; 1858, Keegan v. Western R. R. Co. 8 N. Y. (4 Seld.) 175; 1858.*

140. A servant who sustains an injury from the negligence of a superior agent engaged in the same general business, can maintain no action against their common employer, although he was subject to the control of such superior agent, and could not guard against his negligence or its consequences. The same rule of liability must necessarily apply as well where the employments of the servants are distinct, as to cases where they are one; and to the several grades of employments, where those in the inferior are subject to the direction and control of those in the higher grades, as to cases where all occupy a common footing and possess equal authority. Ct. of Appeals, 1858, Sherman v. Rochester & Syracuse R. R. Co. 17 N. Y. (3 Smith), 153.

141. A master is liable for accidents occasioned by his neglect toward those whom he employs, only while they are engaged in his employment; but great latitude must be given to the phrase, "engaged in his employ-

ment" *eundo, morando et redeundo.* It makes no difference that, at the time of the accident, the servant was leaving his work without lawful excuse or proper cause. *H. of L. 1855, Marshall v. Stewart, 38 Eng. L. & Eq. 1.*

142. A, a miner employed to work in the mine of B, went down, as usual, to his day's work, but he and the other miners, after working a short time, held a meeting amongst themselves to discuss certain supposed grievances, and they resolved, before working further, to come up from the pit at twelve o'clock, the usual hour for their coming up being five o'clock, and go in a body to represent their grievances to B's manager. While so coming up, A was killed by a stone which fell from the top of the shaft, the planking there being in an unsafe state. A's representatives brought an action of damages against B, and the judge told the jury that B was not responsible for the accident, if A was at the time leaving his work without proper cause, and for a purpose of his own. The jury found that A was leaving his work without proper cause, but that he was killed owing to the unsafe state of the planking at the mouth of the pit. *Held*, that the ruling of the judge was wrong, and that, whether A had just cause for leaving his work or not, and was coming up for a cause of his own, still, B was responsible, being bound to take A up just as safely as he let him down. *H. of L. 1855, Marshall v. Stewart, 38 Eng. L. & Eq. 1.*

See this subject more fully treated, under **SERVANTS**; and under the titles of the corporations whose business involves risk of accidents; particularly **RAILROAD COMPANIES.**

2. Towards third persons, upon acts or omissions of agent.

143. That in general a corporation is liable for the acts or omissions of its agents within the scope of their several employments; but not for acts outside of their employment—see *Salem Bank v. Gloucester Bank, 17 Mass. 1; Foster v. Essex Bank, Id. 479; Lowell v. Boston & Lowell R. R. 23 Pick. 24; Thayer v. City of Boston, 19 Id. 511; Magill v. Kauffman, 4 Serg. & R. 317; Sawyer v. Winnegance Mill Co. 26 Me. 127, 128; McLaren v. Pennington, 1 Paige, 102; Bois-*

gerard v. N. Y. Banking Co. 2 *Sandf. Ch.* 23; Merchants' Bank v. Central Bank, 1 *Kelly*, 418; Jenkins v. Morris, 16 *Mees. & W.* 880; Yarborough v. Bank of England, 16 *East*, 8.

144. It is no defence to an action for damages sustained through the unskilful act of an agent of a corporation, that his act was in violation of the instructions given him, if it was within the scope of his employment. The rule that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even that he disapproved or forbade it; he is equally liable if the act be done in the course of the servant's employment. The cases on this subject which seem to countenance the doctrine that the master is not liable, if the act of his servant was in disobedience of his orders, depend on the question, whether the servant at the time he did the act complained of, was acting in the course of his employment, or in other words, whether he was or was not at the time, in the relation of servant to defendant. No case asserts the doctrine that the master is not liable for the acts of a servant in his employment when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim "*respondet superior*," would in a measure nullify it. *U. S. Supreme Ct.* 1852, Philadelphia & Reading R. R. Co. v. Derby, 14 *How.* 468.

145. Thus a person, who, while lawfully riding on an engine of a railroad company on their road, is injured by a collision with another engine of theirs, the collision and the injury being occasioned by the gross negligence of the engineer of the other engine, may recover damages of the company for such injury; although the engineer, whose negligence occasioned the collision, had been expressly forbidden to run his engine over the road at that time. *Id.* See also Southwick v. Es-
lia, 7 *Cush.* 385.

146. Insurance company not liable for office rent upon a lease entered into by an agent whom they have employed on terms of

a commission. See Brandon v. Columbia Ins. Co. 2 *Grant Cas.* 470.

147. A municipal corporation is not liable for a trespass committed by an agent employed by the Common Council in a matter beyond their corporate power. A corporation is liable for a tortious act, *e. g.* a trespass, committed by an agent pursuant to its directions, in relation to the matters within the scope of the objects of its incorporation; but not for any unauthorized acts of its officers, though done *colors officii*. *N. Y. Supreme Ct.* 1848, Boom v. City of Utica, 2 *Barb.* 104.

148. A corporation can act only through agents. If they, while exercising the authority conferred on them, are guilty of falsehood and fraud, their principal is liable for the consequences which may flow therefrom. The true test of the liability of the principal in such cases is to ascertain whether, in committing a fraud, the agent was acting in the business of his principal. If he was engaged in the course of his employment, then parties injured by his misconduct or fraud can resort for redress to the persons who clothed him with the power to act in their behalf, and who have received the benefits resulting from his agency. *Mass. Supreme Ct.* 1861, Fogg v. Griffin, 2 *Allen*, 1.

149. Thus when the officers of an insurance company appoint an agent to solicit risks, and authorizing him to state the amount of the capital of the company, and that it has been paid in &c. to insurers asking information, the corporation is bound by statements made by the agent, within the directions given him, although false. *Id.*

150. False representations. An agent employed for a special purpose,—*e. g.* to obtain subscriptions to a project of forming a joint stock company in relation to lands,—may use the ordinary means of accomplishing the object of his appointment; such as representing the location and quality of the lands, and the like; and if he makes false representations, inducing purchasers to enter into contracts, the principal is affected by such representations, the same as if made by himself. *N. Y. Supreme Ct.* 1840, Sandford v. Handy, 23 *Wend.* 260.

151. Instances. Sharp v. Mayor &c. of New York, 25 *How. Pr.* 889; Waldo v. Chicago &c. R. R. Co. 14 *Wis.* 575.

152. Where a bank, through the fraud of its agent, obtained certain assets as security

for its liabilities through another bank, *held*, that though it was not liable criminally, yet it was liable civilly; as it had appointed the end, though not the means, it could not retain any advantages, which had been gained through the wrong of its agent. *S. O. Ct. of Errors*, 1848, *Johnston v. S. W. R. R. Bank*, 3 *Strobb. Eq.* 263, 317.

153. The possession, by the transfer agent of a corporation, of the transfer books of its stock, and his authority to allow them to be used, do not constitute the *indicia* of an authority to make representations as to the ownership of stock, so as to render the company liable for the falsity of such representations made by him. *N. Y. Superior Ct.* 1862, *Henning v. N. Y. & N. Haven R. R. Co.* 9 *Bow.* 283.

154. Nor does mere permission, given by the agent, to enter upon such books a transfer of reputed stock, there being no new certificate given, amount to a representation by him that the person making the transfer was the owner of any genuine stock. *Ib.*

155. Representations made by one, not an authorized agent, in soliciting stock subscriptions, though false, are not fraudulent, so far as the company is concerned. *Ind. Supreme Ct.* 1858, *Fert Wayne & Blufon Turnp. Co. v. Deam*, 10 *Ind.* 563.

156. An indictment may be maintained against, and a fine imposed upon, the directors of a gas company, for the act of the company's superintendent and engineer, in conveying the refuse gas into a great public river, whereby the fish are destroyed, and the water rendered unfit for use &c. thereby creating a public nuisance, where the acts done by the superintendent and engineer are within his general authority to manage the works, notwithstanding the directors were personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no reason to suppose was discontinued. If persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants. *K. B.* 1884, *Rex v. Medley*, 6 *Carr. & P.* 292.

AGGREGATE CORPORATIONS.

The distinction between "sole" and "aggregate" corporations explained. Overseers

of the Poor of Boston *v. Sears*, 22 *Pick.* 122; *Dartmouth College v. Woodward*, 4 *Wheat.* 518, 667.*

AGRICULTURAL SOCIETIES.

1. A power conferred by a statute upon officers of an agricultural society, to prescribe bounds within which no one can enter except in conformity with regulations established by them, for the purpose of exhibiting horses or the like—*e. g.* *Mass. Gen. Stat. ch. 66, § 11*—can only be exercised within the exact limits authorized by the act. If those limits are exceeded, the forcible exclusion from such bounds, of a person who otherwise might enter, will be punishable as assault and battery. *Mass. Supreme Ct.* 1863, *Commonwealth v. Ruggles*, 6 *Allen*, 588.

2. In Massachusetts this power is so far restricted, that no part of a public highway can be included within such bounds. *Ib.*

3. Liability. The South Kennebec Agricultural Society an aggregate corporation, and responsible for injuries resulting from a want of ordinary care;—see *Brown v. South Kennebec &c. Society*, 47 *Me.* 275.

AMALGAMATION.

CONSOLIDATION.

AMOTION.

[Under this title is treated the power of a corporation, by its own vote or act, to remove a corporate officer from his office; including the causes which have been held to justify such removal, and the proper mode of proceeding. Corporate proceedings to expel a member are treated under DISFRANCHISEMENT, if the corporation is one, membership in which involves rights of a public or political nature; if otherwise, under EXPULSION. What determines the employment of an AGENT, or SERVANT, should be sought under those heads.]

I. THE POWER.

II. GROUNDS.

III. THE MODE OF PROCEEDING.

IV. REVIEW.

1. What power is implied from corporate existence. A corporation has an implied power, incident to its existence as a corporation, and independent of charter provisions, to remove an officer, for cause. *N. Y.*

* Throughout this work, when the word "corporation" is used alone, an *aggregate* corporation is meant; except, indeed, that the rule stated may often apply, also, to a corporation sole. When it is intended to refer to sole corporations particularly, the prefix "sole" is employed.

Supreme Ct. 1835, *Fawcett v. Charles*, 18 *Wend.* 473; *Ind. Supreme Ct.* 1854, *State v. Trustees of Vincennes University*, 5 *Ind.* 77. See, also, Lord Bruce's case, 2 *Strange*, 820; *Rex v. Doncaster*, 1 *Barnard.* 264.

2. This power belongs to the corporation alone; the courts have no jurisdiction to order such removal. *Cal. Supreme Ct.* 1860, *Neall v. Hill*, 16 *Cal.* 145.

3. The power, considered as incident to the corporation, and independent of charter provisions, is vested in the body at large. *K. B.* 1799, *Rex v. Mayor &c. of Lyme Regis*, 1 *Dougl.* 149.

4. Charter provisions conferring an express power. Where, however, the charter of a corporation prescribes the terms under which the power of amotion is to be exercised, they must be pursued. *Ind. Supreme Ct.* 1854, *State v. Trustees of Vincennes University*, 5 *Ind.* 77.

5. That a power to trustees "to appoint a superintendent, who shall be subject to removal only for &c." implies a power in the trustees to remove, for the causes specified,—see *People v. Higgins*, 15 *Ill.* 110.

6. A provision in a general act, or in the foundation of a private charity, that visitors "shall and may" remove officers, for specified causes, is imperative; equivalent to *must* remove. See *Attorney General v. Lock*, 3 *Atk.* 164.

7. That power conferred on the common council of a city to *expel* one of its members does not authorize to *suspend*,—see *State v. Jersey City*, 1 *Dutch.* 536.

II. GROUNDS.

8. The general rule. There are three sorts of offences for which an officer or corporator may be discharged:

1. Such as have no immediate relation to his office, but are themselves of so infamous a nature as to render the offender unfit to execute any public franchise.

2. Such as only against his oath and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.

3. Offences of a mixed nature, being not only against the duty of the office, but also indictable at common law.*

* Whether, for those offences which are of a mixed nature, the corporator can be removed without a previous conviction,—see 2 *Bac. Abr. Bour.* ed. 476, and cases cited.

On offences of the first class, there must have been a conviction at law, before the corporation can remove; for those of the second the corporation may try as well as remove. The power to try and remove for violations of duty as a corporator, is incident to the corporation and may be exercised independent of express authority conferred by charter or prescription. *So held* of an English municipal corporation. *K. B.* 1758, *Rex v. Richardson*, 1 *Burr.* 517, 533.

The above classification substantially restated and approved, see *Rex v. Mayor &c. of Liverpool*, 2 *Burr.* 723, 732; *Commonwealth v. Benevolent Society*, 2 *Binn.* 441; *Commonwealth v. Guardians of the Poor*, 6 *Serg. & R.* 469.

8 a. What are legal causes of amotion. How a power to remove, conferred in general terms, should be construed. See *State v. Chamber of Commerce of Milwaukee*, 20 *Wis.* 63.

9. Ineligibility. The cause for which an officer is removed, must be something which has arisen subsequently to the admission to the exercise of his office; the power of amotion cannot be exercised for a defect of original qualification. *Rex v. Mayor &c. of Lyme Regis*, 1 *Dougl.* 79.

10. Omission to take oath. Whether omission to take an oath enjoined by statute upon the officer is sufficient cause for removing him. See *Rex v. Master &c. of St. John's College*, *Skinn.* 546; *Regina v. Humphery*, 10 *Ad. & E.* 385.

11. Bankruptcy not a ground for removing a common-council-man in an English municipal corporation. See *Rex v. Mayor, &c. of Liverpool*, 2 *Burr.* 723.

12. Poverty. Being too poor to pay the taxes for which he was liable, sufficient cause for removing an alderman. See *Rex v. Mayor &c. of Andover*, 3 *Salk.* 229.

13. Old age not a sufficient cause for removing an alderman. See *Hazard's case*, 2 *Rolle*, 11.

14. Non-residence. When non-residence in, or removal or departure from the corporate limits is ground for removing an officer of a municipal corporation. *Exp. Butler*, 1 *Atk.* 215; *Rex v. Harris*, 1 *Barn. & Ad.* 936; *Rex v. Leicester*, 4 *Burr.* 2087; *Vaughan v. Lewis*, *Carth.* 277; *Exeter v. Glide*, *Comb.* 197; 4 *Mod.* 38; *Rex v. Mayor &c. of Lyme Regis*, 1 *Dougl.* 149; *Regina v. Truebody*, 11

Mod. 75; 2 *Ld. Raym.* 1275; *King v. Glide*, 12 *Mod.* 28; *Rex v. Doncaster*, *Say.* 37.

15. **Non-attendance.** Absence from corporate meeting, unexcused, when cause for amotion. See *Rex v. Harris*, 1 *Barn. & Ad.* 986.

16. **Non-attendance not sufficient cause of removal**, when no business is obstructed by his absence, though his absence was wilful, and had notice to attend. See *Rex v. Richardson*, 1 *Burr.* 517, 540.

17. **Non-attendance of one of a board or body of a corporation**, although the office is of a public nature, is not necessarily cause of removal, as it does not prevent the others from proceeding. Thus non-attendance of an alderman at the court of sessions, does not warrant removal; as it does not hinder the holding of the court. *Q. B.* 1713, *Queen v. Mayor &c. of Pomfret*, 10 *Mod.* 107.

18. **Non-attendance of an officer**, whose duty calls upon him to be constantly present, or who is an integral part of the meeting, is a cause of amotion. *Q. B.* 1705, *Regina v. Bailiffs of Ipswich*, 2 *Ld. Raym.* 1232.

19. **An officer liable to amotion for prolonged and obstinate non-attendance**; but not for one instance of non-attendance. See *Rex v. Wells*, 4 *Burr.* 1999.

20. **Misconduct.** The misconduct must be specially connected with the execution of the office, and the result of improper motives;—see *Regina v. Mayor &c. of Newbury*, 1 *Q. B.* 751, 762; *Bagg's case*, 11 *Coke*, 93.

21. **Riot.** Making a riot in disturbance of an election of a mayor or other officer, a cause of amotion. See *Haddock's case*, *T. Raym.* 485; *Rex v. Mayor &c. of Derby*, *Case t. Hardw.* 153.

22. **Bribery.** That bribing a corporator to vote for a particular candidate at a corporate election is cause for amotion,—see *Rex v. Mayor &c. of Tiverton*, 8 *Mod.* 186.

23. **Breach of trust.** When it is ground for removing a corporate officer. See *Rex v. Chalke*, 1 *Ld. Raym.* 225; *Rex v. Mayor &c. of Doncaster*, 2 *Ld. Raym.* 1564; *Rex v. Mayor &c. of London*, 2 *Durnf. & E.* 177.

24. **Habitual drunkenness** cause for amoving an alderman. See *Rex v. Taylor*, 3 *Salk.* 231, 1616; *Taylor v. Gloucester*, 1 *Bolle*, 409; 3 *Bulet.* 190.

25. **Casual intoxication** not sufficient cause for amoving an alderman. See *Rex v. Taylor*, 3 *Salk.* 231.

26. **Insulting language.** When using opprobrious or insulting language to a fellow-member or officer of the corporation is ground of expulsion or amotion. See *Bagg's case*, 11 *Coke*, 93; *Clark's case*, *Cro. Jac.* 506; *Clark's case*, 1 *Ventr.* 327; *Rex v. Guilford*, 1 *Lev.* 162; *Rex v. Loudon*, 2 *Lev.* 201; *Regina v. Rogers*, 2 *Ld. Raym.* 777; *Innes v. Wylie*, 1 *Carr. & K.* 257; *Regina v. Treasury*, 10 *Ad. & E.* 374; 2 *Perr. & D.* 498.

27. **Threats. Attempts.** A mere threat or attempt to do an improper act, no injury actually resulting, not sufficient. See *Bagg's case*, 11 *Coke*, 93.

28. **Altering corporate records.** That alteration of the corporate records, with a fraudulent intent, is ground for amotion; but the fraudulent intent is essential, and must be averred,—see *Rex v. Chalke*, 5 *Mod.* 257; 1 *Ld. Raym.* 225; *Mayor &c. of Nigan v. Pilkington*, 1 *Keb.* 597.

29. **Withholding them.** Refusal to deliver over the corporation books intrusted to his custody, as the proper officer, to persons applying for them with an order from the corporation, insufficient. See *Anon.* 1 *Barnard.* 402; *Regina v. Bailiffs &c. of Ipswich*, 2 *Ld. Raym.* 1232; *Rex v. Ingram*, 1 *W. Bl.* 50; *Regina v. Treasury*, 10 *Ad. & E.* 374; 2 *Perr. & D.* 498.

30. **Second removal.** The fact that a member of a city common council has been expelled from office does not render him ineligible for re-election, and if re-elected he cannot be again removed for the same cause. *N. J. Supreme Ct.* 1856, *State v. Jersey City*, 1 *Dutch.* 536.

31. **By-law.** That a by-law authorizing amotion for cause may be good, though no power of amotion is given by charter or prescription,—see *Rex v. Richardson*, 1 *Burr.* 517, 539; 2 *Ld. Ken.* 85; *Rex v. Rippon*, 2 *Keb.* 25.

32. **Statutory power of removal.** That if a statute defines the causes for which a mayor and common council of a city may remove an officer, he can not be removed for any other than the specified causes,—see *Shaw v. Mayor &c. of Macon*, 19 *Ga.* 468.

33. **Receiving bribes by a common councilman**,—*Held* sufficient ground for amotion, under a charter power to remove for disorderly conduct. *N. J. Supreme Ct.* 1856, *State v. Jersey City*, 1 *Dutch.* 536.

III. THE MODE OF PROCEEDING.

84. Some corporate act necessary. The fact that good grounds of removing an officer exist, do not amount to removal, or render the office vacant. There must be in addition some corporate act; some exercise of the corporate will to remove. *Mass. Supreme Ct.* 1831, *Murdock v. Phillips' Academy*, 12 *Pick.* 244; *N. J. Chancery*, 1835, *Doremus v. Dutch Reformed Church*, 2 *Green*, 332; *Ind. Supreme Ct.* 1854, *State v. Trustees of Vincennes University*, 5 *Ind.* 77. See also *Rex v. Ponsonby*, 2 *Brown P. C.* 311; *Rex v. Heaven*, 2 *Durnf. & E.* 772.

85. Provisions in articles of an English banking company, that if any person chosen to act as public registered officer of the company should become bankrupt, he should be disqualified, and his office become vacant, construed to mean that his office was to be void at the election of the company; but if, after the bankruptcy, they treated and held him out to the world as their public registered officer, they might sue and be sued in his name. *Exch.* 1844, *Steward v. Dunn*, 12 *Mees. & W.* 655; 1 *Dowl. & L.* 642; 13 *Law J. N. S. Exch.* 324; 8 *Jur.* 218.

86. Vote of a corporate meeting. The power of holding a corporate meeting for amotion is incident to the power of amotion; and therefore need not be set out in a return to a mandamus. *K. B.* 1779, *Rex v. Mayor &c. of Lyme Regis*, 1 *Dougl.* 149.

87. The power to amove an officer, whether possessed as incident to the corporation at large, or vested in a particular body, must appear to be exercised at a regular meeting holden in a corporate character, or at least holden in the character by virtue of which they are empowered to amove. Thus, where it appeared by the return to a mandamus that the common council had the power of amotion, and it was alleged as a fact that the party complaining was removed by thirty of the common councilmen, in the council chamber assembled, the court held this to be insufficient, because it did not appear "that the thirty common councilmen were then and there assembled as a common council, as they might be them to feast, or for other purposes not connected with their corporate character. *K. B.* 1694, *Rex v. Taylor*, 3 *Salk.* 231.

88. The officer may vote. Under a charter which requires corporate acts in general to be done by a majority of the corporation, an

officer (if a member) can only be removed by a majority of all members, counting himself. Removal being an act of an odious nature, all clauses concerning it must receive a strict interpretation. The officer is not excluded from voting, as a member, upon the question, by his personal interest. *Q. B.* 1712, *Queen v. Sutton*, 10 *Mod.* 74.

89. The notice. Right of officer to notice of the intention to amove, and the grounds. See *Rex v. Richardson*, 1 *Burr.* 517; *Rex v. Mayor &c. of Liverpool*, 2 *Id.* 723; *Rex v. Mayor &c. of Doncaster*, *Id.* 738.

40. Where it is intended to remove any one of the members or officers of a corporation, it is, in general, absolutely necessary, not only that he should be summoned generally to attend, but he must have a particular summons to attend and answer the particular charge alleged against him; for it would be highly unjust, upon a general summons, to remove a man for particular offences, which he may have had no opportunity of preparing to answer. *N. C. Supreme Ct.* 1831, *Delacy v. Neuse Navigation Company*, 1 *Hawks*, 274; *Pa. Supreme Ct.* 1815, *Commonwealth v. Pennsylvania Beneficial Institution*, 2 *Serg. & R.* 141; 1826, *Black and White Smith's Society v. Vandkye*, 2 *Whart.* 309. See also *City of Exeter v. Glide*, 4 *Mod.* 33; *Bagg's case*, 11 *Coke*, 93.

41. The removal of a professor is a judicial proceeding, and to render it legal, there should be: 1, a monition or citation to him to appear; 2, a charge given to him, which he is to answer; 3, a competent time assigned for proofs and answers; 4, liberty of counsel to defend him, and to except to proofs and witnesses; and 5, a sentence after a hearing of proofs and answers. *Mass. Supreme Ct.* 1831, *Murdock v. Phillips' Academy*, 12 *Pick.* 244.

42. A committee of trustees, appointed to inquire into the affairs of an incorporated theological seminary, examined the professors and others, and made a report respecting one of the professors, founded on statements made by himself, and by others who were not examined in his presence. The trustees, without notice to him, voted that, in view of the report &c. his connection with the institution ought to be dissolved. After failing to induce him to resign, a committee of the trustees made a report recommending his removal, and sent a copy of it to him,

informing him that he might make any communication in regard to it, and might have the aid of counsel in preparing testimony or arguments, but that he could not be heard by counsel; and they did not offer to file specific charges, and maintain them by proof in his presence, and refused him access to the documents on which their report was (in part at least) founded, and which related to the charges intended to be relied on. Upon his refusing to appear before them, the trustees voted, on the reasons and facts stated in the report, and without other evidence, or hearing, that the report be accepted, and that he be removed from office. *Held*, that the professor had not had the benefit of a trial, and that the vote of the trustees was ineffectual to remove him from his office. *Id.*

43. That if the officer attends and defends himself, this is a waiver of any defect of notice,—see *Rex v. Mayor &c. of Wilton*, 2 *Salk.* 428; *Rex v. Chalke*, 1 *Ld. Raym.* 225.

44. But where a recorder was charged with non-attendance at a session of *oyer and terminer*, and received notice to answer to the same; but was turned out for non-attendance at sessions of *the peace*, and answered to this, though not charged therewith: *Held*, that the variance was fatal. *Q. B.* 1705; *Regina v. Bailiffs of Ipswich*, 2 *Ld. Raym.* 1232; 2 *Salk.* 435.

45. That wherever an officer holds office under an appointment at pleasure, he may be removed at pleasure, and no summons to him to appear and answer is necessary. See *Rex v. Mayor &c. of Coventry*, 1 *Ld. Raym.* 391; *Salk.* 430; *Rex v. Mayor &c. of Oxford*, *Salk.* 428; *Rex v. Mayor &c. of Canterbury*, *Str.* 674.

46. Election to another office. That an election or appointment to a second (and inconsistent) office, followed by acceptance thereof, operates as a removal from a former office. See *Rex v. Pateman*, 2 *Durnf. & E.* 777; *Staniland v. Hopkins*, 9 *Mess. & W.* 178.

47. Election of a successor. If a recorder be liable to removal at the pleasure of the corporation, the choosing another person recorder is a declaration of the pleasure of the corporation. *K. B.* 1728, *Rex v. Mayor of Canterbury*, 11 *Mod.* 403; 1 *Strange*, 674. See also *Attorney General v. Corporation of Poole*, 8 *Beav.* 75.

48. Seal, when necessary. That an offi-

cer of the corporation, appointed under the common seal, ought to be discharged by an instrument authenticated in like manner. See *Rex v. Chalke*, 1 *Ld. Raym.* 225; *Rex v. Mayor &c. of Rippon*, 1 *Ld. Raym.* 563.

49. Resolution, when sufficient. Officer appointed by resolution only, and holding during pleasure, may be removed by a mere resolution rescinding the former one. See *Regina v. Thomas*, 8 *Ad. & E.* 183; 3 *Nov. & P.* 588; 2 *Jur.* 347; *Rex v. Mayor &c. of Canterbury*, *Strange*, 674; *Rex v. Chalke*, 1 *Ld. Raym.* 225.

50. — when it takes effect. Resolutions of a corporation suspending or removing an officer, in a place at a distance, are not to be regarded as taking effect, so as to terminate the liability of his sureties, until the necessary time for communicating them has elapsed. *U. S. Supreme Ct.* 1827, *McGill v. Bank of United States*, 12 *Wheat.* 511.

IV. REVIEW.

51. Jurisdiction of courts of justice, by mandamus. The trustees of a school founded upon a private charity had power, by the charter, "in case of death or removal" of any of their number, to supply the vacancy. The majority of the board assumed power to remove from office as trustee, one of the board, for using disrespectful language of his associates, and neglect of duty as a trustee.

Held, 1. That the trustees were subject to the general supervisory jurisdiction of the courts of justice over their proceedings, independent of any power of visitation.

2. The charter did not give the trustees power to remove one of their own number. The words "or removal" in the charter contemplated the contingency of a voluntary change of residence by a trustee, and were not intended to imply that a trustee might be removed from office by his fellows.

3. If the trustees could be deemed vested with any power to remove one of their number, as incident to the corporate existence, the causes assigned for the removal were not sufficient to warrant the exercise of it.

4. That a mandamus was the proper remedy to restore the trustee complaining to his place. *Conn. Supreme Ct.* 1827, *Fuller v. Plainfield Academic School*, 6 *Conn.* 532.

52. A mandamus lies to restore a member of a city council to the exercise of his legal

rights.* *N. J. Supreme Ct.* 1856, *State v. Common Council of Jersey City*, 1 *Dutch.* 526.

53. Jurisdiction of chancery to reinstate directors who have been removed by vote of shareholders,—see *Inderwick v. Snell*, 2 *Hall & T.* 412; 14 *Jur.* 727; 19 *Law J. Ch.* 542; 2 *Macn. & G.* 216.

54. Mandamus not allowable to restore an officer removed for adequate cause, on the ground of mere irregularities in the mode,—see *Rex v. Griffiths*, 5 *Barn. & Ald.* 731.

55. By appeal (in Mass.) The statutes of a charitable institution (Andover Theological Seminary) gave an appeal to visitors from acts of the trustees, and made it the duty of the visitors to hear the whole case anew. The trustees having removed a professor, he appealed to the visitors, by whom the removal was confirmed; and he then, under a statute of the State, appealed to the Supreme Court. *Held*, that any irregularity or injustice in the proceedings before the trustees, could not be taken into consideration; their sentence being vacated by the appeal to the visitors. *Mass. Supreme Ct.* 1828, *Murdock's Appeal*, 7 *Pick.* 303, 327.

56. A court of justice will not necessarily reverse a decision of a board of visitors, removing an officer of a corporation (e. g. a professor in a theological seminary) for cause, that they refused to conduct the trial with open doors, or refused to admit persons not engaged in the proceeding. The course of the visitors may appear to have been unwise

in this respect; but the court will presume that they had satisfactory reasons for it. *Id.*

For matters relative to Corporate officers generally, see OFFICERS, and the titles there referred to.

For matters relative to Procedure on the mandamus; what must be shown on applying for the writ; what, in the return; in what form relief will be given &c., see MANDAMUS.

For many principles decided upon cases involving the Removal of members, but analogous and more or less applicable to removal of officers, see EXPULSION; MEMBERS.

AQUEDUCT COMPANIES.

1. *Their duties.* When a water-power company carrying a trench across a highway in such a manner as renders a bridge necessary for passage, may be compelled to erect and maintain such bridge,—see *Re Trenton Water Power Co.* *Spen.* 659; *State v. Wilmington Bridge Co.* 3 *Harring.* 312; *Lawrence v. Great Northern Railway Co.* 16 *Q. B.* 648; 4 *Eng. Law & Eq.* 265.

2. *Their liabilities.* The Manchester corporation water-works were empowered to construct a reservoir, and intercept the waters of the river Etherow. They were not to divert the water until a reservoir should be completed and filled with water, and they were required to discharge out of the said reservoir seventy-five cubic feet per second, for twelve hours of every working day. In case of any default they were to forfeit £50, by way of penalty, to the occupiers of certain mills. And it was enacted that it should not be lawful for the corporation to use any water flowing to the river Etherow until they should have secured and commenced to discharge the stipulated quantity of seventy-five feet per second. The corporation made a reservoir which from engineering difficulties was never completed, as required, so as to be capable of being filled with water; and water had not been discharged therefrom in the quantity and manner required, or in any larger quantity; but in 1857 they diverted the water of the Etherow for the supply of the inhabitants within the limits of the acts, and after that time discharged certain quantities of water from the reservoir during twelve hours of every day. In 1860, a mill-

* A restoration is merely an abstaining, on the part of the moving body, from opposing the right of the corporator to transact the duties and enjoy the franchises appertaining to his office. As the effect of the restoration is not to create the person an officer *de novo* and give him a new title, and as it replaces him exactly in the same situation in which he stood before the attempted amotion, all corporate acts, in which he has concurred between the moment of his amoval and restitution, are of equal validity as if he had never been amoved. If he were before a legal officer, such acts are legal; if he were only an officer *de facto*, his acts before his amoval, during the amotion and subsequently to the restoration, are equally voidable, and he may be ousted in *quo warranto* for any defect in his original title. If he were originally a legal officer, and amoved for sufficient cause, but restored on account of informality in the amotion, all his corporate acts, both before and since the amotion, are valid; but he may again be amoved in a more formal manner, which vacates his office from the time of the second amotion, but has no retrospective effect upon the former irregular amotion. Indeed, if the amotion were voidable on account of an insufficient cause, or insufficiency, in the form in which it was effected, the person has not been ousted; and if he continues to be treated as an officer, and acts as such, there is no need of a writ of restoration. *Wills, Corp.* 260-270; *Ang. & A. Corp.* 428.

owner on the Etherow, brought an action against the corporation. The declaration contained counts for wrongfully diverting the waters of the Etherow, and also counts for not discharging a quantity of water equal to seventy-five cubic feet per second for twelve hours of every working day. The defendants paid money into court as to the former counts, and to the latter pleaded that they had not completed the reservoir and works mentioned in the act, so as to make it their duty to discharge water at the rate specified. *Held*, that the plea was good; that the defendants were not estopped from setting up the non-completion of the reservoir, and that the plaintiffs were only entitled to damages for the loss of the natural flow of the waters of the Etherow, and not for the non-discharge, from the reservoir, of the seventy-five cubic feet per second. *Each*. 1861, *Waller v. Mayor &c. of Manchester*, 6 *Hurlst. & N.* 667.

8. **Water rates.** For decisions on the amount and collection of water rates in particular cities,—see *Parker v. City of Boston*, 1 *Allen*, 361; *Cromwell v. Stephens*, 3 *Abb. Pr. N. S.* 26.

ARTICLES OF ASSOCIATION.

[Under this head is treated the instrument, by whatever name known, common in joint stock associations and corporations formed under general acts, which creates the corporate union between the members, and prescribes the corporate objects and form of organization. This instrument is distinguished from *charter* in that the latter emanates from the sovereign power; and from *by-laws*, in that they are the acts of a corporation already in existence. Only cases which relate to the articles *as a whole*, and with reference to matters *common to companies generally* are here given. The interpretation and effect of articles governing particular subjects are under those subjects:—*e. g.* provisions authorizing by-laws are under *BY-LAWS*; those prescribing the mode of conducting elections, are under *ELECTIONS*. And decisions depending on the objects and functions of a particular kind of corporation, are under its particular name.]

1. **Minor informalities in articles do not invalidate.** If the object expressed in articles of association is one expressly contemplated by the statute, and the articles of association are substantially in the form prescribed, and the provisions indicate an intention to form a corporation rather than a voluntary association, the associates may be deemed a corporation notwithstanding the fact that the articles do not conform to the statute in some particulars,—*e. g.* in stating the residence of the subscribers, and referring to the

statute. *Vt. Supreme Ct.* 1847, *Rogers v. Danby Universalist Society*, 19 *Vt.* 187.

2. **Naming directors.** Where the charter of a railroad corporation requires that the directors shall be named in the articles of association, it is a sufficient compliance with the requirement that the articles are adopted at the time of electing the directors. The requirement is only directory. *Ind. Supreme Ct.* 1859, *Eakright v. Logansport &c. R. R. Co.* 13 *Ind.* 404.

3. **Filing.** The delivery of the articles of association of a railroad corporation to the officer whose duty it is to put them on file, may be proved by evidence other than his indorsement. *Ind. Supreme Ct.* 1858, *Johnson v. Crawfordsville &c. R. R. Co.* 11 *Ind.* 280.

4. The date of filing is no part of the articles of association of a railroad company, filed under the general law, and therefore may be proved by parol, regardless of the statute provision for the proof of the articles. *Id.*

5. **What is a "copy" of articles.** Whether under a general act which requires that every association, formed under the act, shall, before it can acquire a corporate character, deposit with the town clerk "a copy of its articles of association," it is necessary that the copy should contain the names of the members as subscribed to the original articles,—see *West Winsted Savings Bank &c. v. Ford*, 27 *Conn.* 282.

6. **Burden of proof to impeach articles of association lies on those who have signed them.**—see *Pennsylvania Ins. Co. v. Murphy*, 5 *Min.* 36.

ASSESSMENTS.

[This title includes the power of a corporation to split its demand against a subscriber upon his engagement to pay for stock, into several instalments, and to collect them successively. These instalments are generally known in the English cases as "calls;" in the American as "assessments." The two terms are employed, in this work, as substantially equivalent; and the whole subject treated under the name most common in this country.]

Many cases upon the right of a corporation to enforce the contract of subscription or other obligations of a stockholder, very analogous to those here presented, except that they regard the obligation as a whole, and do not contemplate dividing it into instalments, are under *BROCK* and *SUBSCRIPTION*.

Other species of assessment are under other titles. Thus the power of mutual insurance companies to make assessments on premium notes, is under *INSURANCE COMPANIES*; the power of a municipal corporation to assess lands within its jurisdiction for the expenses of local improvements, is under *MUNICIPAL CORPORATIONS*; the as-

assessment of damages for taking private property for corporate uses, is under COMPENSATION.]

- I. THE POWER TO ASSESS.
- II. WHO IS LIABLE FOR ASSESSMENTS.
- III. HOW ASSESSMENTS SHOULD BE LAID.
- IV. ENFORCING PAYMENT.
 - 1. By corporate act.
 - 2. By legal proceedings.

I. THE POWER TO ASSESS.

1. Nature and origin of the power to assess. That the debt created by a subscription is entire; the calls made by the company merely ascertaining the amount and the times when the instalments of that debt should be paid,—see *Small v. Herkimer Manufacturing Co.* 2 *N. Y.* (2 *Comst.*) 330.

2. A corporation has not power at common law, as an incident to corporate existence, to assess, for its own use, a sum of money upon the corporators and compel them by action at law to pay it. The power to maintain an action to recover an assessment levied upon the members by the corporation, must be deduced from the act by which they are incorporated. *N. H. Superior Ct.* 1821, *Franklin Glass Co. v. Alexander*, 2 *N. H.* 380; *Mass. Supreme Ct.* 1809, *Andover & Medford Turnpike Corporation v. Gould*, 6 *Mass.* 40; 1810, *Andover & Medford Turnpike Corporation v. Hay*, 7 *Mass.* 102; 1811, *New Bedford & Bridgewater Turnpike Corporation v. Adams*, 8 *Mass.* 138; 1817, *Franklin Glass Co. v. White*, 14 *Mass.* 286; *Ms. Supreme Ct.* 1835, *Bangor House Proprietary v. Hinckley*, 3 *Fairf.* 385.*

3. Paid corporate stock cannot be assessed, without special authority derived from the charter or statute. *R. I. Supreme Ct.* 1858, *Atlantic De Laine Co. v. Mason*, 5 *R. I.* 463.

4. An illegal assessment upon corporate stock cannot be made upon the ground of a presumption of assent, drawn from assent to former illegal assessments of lesser amount; nor can such assent be given by an assignor of stock after an assignment of the stock and notice of the assignment to the corporation. *Id.*

*The subscriptions sued upon in these cases appear not to have contained any definite engagements to pay specific sums, but to have been only designed to constitute the subscribers a body corporate, leaving the mode of raising their capital to be subsequently provided.

For cases on the right to maintain an action for calls, see subdivision IV, 2, of the above chapter; also, SUBSCRIPTION.

5. Assent of individual stockholder to assessment, not necessary to charge him. See *Smith v. Natchez Steamboat Co.* 1 *How. (Miss.)* 479.

6. Succession. Whether a corporation formed pursuant to articles of association of an unincorporated company, can exercise a power of assessment conferred by those articles upon the unincorporated body to whose property and franchises it succeeds,—see *Hull v. Wellesley*, 6 *Hurlst. & N.* 38; *Wallingford Manuf. Co. v. Fox*, 12 *Vt.* 304; *Goddard v. Pratt*, 16 *Pick.* 412.

7. In whom the power is vested. A provision in a statute or charter, authorizing the corporation, at a legal meeting, called for the purpose, to make assessments upon shares, vests the power in the corporation, as distinguished from the board of directors, and the corporation cannot delegate such power to the directors, in the absence of any special authority to do so. *U. S. Circ. Ct. (Mass.)* 1844, *Exp. Winsor*, 3 *Story C. Ct.* 411.

8. A by-law authorizing the directors to take care of the interests, and manage the concerns, of the corporation, must, upon the principles of fair reasoning, be limited to the ordinary interests, and ordinary concerns, of the corporation, as general agents of the corporation; and not extend to the extraordinary interests, or extraordinary concerns, expressly confided to the discretion of the corporation itself, by the very terms of the charter,—e. g. the power to lay assessments on shareholders. *Id.*

9. Power of trustees of a mining company to levy assessments to defray its proper and legal expenses. *Sullivan v. Triunfo Gold & Silver Mining Co.* 29 *Cal.* 585.

10. That, under the English statutes relative to public companies, the power to make calls is regarded as lodged with the directors, being deemed included in their general authority to manage the concerns of the company,—see *Ambergate &c. Railway Co. v. Mitchell*, 4 *Exch.* 540; 19 *Law. J. Exch.* 89.

11. And it was held no sufficient ground of enjoining the directors from making calls, that the proceedings of the directors had been improper, and such as to amount to an abandonment of the enterprise; as it was possible that there were still legal obligations to answer. *Chanc.* 1851, *Logan v. Courtown*, 5 *Eng. L. & Eq.* 171.

12. Limits of the power. A corporation,

authorized to hold real and personal estate, each to a limited amount, may lawfully make assessments on its members to an amount exceeding the personal estate it was authorized to hold. *Me. Supreme Ct.* 1849, *South Bay Meadow Dam Co. v. Gray*, 30 *Me.* 547.

13. If the charter provides that no assessment beyond \$100 per share shall be laid, any further assessment is void. *Me. Supreme Ct.* 1860, *Lewey's Island Railroad Co. v. Bolton*, 48 *Me.* 451.

14. That when the sum designated in a charter, to be raised by assessment, has been raised, the power to assess is exhausted,—see *State v. Morristown Fire Association*, 3 *Zabr.* 195.

15. Construction of statutory power of a corporation to levy a special tax. *Lott v. Ross & Co.* 38 *Ala. N. S.* 156.

16. A statute authority "to make and collect such assessments on the shares" as may be deemed expedient, in such manner as should be prescribed in their by-laws," does not confer (nor does any statute of the state confer) on the corporation the power to create a personal liability on the stockholder to pay for his shares. *Me. Supreme Ct.* 1850, *Kennebec & Portland R. R. Co. v. Kendall*, 31 *Me.* 470.

17. A by-law, made under such authority, and providing that "if the shares of any delinquent stockholder shall not sell for a sum sufficient to pay his assessments, with interest and charges of sale, he shall be held liable for any such deficiency," will not sustain an action at law for the deficiency. *Id.*

18. The Bank of Darien was incorporated with a capital stock of \$1,000,000, divided into 10,000 shares of \$100 each, 5,000 of which were subscribed for by the State; upon these 65 per cent. or \$325,000, was paid in prior to 1834. In that year, upon petition of the president and directors of the bank, an act was passed, extending its charter, with this proviso: "Nor shall anything be so construed as to authorize the president and directors to call in an additional instalment upon the stock owned by the State." Creditors, subsequent to 1834, claimed that the unpaid \$175,000 was a trust fund, out of which they were entitled to be paid. *Held*, that notwithstanding the unpaid capital stock of incorporated companies is deemed a trust fund for the payment of corporation debts, yet the right to call in the unpaid instalments

upon the State stock was taken away by the act of 1834. *Ga. Supreme Ct.* 1855, *Robinson v. Bank of Darien*, 18 *Ga.* 65.

19. A charter of a railroad corporation authorized the directors to make such equal assessments from time to time on all the shares in the corporation as they might deem expedient and necessary in the execution and progress of the work; provided "that no assessments shall be laid upon any share in said corporation of a greater amount than \$100 in the whole on such share; and if a greater amount of money shall be necessary to complete said road, it shall be raised by creating new shares." *Held*, that the charter limited the amount of all the assessments to \$100 on a share, and that assessments beyond that sum, made by the directors for the payment of the debts of the corporation, were illegal. *N. H. Supreme Ct.* 1859, *Great Falls &c. Railroad v. Copp*, 38 *N. H.* 124.

20. A clause in the charter of a manufacturing corporation, "that the shares in said capital stock shall not be liable to assessment after the capital stock so fixed in amount has been paid in, except in equal proportions, and by the consent of the stockholders owning at least three-fourths of the shares of the capital stock of the corporation," authorizes a further assessment of paid stock, only upon the basis, that the capital stock, fixed in amount by the charter, has been subscribed for and actually paid in. *R. I. Supreme Ct.* 1858, *Atlantic De Lains Co. v. Mason*, 5 *R. I.* 463.

21. Effect of conditions precedent, in charter. Where the act of incorporation contemplates some act to be done,—e. g. organization,—before instalments of stock can be required to be paid, such act must be done before the corporation can maintain an action for the instalments, the subscription being made prior to the time of organization. *Ala. Supreme Ct.* 1842, *Carlisle v. Cahawba and Marion R. R. Co.* 4 *Ala. N. S.* 70.

22. Corporators cannot, by their acts, votes, or declarations, relieve the corporation from its obligation to have the capital required by its charter. Should they vote to waive all objections to the deficiency and proceed to make assessments, it would be illegal and void; and assessments made before the necessary amount is subscribed are not binding, and are not made so by waiver or estoppel. In case after the subscription, but before the number of shares subscribed equals that

required, an amendment to their charter is procured, by which the required number of shares is reduced, a previous subscriber is not liable to pay an assessment on his shares, at least until the sum originally fixed is subscribed. *Ms. Supreme Ct.* 1855, *Oldtown &c. R. R. Co. v. Veazie*, 39 *Ms.* (4 *Heath*), 571.

23. The charter of a railroad corporation contained a provision that the capital stock should consist of not less than a certain number of shares. *Held*, that all assessments, laid by the company before the required number of shares had been subscribed, were invalid, and an action for the amount of such assessments could not be maintained. *Id.*

24. — In subscription paper. A subscription paper for shares in a railroad corporation, which provides that assessments may be laid "when three thousand shares shall have been subscribed," does not authorize the laying of an assessment until the stipulated amount has been unconditionally subscribed, payable in cash. Thus this provision does not include a subscription, by a contractor for building a railroad, of a certain number of shares, "being a portion of" a sum which, by his contract, was to be paid to him in stock at par, or, in case of any stock being issued by the corporation below par, then at the rate of the lowest issue. *Id.*

25. The same principle applies to a subscription to the stock of a railroad company (authorized by the charter to connect at the State line with any railroad that may be constructed from a place in another State, or to take a lease of any such contiguous railroad), made upon condition that no assessment shall be made until that part of the railroad between the end of the line in another State and a certain place in this commonwealth shall be put under contract. *Mass. Supreme Ct.* 1857, *Troy &c. R. R. Co. v. Newton*, 8 *Gray*, 596.

26. By a contract of subscription for stock in a railroad company, it was stipulated that two per cent. should be paid at the time of subscription, and three per cent. in three months from that date, and the remainder when called for and required by the president and directors; and the first two instalments were not to be called for until March 1, 1853. *Held*, that the first two instalments were payable on March 1, 1853, and the latter was payable thereafter, at the discretion of the company, according to the terms of the con-

tract. *Miss. Ct. of Errors*, 1856, *Roberts v. Mobile & Ohio R. R. Co.* 32 *Miss.* 373.

27. Where the defendant subscribed for shares in the Mobile and Ohio Railroad Co. payable, "when needed for the payment of the contractors for the construction of the road, in such instalments as shall be called and required by the president and directors of the company, from time to time, the amount to be expended upon the road in Itawamba county." *Held*, that the president and directors had no right to call for the payment of such instalments, until it became requisite to pay contractors for the construction of the road at the point stated. *Id.*

28. Defendant agreed, by his subscription, to pay \$100 on a share at such times as should be determined on by the directors, not exceeding \$25 at any one time. The directors made a call for \$42 at a particular time. *Held*, that the defendant was not bound to pay it on such call, but not having taken advantage of the irregularity in the answer or trial, he could not avail himself of it on appeal. *N. Y. Ct. of Appeals*, 1856, *Eastern Plank Road Co. v. Vaughan*, 14 *N. Y.* (4 *Kern.*) 546.

29. Necessity of completing the subscription. In a suit to recover an assessment laid for the general objects of a corporation whose charter requires that the stock be divided into a certain number of shares, the corporation must show that all the shares were taken up before the assessment was laid; and if any subscriptions were conditional, it must be shown that the condition was fulfilled or waived. *Mass. Supreme Ct.* 1830, *Central Turnpike Corporation v. Valentine*, 10 *Pick.* 143.

30. The subscription paper signed by the defendant stipulated that the capital should be \$1,500,000. In an action for an assessment,—*Held*, 1. That a subscription for the entire sum was a condition precedent to making any calls.

2. That it was not waived by the defendant's having received his shares and paid one assessment upon them, though after knowledge of a vote to reduce the amount to \$1,350,000. *Mass. Supreme Ct.* 1852, *Atlantic Cotton Mills v. Abbott*, 9 *Cush.* 423.

31. Where the charter provided that the members might divide the capital stock into as many shares as they might think proper; and by a written agreement the subscribers

fixed the capital stock at \$50,000, divided into 500 shares of \$100 each, but only 188 were subscribed. *Held*, that no assessment for the general purposes of the corporation could be made. *N. H. Superior Ct.* 1844, Littleton Manufacturing Co. v. Parker, 14 *N. H.* 543; *N. H. Supreme Ct.* 1855, Contocook Valley R. R. Co. v. Barker, 32 *N. H.* 363.

82. Where, on the organization of a corporation, the number of shares of the capital stock, and the sum to be paid for each, are fixed by vote, and inserted in the agreement of subscription, the subscribers are not bound to proceed, and may refuse to pay any part of their subscriptions, until the requisite number of shares is subscribed for, at the rate fixed by the vote. And, where the price of shares is fixed, a subscription conditioned that the shares shall be paid for in other stock, share for share, of the same nominal value, but of less value in the market, is not a compliance with the agreement. *Mass. Supreme Ct.* 1850, Cabot & West Springfield Bridge v. Chapin, 6 *Cush.* 50.

83. — where the number of shares is prescribed by charter. Where the number of shares into which the capital stock of a corporation is divided is fixed by the charter, and that provides that the directors may make equal assessments upon all the shares, no valid assessment can be made against a subscriber for shares, until all the shares are taken, unless he in some way waives the provisions of the charter. *N. H. Superior Ct.* 1855, *N. H. Central Railroad v. Johnson*, 10 *Post.* 390.

84. Where the charter of a railway company provided that the whole capital stock should be subscribed, before any of the powers and provisions of the charter should be put in force, and the company made a call upon the shares before the subscriptions were completed, and commenced an action after they were so, *Held*, the action could not be maintained; the completion of the subscription being necessary to enable the company to make the call.* *K. B.* 1828, *Norwich &*

Lowestoft Navigation Co. v. Theobald, 1 *Moody & M.* 151.

85. If, by the charter, the stock of the company is divided into a certain number of shares, that number cannot be changed by act of the company. And if the charter either expressly or by implication requires that a certain number of shares be subscribed before any assessment is laid, no valid assessment can be laid until that number be *bona fide* subscribed. *Mass. Supreme Ct.* 1827, *Salem Mill Dam Corporation v. Ropes*, 6 *Pick.* 28.

86. But subscribers for stock, who after the passing of an act of incorporation, sign an agreement to pay all legal assessments that may be made after the corporation shall be organized, are personally liable for an assessment laid to defray *preliminary expenses* incurred in obtaining such act, although the corporation was not authorized, at the time of laying such assessment, to lay assessments for the general objects of the act. *Mass. Supreme Ct.* 1827, *Salem Mill Dam Corporation v. Ropes*, 6 *Pick.* 28; 1830, *Central Turnpike Corporation v. Valentine*, 10 *Pick.* 142.

87. When the number of shares in the stock of a corporation is fixed by its charter, an assessment, made before the whole number of shares is subscribed for, is invalid, although the remainder of the shares be subscribed for on the same day, after the dissolution of the meeting of directors at which the assessment was made. *Mass. Supreme Ct.* 1854, *Stoneham Branch Railroad v. Gould*, 2 *Gray*, 277.

88. — where it is left to be fixed by directors. If the charter of a railroad company does not fix the number of shares of the capital stock, it is to be presumed that the legislature intended that the stockholders or the directors should fix the number. And it is indispensable that the number be so determined before any assessment can be made thereon. *Ma. Supreme Ct.* 1858, *Somerset &c. R. R. Co. v. Cushing*, 45 *Ma.*, 524.

89. In a case where the number of shares is not fixed by charter, if the number of shares fixed by the directors exceeds the number actually subscribed for and taken, the stockholders or directors may change the number; but the assessment must be upon the whole number. If the shares are not all taken, an assessment upon the number that have been taken is void. *Id.*

* In a later case it has been held that a provision in the charter of a railway act, that so soon as 1,500,000*l.* shall have been subscribed, it shall be lawful for the company to put in force all the powers of the act, authorizing the construction of the railway, and of the acts therein recited (the general railway acts), does not require such subscription to be made before making calls, but only before exercising compulsory powers of taking land. *Exch.* 1851, *Waterford, Wexford, & W. Railway Co. v. Dalbiac*, 6 *Eng. Railw. C.* 753; 4 *Eng. L. & Eq. R.* 455; 20 *Lane J. Exch.* 237.

40. Where the charter of a railroad corporation provides that the capital stock shall consist of not more than a certain number of shares, "the number of which shall be determined from time to time by the directors thereof," the directors have no power to levy assessments upon subscribers for stock, before determining the whole number of shares. *Mass. Supreme Ct.* 1851, Worcester & Nashua Railroad v. Hinds, 8 *Cush.* 110; 1857, Troy & R. R. Co. v. Newton, 8 *Gray*, 596.

41. Where the charter of the company requires that the capital stock be not less than 500 nor more than 10,000 shares, of \$100 each, and authorizes the directors to assess upon 500 shares, as soon as subscribed, and from time to time to enlarge the capital to the maximum amount named in the charter, all the shares to be equally assessed, it is not necessary for the company to define their capital, within the prescribed limits, before making calls. *N. H. Supreme Ct.* 1856, White Mountains R. R. Co. v. Eastman, 34 *N. H.* 124.

42. Nor is it necessary, in order to entitle the corporation to recover the assessments so made, that notice should have been given to the governor, of the assessments, according to the provisions of the third clause of section 2 of the N. H. act of 1846, relating to corporations. *Id.*

43. The charter of a railroad corporation provided that the capital stock should be not less than 4,000 shares, but the precise number was not fixed in any mode by the company. By a contract of subscription a party agreed to take and pay the assessments on certain shares upon certain conditions, none of which required the least number of shares made necessary by the charter, to be taken. And one condition was that no share should be assessed more than a certain amount. *Held*, that such subscriber was liable under a provision in the charter, if his shares sold for less than the unpaid assessment thereon, although the minimum number of shares fixed by the charter had not been subscribed for. *Mass. Supreme Ct.* 1855, York & Cumberland Railroad Co. v. Pratt, 40 *Mass.* 447.

44. Where the directors were authorized to limit the number of shares, but could not proceed with the road until 250 shares were subscribed, and after that number were taken, they resolved to close the books,—*Held*, that this vote was equivalent to a vote fixing the

number of shares, and that the company might therefore proceed to make and enforce calls, under the statute, and to collect the deficiency remaining, after the sale of forfeited stock. *Mass. Supreme Ct.* 1847, Lexington & West Cambridge R. R. Co. v. Chandler, 13 *Metc.* 311.

45. — how proved. The records of a corporation are competent and sufficient evidence to show who were the incorporators and the number of shares that had been taken at the time of an assessment, unless some proof be introduced to destroy their effect. *Mass. Supreme Ct.* 1855, Penobscot Railroad Co. v. Dummer, 40 *Mass.* 172; 1856, Penobscot R. R. Co. v. White, 41 *Mass.* 512.

46. The books of the corporation are the usual and proper evidence of its dealings;—*e. g.* of the number of its shares that have been subscribed for;—but are not indispensably necessary, for if they cannot be referred to, other evidence may be adduced. *Mass. Supreme Ct.* 1830, Central Turnpike Corporation v. Valentine, 10 *Pick.* 142.

See RECORDS.

47. Subsequent completion not enough. That, if calls are made before the requisite stock is subscribed, no recovery can be had, although the subscription is completed before action brought—see Norwich & Lowestoffe Navigation Co. v. Theobald, 1 *Moody & M.* 151; Stratford & M. Railway Co. v. Stratton, 2 *Barn. & Ad.* 518.

48. Receivers. Receivers appointed for an insolvent corporation, under an order of a court of chancery, with authority to collect unpaid instalments from stockholders, possess the powers which are given by the charter of the corporation to the directors in such cases, both as to the time of payment and the amounts to be called in. *Md. Ct. of Appeals*, 1847, Hall v. United States Ins. Co. 5 *Gill*, 484.

As to the powers and duties of Receivers of insolvent companies, in respect to making calls upon stock, see RECEIVER; also the titles of the various kinds of corporations.

49. Assignees. An assignee of the company, for the benefit of their creditors, has no power to make assessments. *N. Y. Supreme Ct.* 1855, Hurlbut v. Carter, 21 *Barb.* 221. To the same effect, 1855, Hurlbut v. Root, 12 *How. Pr.* 511; to the contrary, 1853, Hill v. Reed, 16 *Barb.* 280. Compare *N. Y. Laws of* 1854, 502, ch. 224.

As to the power and the proper way to

make Assessments upon premium notes given to mutual insurance companies, see INSURANCE COMPANIES; RECEIVERS.

II. WHO IS LIABLE FOR ASSESSMENTS.

50. **Liability of an original subscriber.** As to what constitutes a person a shareholder in an English railway company so as to render him liable for calls,—see *Wolverhampton &c. Co. v. Hawkeford*, 6 *Com. B. N. S.* 336.

51. That a shareholder in an English public company, who has signed the deed which is registered to procure incorporation, cannot avail himself, as a defence to an action for calls, of any omission from the deed, of certain provisions required, by the general statute authorizing incorporation, to be inserted therein,—see *Banwen Iron Co. v. Barnett*, 14 *Jur.* 112; 19 *L. J. N. S. C. P.* 17.

52. But one who had taken shares in a projected railway company, but without executing the deed of settlement, or any deed referring to it, was held not liable to contribute to the expense incurred, in attempting to put the company in operation; especially as his acceptance of the shares was conditioned upon the full amount of the capital of the company being subscribed, which was never done. *Each.* 1852, *Galvanized Iron Co. v. Westoby*, 14 *Eng. L. & Eq.* 386; 21 *Law J. N. S.* 302; 16 *Jur.* 892; 8 *Each.* 17.

53. Erasure of name of a prior subscriber from the subscription, not enough to discharge a subsequent subscriber. See *Agriculturist Cattle Ins. Co. v. Fitzgerald*, 15 *Jur.* 489; 20 *Law J. N. S. Q. B.* 244.

54. It is not a sufficient reason for refusing to pay an assessment, that the corporation was not organized until after the defendant had subscribed for his shares. *Conn. Supreme Ct.* 1853, *Danbury & Norwalk R. R. Co. v. Wilson*, 23 *Conn.* 435.

55. If all the shares are taken up by solvent subscribers in good faith, although some of them, whether before or after the corporate powers are exercised, become unexpectedly insolvent, the corporation may nevertheless lay assessments, and the subscribers may be compelled to pay them. *Mass. Supreme Ct.* 1839, *Salem Mill-Dam Corporation v. Ropes*, 9 *Pick.* 187.

56. "Register of shareholders" of English railway companies,—Held admissible to charge persons named therein for calls, not-

withstanding defects in the way it was kept. See *Bain v. Whitehaven &c. Junction Railway Co.* 8 *Ho. of L. Cas.* 1; *London &c. Railway Co. v. McMichael*, 5 *Each.* 855; *London Grand Junction Railway Co. v. Graham*, 2 *Eng. Railw. Cas.* 870. But compare *Birkenhead &c. Railway Co. v. Brownrigg*, 6 *Eng. Railw. Cas.* 47; 4 *Each.* 426; 19 *Law J. N. S. Each.* 27.

57. Register book of subscriptions may be evidence to charge a subscriber in an action for calls, notwithstanding it does not state the amounts of subscriptions paid on the respective shares. See *Birmingham &c. Railway Co. v. Locke*, 1 *Ad. & E. N. S.* 256; 2 *Eng. Railw. Cas.* 867; 1 *Q. B.* 256.

58. **Effects of steps to forfeit stock, as a discharge.** One who had subscribed for stock held liable in an action for calls, notwithstanding initiatory steps had been taken, to forfeit his stock for the default, and his vote, offered at a corporate meeting had been rejected because his calls were unpaid. See *Birmingham &c. Railway Co. v. Locke*, 1 *Ad. & E. N. S.* 256; 2 *Eng. Railw. Cas.* 867; 1 *Q. B.* 256; *Aylesbury Railway Co. v. Mount*, 5 *Scott N. R.* 147 n; 13 *Law J. N. S. Each.* 474.

59. Where shares are allotted to one upon the express condition that they shall be forfeited, if a certain deposit is not paid in a certain time, and nothing more is done by the allottee, he is not liable for calls, although the company have entered his name upon the register of shares, as a shareholder. *Each.* 1852, *Waterford &c. R. R. v. Piddock*, 18 *Eng. L. & Eq.* 517.

60. That, in a suit by a corporation against one of its members to recover instalments due on stock, the defendant cannot plead that, by reason of his default respecting another instalment, he had forfeited to the corporation all the shares subscribed by him, and that the amount thus forfeited was equal to the amount claimed in this suit,—see *Herkimer &c. Co. v. Small*, 2 *Hill*, 127.

61. **Effect of transfer of shares, as a discharge.** That when the charter authorizes the subscribers to assign their shares, an original subscriber is not liable for any call made after assigning his share,—see *Huddersfield Canal Co. v. Buckley*, 7 *Durnf. & E.* 36. And see *Wilson v. Birkenhead &c. Railway Co.* 20 *Law J. Each.* 306.

62. That where the company accept a con-

veyance of shares to themselves, it will exonerate the owner from calls,—see *Plate Glass Insurance Co. v. Sunley*, 29 *Law Times*, 277.

63. The charter of a company provided that the stock might be “transferred on the books of the company,” and the company were authorized “to regulate the transfer of stock,” by by-laws. And a provision in the charter authorized the company, in certain cases, to make assessments of stockholders beyond their shares of stock.

Held, 1, that no such assessment could be made on a party, after he had ceased to be a member, by a transfer of his stock.

2. The power “to regulate the transfer” did not include the power to restrain transfers, or to prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them; and that the company could not prevent a party from selling his stock, even to an insolvent person.

3. That an assignment “upon the books of the company” was sufficient to effect a change of ownership, without taking out a new certificate in the name of the assignee; and that any transfer in writing was valid against the company, if, being notified, they refused to allow it to be made according to their by-laws. *Mo. Supreme Ct.* 1855, *Chouteau Spring Co. v. Harris*, 20 *Mo.* 382.

64. What will operate as a transfer. A plea to an action to recover calls on stock subscribed, that another person had agreed to take the stock, and that the commissioners had counted this stock to such other person, is insufficient. The signature of the first subscriber should have been erased, and that of the other substituted, or something done to hold the latter liable. A subscriber for stock cannot subrogate another person to his obligation, without a substitution of his name upon the books of the company, or some other equivalent act recognized by the charter and by-laws of the company. *Ill. Supreme Ct.* 1851, *Ryder v. Alton & Sangamon R. R. Co.* 18 *Ill.* 516.

65. Transfer on the company's books necessary. That a shareholder is presumed to continue in that character till a transfer of his shares is duly registered. *Corden v. Universal Gas-Light Co.* 6 *Dowl. & L.* 879; *Midland Great Western Railway Co. v. Gordon*, 5 *Eng. Railw. Cas.* 76; 16 *Mees. & W.* 804; *Sayles v. Blane*, 6 *Eng. Railw. Cas.* 79; 14 *Jur.* 87; 19 *Law J. Q. B.* 19.

66. An action for a call upon shares in an English Railway Company—*Held* not to lie against a party who had transferred his shares after the call had been made, and before it was payable, and after the company had entered a memorial of the transfer. *Aylesbury Railway Co. v. Mount*, 2 *Dowl. N. S.* 143; 5 *Scott N. R.* 127.

67. An allottee of scrip in an English railway company, who has subscribed the subscribers' agreement, and sold his scrip in the market before the act of Parliament is obtained, although his name has been entered on the register of shareholders without his consent, continues liable for calls until the name of the purchaser is inserted in the register of shareholders. Since the 8 & 9 *Vict. c.* 16, the sale of scrip certificates of shares in a railway company does not constitute the vendee a shareholder in the company, and only conveys an equitable title to have the shares assigned to him, and his name entered on the register as such shareholder. *Exch.* 1847, *Midland Great Western Railway Co. v. Gordon*, 11 *Jur.* 440; 16 *Law J. Exch.* 165.

68. Where the by-laws provided that transfers of stock should be made by assignment in the treasurer's book, either in person or by attorney,—*Held*, that to render a transfer valid, so as to make the assignee liable in an action for assessments brought against him as a stockholder, there must be a written assignment on the book, subscribed by the assignor or his attorney. An entry of credit to the assignee, on the book, for the amount of the stock, was insufficient. *Conn. Supreme Ct.* 1818, *Marlborough Manufacturing Co. v. Smith*, 2 *Conn.* 579.

69. Liability of transferees. A stockholder in a corporation cannot avoid liability for assessments made upon his shares of stock, either upon the ground that he was not an original subscriber, but is an owner by purchase, or on the ground that he has made no express agreement to hold himself individually liable. Subscribing means nothing more than becoming a stockholder, and the obligation to pay springs solely from that relationship. *Mich. Supreme Ct.* 1866, *Merrimac Mining Co. v. Bagley*, 14 *Mich.* 501.

70. There is no principle of law which can establish any difference among stockholders, in the duties which are implied from that relation. The very essence of a corporation consists in its corporate succes-

sion, which, in stock companies, is kept up by the substitution of one owner for another in the proprietorship of shares. If the original stockholders stand under different relation to the company from their assigns, the corporation itself loses some of its attributes by the substitution, or else becomes introduced into more complicated relations. Every liability, therefore, which attaches to a stockholder as such, is inseparable from the ownership of the stock. *Id.*

71. Where the proprietor of shares transferred them upon the books of the company, after calls were made, but before they fell due, —*Held*, that the transferee was liable for such calls, although he had never received certificates, or given notice to the transferrer of the acceptance of the transfer. And it was held to make no difference, that the transfer was from an original subscriber, without consideration, and that the holder is nevertheless liable for unpaid calls. *Pa. Supreme Ct.* 1837, *West Philadelphia Canal Co. v. Innes*, 3 *Whart.* 198; *Conn. Supreme Ct.* 1838, *Hartford & New Haven R. R. Co. v. Boorman*, 12 *Conn.* 530; *C. P.* 1842, *Aylesbury R. v. Mount* 2 *Dowl. N. S.* 143; 5 *Scott N. R.* 127.

72. A transferee of shares in the stock of an incorporated company, subject to the payment of future calls, is not personally liable for such unpaid instalments, in the absence of any provision in the act of incorporation to this effect. *Pa. Supreme Ct.* 1859, *Palmer v. Ridge Mining Co.* 34 *Pa. St.* 288.

73. That one to whom, or for whose benefit, shares of stock in an English railway company are made over, as security, without their being transferred into his name on the books of the company, is not liable to an action for arrears of calls upon such shares,—see *Newry &c. Railway Co. v. Moss*, 14 *Beav.* 64; 15 *Jur.* 487; 20 *Law J. Ch.* 633.

74. That the defendant in an action for calls may, under a traverse of his being a shareholder, prove that he was not such *de jure* as well as *de facto*,—see *Shropshire Union Railways & Canal Company v. Anderson*, 6 *Eng. Railw. Cas.* 56; 6 *Dowl. & L.* 482; 3 *Exch.* 401; 18 *Jur.* 175; 18 *Law J.* 232.

As to how far Transferees of stock succeed to the engagement of the original subscriber, see *Stock*.

75. Liability of representative of deceased shareholder. Under a statute declaring that

on the death of a shareholder his representative shall not be entitled to take profits or to vote upon the shares until he has registered his name as a proprietor, the executors of a deceased proprietor are liable, as executors, for calls, notwithstanding they have not registered their names. The representative becomes entitled to the shares, and liable as owner, before registry; but until registry, he is not entitled to take profits or to vote. *Chancery*, 1842, *Fyler v. Fyler*, 2 *Eng. Railw. Cas.* 878; 3 *Beav.* 550; 12 *Law J. N. S. Ch.* 23; 7 *Jur.* 185. And see *Jacques v. Chambers*, 4 *Eng. Railw. Cas.* 499; *Shaw v. Fisher*, 5 *Eng. Railw. Cas.* 461.

76. Liability of infant. As to liability of an infant for calls,—see *Leeds & Thirsk Railway Co. v. Fearnley*, 7 *Dowl. & L.* 68; 18 *L. J. Exch.* 330; *Newry & Enniskillen Railway Co. v. Combe*, 8 *Railw. Cas.* 633; 3 *Exch.* 565; 18 *L. J. Exch.* 325; *North Western Railway Co. v. McMichael*, 5 *Exch.* 114; *Birkenhead &c. Railway Co. v. Pilcher*, 5 *Exch.* 121; 14 *Jur.* 297; 15 *Jur.* 132; 19 *Law J. Exch.* 207; 20 *Law J. Exch.* 97; 6 *Railw. Cas.* 622; *Cork & Bandon Railway Co. v. Cazenove*, 10 *Q. B.* 985.

77. — of bankrupt. That the bankruptcy of a shareholder dissolves his connection with the company, and he cannot be made contributory to any call made subsequent to the flat,—see *Exp. Greenshields*, 11 *Eng. L. & Eq.* 240; *Wylam Steam Fuel Co. v. Street*, 30 *Eng. L. & Eq.* 569.

78. Subscriber when estopped. When a defendant is sued as a stockholder in a railroad corporation for the sum remaining due on an assessment upon his shares, after they have been sold for non-payment of the assessment, it is competent and sufficient, for the purpose of showing him to be such stockholder, and liable for the assessment, to give evidence that he signed a subscription-paper for shares, before the corporation was organized, that he attended the meeting of the stockholders for the organization of the corporation, and that he wrote and distributed votes, and himself voted for directors. *Mass. Supreme Ct.* 1847, *Lexington & West Cambridge R. R. Co. v. Chandler*, 18 *Metc.* 311.

79. In an action to recover unpaid assessments upon shares of the stock of a railroad company, an agreement between the defendant and a third person, by which the latter agreed to subscribe for stock in said company,

and the former guaranteed to him dividends, equal to six per cent. per annum, on the stock subscribed for by him, in pursuance thereof, was *Held*, to be admissible in evidence, for the purpose of showing that the defendant procured others to subscribe to the stock of said company, and the inducements which he held out for that purpose. *Conn. Supreme Ct.* 1853, *Danbury & Norwalk R. R. Co. v. Wilson*, 22 *Conn.* 435.

80. Payment of instalments on a subscription to its stock, is a sufficient recognition of the legal existence and organization of a corporation by the subscriber so paying, to enable it to recover the remaining instalments from him. *Md. Ct. of Appeals*, 1860, *Maltby v. Northwestern &c. R. R. Co.* 16 *Md.* 422.

81. A subscriber who has paid an illegal assessment is not thereby estopped from setting up illegality as a defence to a suit for a second. *Me. Supreme Ct.* 1858, *Somerset &c. R. R. Co. v. Cushing*, 45 *Me.* 524.

82. Where a commissioner appointed to receive subscriptions for railroad stock, subscribed for shares in his own name and then united with other commissioners in making a return to the governor, which stated that the subscriptions were in all respects made and taken in good faith and agreeably to the provisions and requirements of the laws of the State, and that he had subscribed for twenty shares, and on the strength of this return the charter was granted,—*Held* that, in an action for assessments upon the subscription, he was estopped from showing that it was made upon a condition which had not been complied with. *Pa. Supreme Ct.* 1859, *Bavington v. Pittsburg &c. R. R. Co.* 34 *Penn. St.* 358.

83. A subscriber for shares in a corporation may, by his acts, be estopped from denying the legality of assessments upon his shares, on the ground that all the shares are not taken up. *N. H. Superior Ct.* 1855, *N. H. Central R. R. Co. v. Johnson*, 10 *Post.* 390.

84. In an action for calls, it was found, upon a special verdict, that, before the calls were made, the defendant was registered as a shareholder, and that he knew he was registered, and that he adopted the registry, and acted as a shareholder;—*Held*, that, upon such finding, the defendant was presumptively liable for calls. *Q. B.* 1850, *West Cornwall Railway Co. v. Mowatt*, 15 *Jur.* 101; 15 *Q. B.* 521.

85. And where one has paid calls on shares, or attended meetings of the company, as the proprietor of shares, he is estopped to deny membership. *Q. B.* 1841, *London Grand Junction Railway Co. v. Graham*, 2 *Eng. Railw. Cas.* 870; 1 *Q. B.* 271; *Each.* 1829, *Cromford & Highpeak Railway Co. v. Lacey*, 3 *Younge & J.* 80.

86. Defendant in actions for calls,—*Held* to have been made liable as a proprietor by his own acts, notwithstanding the provisions of the statute, necessary to make him a proprietor, had not been complied with. See *Cheltenham &c. Railway Co. v. Daniel*, 2 *Ad. & E. N. S.* 281; 2 *Eng. Railw. Cas.* 728; *West Cornwall Railway Co. v. Mowatt*, 19 *Law J.* 478. See also *ESTOPPEL*; *MEMBERS*; *STOCK-HOLDERS*; *STOCK*.

87. Director, when estopped. That a stockholder, also a director, is not estopped from disputing, as a stockholder, his liability for a call, by the fact that as a director he voted for imposing it; nor by the fact that he has made a part payment upon it,—see *Stratford & Moreton Railway Co. v. Stratton*, 2 *Barn. & Ad.* 519.

88. Transferee, when estopped. A buyer of shares who has made false representations to the company, to induce them to enter his name upon the register of shares, is estopped to deny the validity of the transfer so obtained, in an action against him for calls. *Each.* 1841, *Sheffield &c. Railway Co. v. Woodcock*, 2 *Eng. Railw. Cas.* 522; 7 *Mees. & W.* 574; *London Grand Junction Railway Co. v. Freeman*, 2 *Eng. Railw. Cas.* 468.

89. Where the party represented himself to the company as the owner of shares, and sent in scrip certificates, which had been purchased by him, claiming to be registered as a proprietor, in respect thereof, and had received from the company receipts therefor, with a notice that they would be exchanged for sealed certificates on demand, he was held estopped to deny his liability for calls, although his name had not been entered upon the register of shareholders, or any memorial of transfer entered, as required by the act. *Q. B.* 1841, *Cheltenham &c. Railway Co. v. Daniel*, 2 *Eng. Railw. Cas.* 728; 2 *Ad. & E. N. S.* 281; *Cheltenham &c. Railway Co. v. De Medina*, 2 *Eng. Railw. Cas.* 735.

For some grounds of Defence to an action for assessments, see *infra*, 147–152.

III. HOW ASSESSMENTS SHOULD BE LAID.

90. Requisites of meeting of stockholders. In a suit against a stockholder for an assessment, the circumstances under which he attended the meeting at which the assessment was made are immaterial, as regards the legality of the organization, and the right to make assessments. *Me. Supreme Ct.* 1856, *Penobscot R. R. Co. v. White*, 41 *Me.* 512.

91. — of directors. Where the charter of an incorporated plank-road company authorized the stockholders to make calls for payment on subscriptions for stock, and to appoint a board of directors, consisting of stockholders, "to manage the business of the corporation,"—*Held*, that the stockholders might, by resolution, after the organization of the company, delegate to the board of directors the power to call in stock. *Ala. Supreme Ct.* 1857, *Rives v. Plank-road Co.* 80 *Ala. N. S.* 92.

92. In an action to recover an assessment on subscriptions to the capital stock of a railroad company, the defendant may prove that the order for such assessment was made by less than a majority of the directors and is therefore void; and subsequent action by the whole board under this order will not amount to a ratification. *Ind. Supreme Ct.* 1859, *Price v. Grand Rapids &c. R. R. Co.* 18 *Ind.* 58; *Cowley v. Same*, 18 *Ind.* 61; *Hamilton v. Same*, 18 *Ind.* 347. And see *Swansea Dock Co. v. Levien*, 7 *Eng. L. & Eq.* 535.

93. Averment. In a suit against a stockholder for assessments, which, under the charter, could only be made by the board of directors, the averments that "the corporation was organized," and that "the board of directors of said corporation made assessments," &c. are sufficient averments of the existence of the board of directors. *Ark. Supreme Ct.* 1859, *Mississippi &c. R. R. Co. v. Gaster*, 20 *Ark.* 455.

94. In a suit on a contract made with a corporation to pay in such portions and at such times as the directors of the corporation, agreeably to their act of incorporation and by-laws, require, it is not sufficient to aver that the directors required and ordered that the defendant pay an assessment of, &c. Conformity to the charter and by-laws should be alleged. *N. H. Supreme Ct.* 1859, *Atlantic Mut. Fire Ins. Co. v. Young*, 88 *N. H.* 451.

95. Presumption. The charter of a turnpike company provided, that a general meeting of the company should be holden annually, and that the meetings, after the first, should be holden at such time and place as the company should prescribe; that the affairs of the company should be governed by a board of directors chosen by the stockholders in general meeting; and that the officers chosen by the company should hold their offices until others should be appointed in their stead. It appeared that, at the first meeting, seven directors were duly appointed, and that a by-law was passed, authorizing the directors to order the payment of instalments, but that the time and manner of holding future meetings were not prescribed; that two instalments were laid by directors chosen at subsequent meetings, four of whom were chosen at the first meeting; and that the defendant expressly promised to pay those instalments more than thirty days after the last was laid. In an action against the defendant for these instalments,—*Held*, that, as the votes laying these instalments purported to be passed by the directors of the company, the presumption of law was, in the absence of evidence to the contrary, that they were passed by legal directors, and that the instalments were legally imposed. *Conn. Supreme Ct.* 1839, *Turnpike Co. v. Thorp*, 13 *Conn.* 173.

As to the general requisites of Meetings, see MEETINGS.

96. What notice of object of meeting is necessary. An assessment upon paid stock, when authorized by charter, can be made at a special meeting, only when notice is duly given to the stockholders of the purpose of the meeting; nor does a clause in the charter declaring, that "all or any business of the corporation may be transacted, or acted on," at such a meeting, nor a by-law, passed in pursuance of the charter, prescribing how notice of special meetings shall be served upon the stockholders, dispense with the necessity of specifying in such case the purpose, in the notice of the meeting. *R. I. Supreme Ct.* 1858, *Atlantic De Laine Co. v. Mason*, 5 *R. I.* 463.

97. As to what notice is necessary to be given of the object of a meeting held for the purpose of laying an assessment,—see *Wills v. Murray*, 19 *Law J. Ech.* 209; *Swansea Dock Co. v. Levien*, 20 *Law J. Ech.* 447; *Sheffield &c. Railway Co. v. Woodcock*, 7

Moss. & W. 574; 2 *Eng. Railw. Cas.* 522; Turnpike Co. v. Meriwether, 5 *B. Monr.* 18.

98. What constitutes an "assessment." By the term "assessment" is meant a rating by the board of directors, by instalments, of which notice is to be given. *Ill. Supreme Ct.* 1859, Spangler v. Indiana &c. R. R. Co. 21 *Ill.* 276.

99. — or a "call."* That a resolution of the board of directors of a railway company that a call be made, is the call,—see *Exp. Tooke*; in *re Londonderry & Coleraine Railway Co.* 6 *Eng. Railw. Cas.* 1.

100. That a circular letter sent to every shareholder in a railway company, informing him that the directors have resolved on making a call, constitutes the call,—see *Shaw v. Rowley*, 16 *Moss. & W.* 810; 5 *Eng. Railw. Cas.* 47; *Newry & Enniskillen Railway Co. v. Edmunds*, 5 *Eng. Railw. Cas.* 275.

101. That a call may mean either the resolution or its notification, or the time when it is payable,—see *Ambergate &c. Railway Co. v. Mitchell*, 6 *Eng. Railw. Cas.* 235; 4 *Exch.* 540.

102. What amount may be called for. Where one condition of the defendant's subscription to the stock of a railroad corporation was, that "assessments shall not exceed five dollars on each share at one time," and two or more assessments are laid at one time, but payment of no more than five dollars on each share required at one time, the condition is not violated, and the assessments

are binding. *Me. Supreme Ct.* 1855, Penobscot & Kennebec R. R. Co. v. Dunn, 39 *Me.* 587; *Penobscot R. R. Co. v. Dummer*, 40 *Me.* 172.

103. In order to recover subscriptions to stock in a railway company, which is to be called for in proportions, it must appear that the instalments were called for periodically; and not that the assessments therefor were all made at one time, without notice of previous assessments. *Ill. Supreme Ct.* 1859, Spangler v. Indiana &c. R. R. Co. 21 *Ill.* 276.

104. Instalments. If the directors have a general power to make calls, a call is not invalid because it is imposed for a gross sum payable in several instalments. It is not necessary that each instalment should be the subject of a separate call. *Exch. Ch.* 1851, *Ambergate R. R. Co. v. Norcliffe*, 4 *Eng. L. & Eq.* 461; 20 *Law J. N. S. Exch.* 234; *Exch.* 1851, *Birkenhead &c. R. R. Co. v. Webster*, 6 *Railw. Cas.* 498; 4 *Eng. L. & Eq.* 461.*

105. Form of the resolution. Where the charter of a mutual insurance company provides that all assessments shall be determined by the directors, and lays down the rules by which the amount to be raised, and the manner in which it is to be apportioned, are fixed, all that is necessary is, that the directors determine by vote that an assessment be made; and such vote is a sufficient requirement of a payment to be made. *N. H. Supreme Ct.* 1858, *Atlantic Fire Ins. Co. v. Sanders*, 36 *N. H.* 252.

106. Calls made by a treasurer under general authority given by the board of directors are valid, although the resolutions do not specify the amount of each call. *Pa. Supreme Ct.* 1860, *Hays v. Pittsburgh &c. R. R. Co.* 38 *Pa. St.* 81.

107. Where a corporation was limited to fifteen per cent. calls per annum, and ten per cent. had already been called, it was held immaterial that the last call did not specify the amount, time, or place of payment, the accompanying notice pointing out the time and place. *Ind. Supreme Ct.* 1860, *Andrews v. Ohio &c. R. R. Co.* 14 *Ind.* 169.

108. That the resolution of the directors to make a call need not specify either the

* The English statute of 1845, called "The Companies Clauses Consolidation Act," requires all calls to be paid before any valid transfer can be made. Under this statute, and similar provisions in special charters, it has often been made a question, when a call may be said to be made. It seems to be considered that the word "call," in this connection, may refer to the resolution of the directors by which a certain sum is required to be paid to the company, by shareholders, or secondly, to the notice to the shareholders of the assessment, and the time and place at which they will be required to make payment, and the amount to be paid. But it seems finally to be settled, that the company are not obliged to regard any transfer, made after the resolution of the directors making the assessment; which need not specify the time of payment, but that may be determined by a subsequent act of the board. 1 *Redf. on Railw.* 146. See *Exp. Tooke*; in *re Londonderry & Coleraine Railway Co.* 6 *Eng. Railw. Cas.* 1; *North American Colonial Association of Ireland v. Bentley*, 19 *Law J.* 427; 15 *Jur.* 187; *Great North of England Railway Co. v. Biddulph*, 2 *Eng. Railw. Cas.* 401; 7 *Moss. & W.* 243; *Newry & Enniskillen Railway Co. v. Edmunds*, 5 *Railw. Cas.* 275; 3 *Exch.* 118, 122; *Ambergate &c. Railway Co. v. Mitchell*, 6 *Eng. Railw. Cas.* 235; 4 *Exch.* 540; *Regina v. Londonderry & Coleraine Railway Co.* 13 *Q. B.* 998; *Shaw v. Rowley*, 11 *Jur.* 911; 16 *Law J. Ex. A.* 180; *Skinner v. Lambert*, 4 *Mann. & G.* 477.

* Earlier cases to the contrary, overruled by those in the text, are *Ambergate &c. Railway Co. v. Coulthard*, 6 *Eng. Railw. Cas.* 218; 5 *Exch.* 459; 14 *Jur.* 625; 19 *Law J. Exch.* 311; *Stratford &c. Railway Co. v. Stratton*, 2 *Barn. & Ad.* 519.

time or place of payment, though the directors must appoint a time and place, which must be notified to the shareholders by a notice allowing them twenty-one days for making payment,—see *Newry & Enniskillen Railway Co. v. Edmunds*, 5 *Eng. Railw. Cas.* 275.

109. A vote of the directors requiring instalments to be paid at the times therein designated, but which did not, in terms, make them payable to the treasurer of such corporation; construed to mean that such instalments were payable to the treasurer, he being the proper officer to receive and keep the moneys of the corporation. *Conn. Supreme Ct.* 1853, *Danbury & Norwalk R. R. Co. v. Wilson*, 22 *Conn.* 435.

110. By a charter of a bridge corporation, subscribers to stock were required "to pay assessments to the treasurer of the trustees, at such times and in such proportions as the trustees shall direct; and in default of payment, it shall be lawful for the trustees to sue for or recover the same, in the name of their treasurer, by action of debt or on the case," &c. The order of the trustees directed the money to be paid into a certain bank to be placed to the account of P. M. as treasurer: *Held*, that the treasurer was sufficiently designated in the order, and that the form of action might be either in debt or on the case. *Q. B.* 1843, *Miles v. Bough*, 3 *Gale & S.* 119; 7 *Jur.* 81; 12 *Law J. N. S.* 74; 3 *Ad. & E. N. S.* 845.

111. What demand is necessary. No other demand for payment of an assessment is necessary than that prescribed by the by-laws of the corporation. *Me. Supreme Ct.* 1855, *Penobscot R. R. Co. v. Dummer*, 40 *Me.* 172.

112. Verbal notice, sufficient. If the charter of the corporation does not require a written notice of calls for stock, a verbal notice by the secretary, given by order of the president, in pursuance of a resolution of the board of directors, is sufficient. *Ala. Supreme Ct.* 1857, *Smith v. Plank Road Co.* 30 *Ala. N. S.* 650.

113. Notice in newspapers. Notice to stockholders in a corporation to pay instalments of stock may be given by publication in the newspapers where the corporation usually transacts its business. A similar notice may be given by receivers of an insolvent corporation, appointed by the court. *Md.*

Ct. of Appeals, 1847, *Hall v. United States Ins. Co.* 5 *Gill*, 484.

114. How far provisions of charter are directory. Where the charter prescribes that "payment of the shares of the capital stock shall be made in such sums, and at such periods as shall be fixed by the board of directors; provided, that sixty days' notice be given of each call, published in at least two newspapers in South Arkansas, and one in the city of Little Rock;" the giving sixty days' notice is a condition precedent to the right of action by the company, but the provisions as to the mode of giving notice are directory; and personal notice is sufficient. *Ark. Supreme Ct.* 1859, *Mississippi &c. R. R. Co. v. Gaster*, 20 *Ark.* 455. But compare *Tomlin v. Tonica &c. R. R. Co.* 23 *Ill.* 429.

115. Where the declaration in such case set forth the days on which the assessments sued for were made, alleging that the defendant then had notice, and was requested to make payment—*Held*, on demurrer, that the court would look to the time of filing the declaration to ascertain whether the sixty days had expired. *Id.*

116. A by-law of a railroad corporation provided, that in case of a sale of shares for non-payment of assessments, "the treasurer should give notice to the delinquent owner, when his residence was known, of the time and place of sale, by letter seasonably put into the mail." *Held*, that this by-law was directory to the treasurer, and not a condition precedent; and that a written notice of the time and place of sale, signed by the treasurer, and delivered to the owner of the shares, or left at his dwelling-house, and received by him as soon as he was entitled to receive it by mail, was sufficient. *Mass. Supreme Ct.* 1847, *Lexington &c. R. R. Co. v. Chandler*, 18 *Mass.* 311.

117. Giving personal notice of an assessment laid by a mutual fire insurance company is a sufficient publication, within the meaning of a provision in their charter, requiring an assessment to be paid "within thirty days after notice of said assessment shall have been published." *Mass. Supreme Ct.* 1856, *Jones v. Sisson*, 6 *Gray*, 288.

118. A railroad charter authorizing the sale of the stock of delinquent subscribers, required notice of the assessment to be given thirty days before the order of the directors for the sale of the shares; that the sale should

be by public auction, at the post-office in C.; and that the treasurer should give to the subscriber a notice in hand, signed by the treasurer, or by a director in his behalf.

Held, 1. That a notice of the assessment thirty days before the sale was insufficient.

2. That a sale otherwise than by public auction at the post-office in C. was invalid.

3. That a notice to the subscriber in hand, not signed by the treasurer or a director, was insufficient. *Me. Supreme Ct.* 1860, *Lewey's Island R. R. Co. v. Bolton*, 48 *Me.* 451.

119. — or may be waived. The design of the provision of the general railroad act of Connecticut, "That the president and directors of railroad corporations may direct the assessments on the shares to be paid to the treasurer, in such manner and with such notice as may be prescribed by the by-laws of said corporation," is not to make the mode of notice, therein mentioned, exclusive of all others. And, therefore, where a corporation never passed any by-law, prescribing the mode of such notice, and, at the meeting of the directors, of whom the defendant was one, and at which he was present, and acted, laid an assessment, and directed the treasurer to give notice to the stockholders, by advertising in a newspaper published in the town where the defendant resided,—*Held*, that the defendant had waived the right to claim that a by-law should be passed, prescribing the mode of notice. *Conn. Supreme Ct.* 1858, *Danbury & Norwalk R. R. Co. v. Wilson*, 22 *Conn.* 435.

120. Proof of notice, when necessary. In an action of assumpsit for subscription instalments, proof of actual notice of the call to the defendant, or demand upon him, is unnecessary, as knowledge is presumed. *Ill. Supreme Ct.* 1856, *Peake v. Wabash R. R. Co.* 18 *Ill.* 88.

121. Subscribers to the stock of a railroad company stipulated to pay the first instalment after the work should be commenced, "as shall hereafter be directed by the directors of said company." There was no stipulation for notice to the subscribers of the calling in of the instalment. *Held*, that no proof of notice or demand, other than an order passed as above, by the directors, and entered on the record-book, was necessary in a suit against a subscriber to recover said instalment. *Ind. Supreme Ct.* 1855, *Ross v. Lafayette &c. R. R. Co.* 6 *Ind.* 297.

122. Where an act of incorporation provided, that "in all cases where it might be necessary for the trustees to give any notice in writing to any person whatever, under the provisions of the act," such notice was to be signed in a particular manner,—*Held*, that in an action against a shareholder for calls, the declaration averring that the defendant had had "due notice" of such calls, to wit, "by notice in writing signed," &c. (in the manner pointed out by the act), it was necessary to prove a notice signed in the manner so pointed out, although the act did not contain any express provision, that notice in writing of calls should be given to shareholders. *Q. B.* 1843, *Miles v. Bough*, 8 *Gale & S.* 119; 12 *Law J. N. S.* 74; 7 *Jur.* 81; 3 *Ad. & E. N. S.* 845.

123. Notice of a call, published in the newspapers, presumed to be the act of the directors,—see *Great North of England Railway Co. v. Biddulph*, 7 *Moss. & W.* 243; 5 *Jur.* 221.

124. — and how it may be made. The subscribers to the stock of a railroad company promised by the terms of the subscription, to pay their respective shares "in such manner, and in such proportion, and at such times," as the company should direct. In an action on the subscription, the answer admitted the subscription, but denied other averments (not material to this point).

Held, 1. That evidence of a personal notice of a call for stock was not requisite.

2. That it was not necessary to give the book containing subscriptions to the stock, in evidence. *Ind. Supreme Ct.* 1856, *Fisher v. Evansville &c. R. R. Co.* 7 *Ind.* 407.

125. Evidence that notices of an assessment laid by a mutual fire insurance company, addressed to each of the parties assessed, were made out either by the secretary or the treasurer of the company, and that the secretary carried some of them to the post-office, and the treasurer carried some, and that one of the members, when afterwards called upon for his assessment, refused to pay on other grounds than want of notice, are sufficient evidence of notice to him of that assessment, to be submitted to the jury. *Mass. Supreme Ct.* 1856, *Jones v. Sisson*, 6 *Gray*, 288.

126. In order to prove the service of a notice of a call, the plaintiff proved that it was the duty of C. to fill up the printed notices and direct them to the shareholders; that on

the day of the call he had received instructions to send out such notices; that he had been seen in the act of making out such notices, and putting them into a basket ready to be posted, and that at that time he had a list in his hand. It was proved that all the letters in the basket were posted. C. was dead at the time of the trial, but a list containing the name of the defendant was produced in his handwriting, with an indorsement by him, "Letters sent out." *Held*, that this list, so indorsed, was admissible, as it might reasonably be inferred that it was a contemporaneous entry. *Each*. 1850, *Eastern Union Railway v. Symonds*, 19 *Law J. N. S. Each*. 287.

127. The charter of a railroad company required notice of an assessment to be published three weeks before it should be due. *Held*, that producing a copy of the publication with oral evidence that it had been repeated the requisite number of times was presumptive evidence of compliance; without producing all the successive papers. *Ind. Supreme Ct.* 1855, *Unthank v. Henry County Turnpike Co.* 6 *Ind.* 125.

128. The affidavit of the newspaper clerk is sufficient evidence of the publication of a notice calling for instalments of stock in a newspaper. *Ind. Supreme Ct.* 1860, *Andrews v. Ohio & C. R. R. Co.* 14 *Ind.* 169.

129. What certificate of the secretary of a company, to the fact of publication of notice may be received,—see *Tomlin v. Tonica & C. R. R. Co.* 23 *Ill.* 429.

130. Notice by receiver, &c. That one officially appointed to wind up an insolvent company is not always bound to pursue the same method of giving notice of an assessment as imposed upon directors of the company,—see *Hull & C. Co. v. Wellesley*, 6 *Hurlst. & Nor.* 38.

131. That it is sufficient for him to pursue a mode which might be pursued by the company,—see *Hall v. United States Ins. Co.* 5 *Gill*, 484.

IV. ENFORCING PAYMENT.

1. By corporate act.

132. *Forfeiture.* Forfeiture of the policy, for non-payment of assessments on the premium note, good, as a condition of the policy of a mutual insurance company,—see *Beadle v. Chenango County Mut. Ins. Co.* 3 *Hill*, 161,

162; *Cahill v. Kalamazoo Mut. Ins. Co.* 2 *Doug.* 139. Also *INSURANCE*.

As to the general power of a corporation to forfeit stock, as a penalty for the subscriber's failure to comply with his subscription,—see *STOCK*.

133. *Offset.* Dividends. Where a corporation, having made a dividend of ten per cent. on each share, before payment thereof, laid an assessment of ten per cent. payable on the same day,—*Held*, that the corporation were not entitled to take the dividend of any stockholder, without an order from him, in payment of any debt due from him to the corporation, or as a set-off to the assessment, or as a charge upon any shares which might afterwards be sold. *U. S. Circ. Ct. (Mass.)* 1844; *Exp. Winsor*, 3 *Story C. Ct.* 411.

134. That a corporation cannot set off a claim for unpaid assessments, in an action brought against them for a debt due to a stockholder, when the case is such that the assessment could not be recovered by a direct action by the company against the stockholder,—see *Outler v. Middlesex Factory Co.* 14 *Pick.* 488.

135. *Sale of stock.* Where a sale is authorized to pay unpaid assessments, it is not valid if made in whole or in part for an illegal assessment. *Me. Supreme Ct.* 1860, *Lewey's Island R. R. Co. v. Bolton*, 48 *Me.* 451. And see *Stoneham Branch Railroad v. Gould*, 2 *Gray*, 277.

2. By legal proceedings.

136. *When an action lies.* Upon the question whether, independent of a charter provision, a corporation may sue a subscriber upon his engagement to take shares, the authorities are not agreed. The doctrine in New York and some other States appears to be, to hold the provision in the charter to sell the shares as a remedy merely cumulative, and to sustain an action for assessments, without an express promise to pay, and before resort is had to a sale of the shares. [Citing 21 *Wend.* 296; 21 *Wend.* 278; 2 *Hill*, 127; 2 *Barb.* 294; 10 *Barb.* 260; 20 *Conn.* 178; 10 *Smedes & M.* 577; 6 *Humph.* 241; 5 *Ala.* 787; 3 *Ala.* 660; 2 *Bibb*, 577.]

In Massachusetts the doctrine is otherwise, and it has there been held that where there is no express promise to pay the assessments, the remedy, in the first instance, is by a sale

of the shares. [5 Mass. 80; 6 Mass. 40; 16 Mass. 94; 8 Mass. 138.] And this has been declared to be the rule in New Hampshire. [2 N. H. 880.]

Upon an examination of the authorities and upon principle the true rule appears to be this: that where a party makes an express promise to pay the assessments, he is answerable to the corporation upon such promise for all legal assessments; and may be compelled to its performance, by action at law, before resorting to a sale of the shares. It is a personal undertaking beyond the terms of the charter. Where on the other hand, he only agrees to take a specified number of shares, without promising expressly to pay assessments, then resort must first be had to a sale of the shares to pay the assessments before an action at law can be maintained. His agreement simply to take the shares is an agreement upon the faith of the charter, and by it alone is he to be governed, so far as his shares are to be affected. He takes them upon the conditions and law of the charter. They exist only by virtue of the charter, and are to be governed by the provisions therein contained.

Where the subscription for shares contains a promise to pay the assessments, and the conditions of the subscription have been performed, there is no doubt that an action of assumpsit can be maintained, in the first instance, for all legal assessments. [30 Me. 547; 1 How. (Miss.) 479; 6 Pick. 28; 10 Pick. 147; 19 Wend. 424; 24 Wend. 153; 14 Johns. 238.] *N. H. Superior Ct.* 1855, *New Hampshire Central R. R. v. Johnson*, 10 *Poster*, 390.

137. If no statute nor by-law provides another remedy for the recovery of assessments, corporators are liable therefor, in an action of assumpsit, though they have made no express promise. *Vt. Supreme Ct.* 1830, *Essex Bridge Co. v. Tuttle*, 2 *Vt.* 893; *Ill. Supreme Ct.* 1856, *Peake v. Wabash R. R. Co.* 18 *Ill.* 88; 1859, *Spangler v. Indiana &c. R. R. Co.* 21 *Ill.* 276.

138. When it will not. A corporation cannot, in an action at law, recover the amount of the shares, or the assessments on them, unless the holder has expressly agreed to pay them, or unless by the charter, or some other statute, a personal obligation to pay is imposed on the holder. *Me. Supreme Ct.* 1850, *Kennebec & Portland Railroad Co. v. Kendall*, 31 *Me.* 470.

139. In case that the trustees of a joint-

stock company agree, as between themselves, to bear all expenses beyond a stated amount, and that sum is contributed, they cannot by bill enforce contributions from the shareholders of the expenses beyond that amount, though incurred, as alleged, by reason of difficulties, which defeated all caution; but will be left to any remedy they may have at law. *V. Ct.* 1847, *Gillan v. Morrison*, 11 *Jur.* 861.

140. That the remedy by action is "cumulative." An action may be maintained by a corporation, upon a promise by a subscriber for shares in its capital stock, contained in his subscription, to pay the assessments upon them as ordered, notwithstanding the charter empowers the directors to sell the shares for the non-payment of the assessments. The remedy provided by the act of incorporation is cumulative. *N. H. Supreme Ct.* 1856, *White Mountains R. R. Co. v. Eastman*, 34 *N. H.* 124.

141. So held where the power to sell was derived from the by-laws of the corporation. *N. H. Supreme Ct.* 1859, *Piscataqua Ferry Co. v. Jones*, 39 *N. H.* 491.

142. Although the charter of a railroad corporation authorizes the sale of a subscriber's stock for the non-payment of assessments thereon, yet an action of assumpsit may be maintained upon his express promise to pay such assessment. *Ala. Supreme Ct.* 1842, *Carlisle v. Cahawba & Marion R. R. Co.* 4 *Ala.* N. S. 70; *Me. Supreme Ct.* 1849, *South Bay Meadow Dam Co. v. Gray*, 80 *Me.* 547; *Vt. Supreme Ct.* 1852, *Connecticut & Passumpsic R. R. Co. v. Bailey*, 24 *Vt.* 465.

143. An action will lie upon an implied promise for the collection of assessments made on the shares of stock owned by a corporator notwithstanding the charter may provide for the forfeiture or sale of the shares of delinquents. *Fla. Supreme Ct.* 1857, *Kirksey v. Florida & Georgia Plank Road Co.* 7 *Fla.* 23.

144. On a written promise to a corporation to pay a certain sum for each share set against the subscriber's name, in such instalments as the president and directors may legally require, the corporation may maintain an action for an assessment legally laid and notified, but not paid, without first selling the shares for non-payment thereof. *Mass. Supreme Ct.* 1856, *City Hotel v. Dickinson*, 6 *Gray*, 586.

145. The sale of the shares of a delinquent

stockholder in a railroad corporation, to pay over-due assessments upon such shares, is no defence to an action against him, to recover the deficiency. *Conn. Supreme Ct.* 1853, *Danbury & Norwalk R. R. Co. v. Wilson*, 22 *Conn.* 435.

146. A stockholder, who was not one of the original subscribers to a corporation organized under the general mining law of Michigan, is liable for the balance due upon assessments, after the application of the proceeds of stock sold for default. *Mich. Supreme Ct.* 1866, *Merrimac Mining Co. v. Bagley*, 14 *Mich.* 501.

For many matters which Defeat Liability for assessments, see *supra*, 50-59.

For a fuller view of the remedies of a corporation to compel Payment for stock, independent of the right to divide the amount due into instalments, and enforce payment of them separately, see *Stock; Subscriptions*.

147. Defences. Facts which would operate to forfeit a charter cannot be taken advantage of by a stockholder in an action brought against him for the recovery of assessments on his stock. The State alone can claim a forfeiture. *Vt. Supreme Ct.* 1852, *Connecticut & Passumpsic R. R. Co. v. Bailey*, 24 *Vt.* 465.

148. It is no defence to an action on a subscription to a corporation for the purpose of building a hotel, that a large and valuable portion of the building erected, was constructed and occupied for shops. If, in this particular, the corporation has violated its charter, or exceeded its powers, the objection cannot be taken advantage of by an individual proprietor, as a defence to a suit brought for the recovery of money which he has expressly promised to pay. *Mass. Supreme Ct.* 1856, *City Hotel v. Dickinson*, 6 *Gray*, 586.

149. Alteration in location of a railroad—*Held*, no defence, under the circumstances, to an action against a stockholder, to recover assessments on his stocks,—see *Danbury & Norwalk R. R. Co. v. Wilson*, 22 *Conn.* 435.

150. That where the charter declares that instalments shall be paid on the call of the directors, the question whether the exigencies of the company require their payment, is not one to be raised in a defence to a suit at law for their recovery,—see *Judah v. American Live Stock Ins. Co.* 4 *Ind.* 383.

151. What special agreement between the company and a shareholder, or what fraud

practised upon the latter, by officers of the company, may be set up in defence to an action for calls—see *Waterford &c. Railway Co. v. Logan*, 14 *Jur.* 346; 19 *Law J. Q. B.* 259; *West Cornwall Railway Co. v. Mowatt*, 15 *Jur.* 101; 15 *Q. B.* 521; *Mangles v. Grand Collier Dock Co.* 10 *Sim.* 519; 2 *Eng. Railw. Cas.* 359; 3 *Mylne & C.* 742.

152. That the courts are reluctant to admit defences to actions for calls, upon the ground of informality in the proceedings of the company, or even of alleged fraud, where there has been any considerable acquiescence on the part of the shareholder. *Cromford & High Peak Railway Co. v. Lacey*, 3 *Youngs & J.* 80; *Mangles v. Grand Collier Dock Co.* 2 *Eng. Railw. Cas.* 359; 10 *Sim.* 519; *Thorpe v. Hughes*, 3 *Mylne & C.* 742.

153. Relief in equity against calls. That equity will relieve against a demand for a call on a shareholder, where the undertaking, owing to subsequent circumstances, becomes impossible; or where the corporator was entrapped into entering the corporation by means of its fraud or misrepresentation; or where the particular call was fraudulently made. *Mangles v. Grand Collier Dock Co.* 2 *Eng. Railw. Cas.* 359; 10 *Sim.* 519; *Richardson v. Larpent*, 2 *You. & C. Ch.* 507; *Thorpe v. Hughes*, 3 *Mylne & C.* 742.

154. Compelling assessment, in favor of creditors. A court of chancery may, independent of statute, compel the payment by stockholders of amounts unpaid on their stock, to be applied for the benefit of corporation creditors. *Mich. Supreme Ct.* 1859 *Pettibone v. McGraw*, 6 *Mich.* 441.

155. An act of Connecticut incorporating a manufacturing company, provided that the capital stock of the corporation should not exceed \$50,000; that a share of the stock should be \$100; that the directors might call in the subscriptions to the capital stock by instalments, in such proportions, and at such times and places as they should think proper. After the stockholders had paid in forty per cent. on their subscriptions, the corporation became insolvent, having no visible property. On a bill in chancery, brought by certain creditors, praying that they might be compelled to pay in the remaining sixty per cent. (or so much thereof as should be necessary), to be applied in payment of the debts of the corporation, it was *Held*, 1. That the obligation which the stockholders as-

sumed, by their subscription to the capital stock of the corporation, was to pay the sum of \$100 on each share, in such instalments and at such times as should be required by the directors.

2. That the amount of the shares subscribed, and not the sum actually paid in, constituted the capital stock of the corporation.

3. That it was the duty of the directors to call in such instalments as were necessary to meet the debts of the corporation.

4. That this duty might be enforced by a decree in chancery. *Conn. Supreme Ct. 1844, Ward v. Griswoldville Manuf. Co. 16 Conn. 593.*

156. That chancery will not, ordinarily, decree a company to make calls in favor of a particular creditor,—see *Case of York Buildings Co. 2 Atk. 56.*

ASSIGNMENTS.

I. GENERALLY.

II. IN TRUST FOR CREDITORS.

I. GENERALLY.

1. To a corporation. A corporation may become the assignee of a bond, unless specially prohibited by the charter. A special grant of such power by the charter is not necessary to the possession of the power. *N. J. Supreme Ct. 1842, Bennington Iron Co. v. Rutherford, 3 Harris, 467.*

As to the power of a corporation to Take and hold property, see PROPERTY; and titles there cited.

2. Though the charter empowers the corporation to take and hold real estate for specified purposes and considerations only, if the conveyance is in terms which are consistent with such purposes and considerations, it may be sustained. The presumption is in its favor. *N. Y. Ct. of Appeals, 1859, Chautauque Co. Bank v. Risley, 19 N. Y. 369.*

3. An incorporated bank having power to acquire real property in "satisfaction of debts," took from the holder of a sheriff's certificate of sale, after the same had become absolute, an assignment of all his rights, and then received the sheriff's deed. The consideration of the assignment was expressed, in general terms, to be "for value received,"

and there was no other proof of the consideration.

Held, 1. That the assignment was presumptively a valid transfer to the bank, the words "for value received" being equally referable to a debt due from the assignor, or to a present payment in money.

2. That the bank, having legally acquired the certificate, could take the sheriff's deed, and hold the title. *Id.*

4. General averments, in a bill filed by a corporation to enforce a demand held by assignment, that complainants were duly incorporated and had power to purchase and hold the demand,—*Held* sufficient on demurrer. *Camden & Amboy R. R. Co. v. Remer, 4 Barb. 127.*

5. By a corporation. A bank may assign or convey any property held by it, and may enter into the common covenants of guaranty or warranty, on making such assignment or conveyance. *N. Y. Supreme Ct. 1854, Talman v. Rochester City Bank, 18 Barb. 123.*

6. An assignment, by a bank of a mortgage, for the legitimate purpose of securing a debt due, sustained, as an act within the powers of the corporation, and not out of the usual course of business. *N. Y. Supreme Ct. 1845, Gillett v. Campbell, 1 Den. 520.*

7. That an assignment made by an insolvent bank to pay an existing debt to a creditor, is not necessarily void because the value of the assigned assets is larger than sufficient to pay the debt, and the assignment contains a stipulation that any excess shall be returned to the bank,—see *Carey v. Giles, 10 Ga. 9.*

As to the power of Particular classes of corporations, such as BANKS, INSURANCE COMPANIES, RAILROAD COMPANIES, and others to assign demands acquired by them in the course of their peculiar business, and the manner in which they may do so, see the titles treating of the particular classes of corporations.

As to the transfer of Negotiable instruments owned by corporations, see BILLS, AND NOTES.

8. Form. Proper mode of assignment of a bond and mortgage by a corporation. *Hoyt v. Sheldon, 3 Bow. 267.*

9. An assignment of a mortgage, though made by a corporation, may be good, although not under seal. *N. Y. Supreme Ct. 1845, Gillett v. Campbell, 1 Den. 520.*

10. An instrument in the form of an as-

signment, by a municipal corporation, of a decree,—*Held*, under the circumstances, operative only as a release. *N. Y. Surr. Ct.* 1849, *Paff v. Kinney*, 1 *Bradf.* 1.

11. Authority of officers. Where a charter gives to a board of directors the management of the affairs of the corporation, the president and cashier cannot, without authority from the board, assign *choses in action*, except when done in the usual course of business. Such assignments are void. *N. Y. Ct. of Appeals*, 1851, *Hoyt v. Thompson*, 5 *N. Y. (1 Seld.)* 320.

12. A charter declared that the corporate powers should be exercised by a board of twenty-three directors; omitted to prescribe the number necessary for a quorum; but gave power to make such by-laws as the board should judge necessary.

Held, 1. That a by-law declaring five directors—or, in the absence of the president, seven—a quorum for the transaction of the ordinary business of the company, was valid.

2. That an assignment of securities to a very large amount, made under the corporate seal, to secure to the assignee an admitted debt arising in the business of the company, was "ordinary business of the company," which such quorum might direct. *Id.*

13. Whether the transaction be small or large, cannot affect the question whether it is "ordinary business." Though such pledge or assignment was of the principal part of the assets of the corporation to a creditor who was pressing for payment of a very large demand, yet it being made with no design of going into insolvency, but to relieve the corporation from embarrassment and enable it to continue its business,—the transaction should be deemed included in the authority delegated to the five directors. *Id.*

As to what constitutes a Quorum, in general, see MEETINGS; QUORUM.

14. The stockholders of a bank, having resolved to assign its assets to trustees, for the purpose of private banking, instructed the president and directors to execute deeds to carry their resolve into effect, and the cashier to indorse and transfer all the notes &c. to the trustees. Thereupon the president and directors conveyed the assets to the cashier, in trust to be reconveyed to themselves, which was done. The directors then directed A, as president, to indorse all notes &c. which was done in the presence, and with

the assent of the cashier. They then adjourned *sine die*, and the corporation was dissolved: *Held*, That these acts were in conformity with the directions given, and transferred the assets to the trustees, who were therefore authorized to maintain suits on the notes. *Md. Ct. of Appeals*, 1849, *Merrick v. Bank of Metropolis*, 8 *Gill*, 59.

15. Where a number of notes were placed by a corporation in the hands of trustees, who were authorized by resolution of the directors to dispose of any of them in a specified manner, and such trustees transferred a portion of them for the purpose stated,—*Held*, that the transfer was valid. *N. Y. Supreme Ct.* 1860, *Warner v. Chappell*, 32 *Barb.* 809.

As to the authority of the Board of Directors or of Particular officers, to assign assets of the corporation, see BOARD; OFFICERS; and the titles of particular officers, and those of particular classes of corporations.

16. Mode of execution. Where the directors of a corporation have, by resolution, duly authorized the execution of an assignment of its property, it is no objection to the validity of such assignment, that it was dated and executed by one of the officers signing it, in anticipation of the resolution authorizing it; it not being executed by the other officer, or delivered, until after the passage of the resolution. *N. Y. Supreme Ct.* 1862, *Carroll v. Cone*, 40 *Barb.* 220.

17. Affixing corporate seal. The president and secretary of a corporation executed an assignment of its property, and attached the seal of the company thereto, without any specific authority from the company to do so.

Held, 1. That this was not a proper execution of the instrument.

2. That the want of authority on the part of the officers could not be cured by any proof of execution made before the commissioner. *N. Y. Supreme Ct. Sp. T.* 1863, *Murray v. Vanderbilt*, 39 *Barb.* 140.

18. How the authority of the corporate officer to affix the seal of the corporation to an assignment should be alleged in the certificate of acknowledgment,—see *Johnson v. Bush*, 3 *Barb. Ch.* 207.

19. Presumption. Where the directors of a corporation, by resolution, directed that a claim held by the corporation should be transferred to certain persons specified, and that the "proper officers" should execute

the requisite assignment,—*Held*, that it was to be presumed, at least in favor of third persons dealing with the company, that the president and secretary were the proper officers for that purpose. *N. Y. Supreme Ct.* 1862, *Carroll v. Cone*, 40 *Barb.* 220.

20. An act relative to a banking association having directed that the president and cashier should sign the contracts of the association,—*Held*, that their signatures were presumptive, if not conclusive, evidence that such contract was the act of the corporation. *N. Y. Supreme Ct.* 1845, *Gillett v. Campbell*, 1 *Den.* 520.

21. That an assignment of an evidence of debt made by delivery, by the managing officer of a corporation owing it, is presumptively valid, to the same extent as if made by an individual owner,—see *Blake v. Holley*, 14 *Ind.* 383.

22. Impeaching corporate assignments. That it is competent to attack an assignment made by an insolvent bank to a creditor, upon the ground of fraud in fact, and that any fact or circumstance within the allegations in the complainant's bill may be proven, which will go to show that the bank intended to perpetrate a fraud in making the assignment,—see *Carey v. Giles*, 10 *Ga.* 9.

23. In January, 1856, an insurance company being embarrassed, sundry persons agreed to lend to it their notes, on condition that it should deliver to certain trustees for their benefit other notes as collateral security. The notes were lent accordingly, and in February, 1856, the collaterals, including a note of the defendant, were assigned to the trustees. They did not, however, obtain possession of the defendant's note until May, 1856, in consequence of its being deposited with a bank as security for a debt of the company. In March, 1856, a claim of the defendant against the company for a loss was adjusted. In an action brought upon this note by the trustees,—*Held*, 1. That the defendant could not impeach the power of the officers of the company to make the assignment.

2. That he could not set off his claim against the company, it not accruing until after the transfer to the plaintiffs. *N. Y. Supreme Ct.* 1863, *Nelson v. Edwards*, 40 *Barb.* 279.

24. Under a statute prohibiting a transfer of assets of a corporation exceeding \$1,000 in value, without a resolution of

the board of directors, if one claiming as purchaser from a corporation of effects exceeding that value, proves that he paid value, the burden of proof rests upon the other party to prove that the purchaser had notice of any want of authority for the transfer. *N. Y. Supreme Ct.* 1860, *Warner v. Chapell*, 32 *Barb.* 309; *S. P. Akin v. Blanchard*, *Id.* 527.

25. A transfer or assignment of the effects of an association, made by the president by direction of the finance committee, after notice to the president of a motion for an injunction and receiver, is not to be permitted to stand. It is a fraud on the court and its process. *So held*, where the motion had been granted before the execution of the assignment. *N. Y. A. V. Chan. Ct.* 1843, *Leavitt v. Tylee*, 1 *Sandf. Ch.* 207.

II. IN TRUST FOR CREDITORS.

26. Effect of insolvency of corporation, upon its power to assign. That at common law mere insolvency does not destroy the power of a corporation to make a transfer of its property or choses in action,—see *Hoyt v. Shelden*, 3 *Bow.* 267.

27. The insolvency of a corporation does not affect its right to prefer creditors. *Pa. Supreme Ct.* 1843, *Dana v. Bank of United States*, 5 *Watts & S.* 223.

28. The New York act to prevent fraudulent bankruptcies by incorporated companies, prohibiting an assignment of any property to any officer or stockholder for the payment of any debt, and any assignment to any person, in contemplation of insolvency, was intended to prevent an assignment which should give a preference to the officers or stockholders, and to secure the making a fair dividend among the *bona fide* creditors. An assignment made not in contemplation of insolvency, and made to assignees who are not officers or stockholders of the corporation, in trust for the payment of all its debts *pro rata*, is valid. *N. Y. Supreme Ct.* 1829, *Hartun v. Bishop*, 3 *Wend.* 13.

29. Although the provisions of a statute which render void transfers by corporations who have refused specie payments, or in contemplation of insolvency—*a. g.* 2 *N. Y. Rev. Stat.* 5 ed. 600, § 4—may be applicable to manufacturing companies; and although neither publicity nor knowledge by the

transferee, of actual insolvency, is essential to make the transfer void, yet the terms of such a statute should not be held to embrace sales in the ordinary and legitimate business of such company, at times when it might be held afterwards to have been on the verge of insolvency, and, therefore, in contemplation of it. For by such construction the whole business of the company would be impeded. The statute should be deemed only intended to prevent injurious preferences, and "contemplation of insolvency" must also mean something more than mere expectation of it; it must include provision against its results, as to the transferee, and that can only be where he is already a creditor, and the object is to take his debt out of the equal ratable distribution of assets. *N. Y. Superior Ct.* 1860, *Heroy v. Kerr*, 8 *Bow.* 194; 21 *Hov. Pr.* 409.

30. A payment or transfer made by a corporation, even when actually insolvent, is not to be deemed void as made with intent to prefer a particular creditor, unless the intent, as well as the insolvency, is alleged and proved. *N. Y. Ct. of Appeals*, 1857, *Curtis v. Leavitt*, 15 *N. Y. (1 Smith)* 9, 109, 138, 198.

As to assignments made by corporations in pursuance of Legal proceedings to wind up their affairs, see DISSOLUTION; INSOLVENCY; RECEIVER.

31. The power to prefer creditors. A corporation, unless restricted by its charter, or prevented by the operation of some bankrupt or insolvent law, may, by virtue of its general power to contract, make an assignment of its effects, entire or partial, with or without preferences, if made *bona fide* for the payment of its debts. *Ark. Supreme Ct.* 1853, *Ringo v. Real Estate Bank*, 8 *Engl.* 563; *Md. Ct. of Appeals*, 1834, *State of Maryland v. Bank of Maryland*, 6 *Gill & J.* 205; *Pa. Supreme Ct.* 1843, *Dana v. Bank of United States*, 5 *Watts & S.* 223.

32. A corporation, as well as a private individual, may make a *bona fide* assignment of all its property to trustees for the payment of its debts, and has a right to prefer one set of creditors, or a single creditor, to others, in all cases not affected by the bankrupt or insolvent laws. Such an assignment made by the Central Board of the Real Estate Bank of Arkansas—*Held* valid, though some of the trustees were indebted to the bank, their

indebtedness not being thereby extinguished; and though the debtors of the bank were allowed to pay in eight annual instalments; and though it was not expressed on the face of the deed that the bank was not in failing or insolvent circumstances. *Held*, also, that bonds given by the trustees to the attorney of the bank and his successors in office were valid. *Ark. Supreme Ct.* 1842, *Exp. Conway*, 4 *Ark.* 302.

33. It is competent for a banking corporation, in making an assignment, to prefer those holders of its notes who are willing to deposit them, and accept certificates drawing interest; but it cannot compel any creditor who chooses to run the risk of a failure of assets, to forego any part of his claim or demand against the assets of the bank. He may be postponed, but cannot be deprived of any claim on the surplus assets. *Ark. Supreme Ct.* 1853, *Ringo v. Real Estate Bank*, 8 *Engl.* 563.

34. The power to assign without preferences. A corporation may pledge its things in action to trustees for the benefit of creditors. *N. Y. Supreme Ct.* 1863, *Nelson v. Edwards*, 40 *Barb.* 279; *Clark v. Titcomb*, 42 *Barb.* 122.

35. A corporation may assign its property to a trustee for the benefit of its creditors.* *Tenn. Supreme Ct.* 1843, *Hopkins v. Gallatin Turnpike Co.* 4 *Humph.* 403; *N. Y. Supreme Ct.* 1855; *Hurlbut v. Carter*, 21 *Barb.* 231. Compare *supra*, 6, 7.

36. A corporation may make an assignment of its property in trust for the payment of its debts, preserving to each creditor the right of sharing *equally and ratably* according to the amount of his claim. *Miss. Superior Ct. of Chancery*, 1843, *Robins v. Embury*, 1 *Smodes & M.* 207, 258; *Montgomery v. Commercial Bank of Rodney*, 1 *Smodes & M.* 632.

37. A corporation, whether trading or religious, may, at common law, assign its property in trust for the payment of its debts, unless restrained by its charter or by some other statute. And such an assignment may be made to persons ineligible under the charter to be general trustees of the corporation. *N. Y. Ct. of Appeals*, 1850, *De Ruyter v. St. Peter's Church*, 3 *N. Y. (3 Comst.)* 238.

* The right of corporations in Louisiana to make voluntary cessions of assets to creditors, and obtain benefit of insolvent laws, denied. *Jeffries v. Belleville Iron Works Co.* 18 *La. Ann.* 635.

38. That a corporation cannot make an assignment which, in its terms or effect, is contrary to the provisions of the charter—see *Ringo v. Real Estate Bank*, 8 *Engl.* 563.

39. Where the particular mode in which the affairs of a certain class of corporations shall be wound up, in case of insolvency, is prescribed by statute, an assignment made manifestly with a view to evade the provisions of the statute cannot be sustained. *Mich. Ct.* 1838? *Bank Commissioners v. Bank of Bust, Harring. Ct.* 106.

40. That the corporate power to alienate or assign the corporate property is not affected by a provision in the charter that the stockholders shall be individually liable for the corporate debts,—see *Pope v. Brandon*, 2 *Stew.* 401.

41. — under statutes of Maryland. The banking corporations of the State of Maryland may provide for the payment of their debts by a transfer in trust of all the property of the bank. *Md. Ct. of Appeals*, 1834, *Union Bank of Tennessee v. Ellicott*, 6 *Gill & J.* 363.

42. Funds belonging to the State of Maryland were deposited in the Bank of Maryland, under a resolution of the general assembly. The bank being in failing circumstances, the president and directors transferred all its property to trustees for the equal benefit of all its creditors: *Held*, that the assignment was valid, and that the deed of trust protected the property in the hands of the trustees against the right of the State to that preference, in the payment of its debt, to which it would have been entitled had there been no valid transfer or existing lien. *Md. Ct. of Appeals*, 1834, *Maryland v. Bank of Maryland*, 6 *Gill & J.* 205.

43. — of Mississippi. That the right of a bank in failing circumstances, to make a general assignment for the benefit of creditors is not taken away by the statute of Mississippi of 1840 prohibiting banks from transferring, by indorsement or otherwise, any note, bill receivable, or other evidence of debt. See *Montgomery v. Commercial Bank*, 1 *Smedes & M.* 632; *Grand Gulf R. R. & Banking Co. v. State*, 10 *Smedes & M.* 428.

44. — of New York. The provision of 1 N. Y. Rev. Stat. 791—that no assignment &c. by any moneyed corporation, when insolvent, giving preferences shall be valid—implies that an assignment made without

giving preferences, is valid. *N. Y. Supreme Ct. Sp. T.* 1857, *Bowery Bank Case*, 5 *Abb. Pr.* 415.

45. An assignment of all its property, by a mutual insurance company, created subsequent to the enactment of the Revised Statutes, for the equal benefit of all its creditors, is valid in New York. An insurance company is a moneyed corporation, and may therefore make an assignment without preferences, under 1 Rev. Stat. 591, § 9. *N. Y. Supreme Ct. Sp. T.* 1853, *Hill v. Reed*, 16 *Barb.* 280.

46. A corporation—*e. g.* an insurance company—may make a general assignment for the benefit of creditors; though forbidden by the statute of the State—*e. g.* 1 N. Y. Rev. Stat. 591, § 9—to give preferences among creditors. But a corporation cannot transfer the powers of its officers as such, to an assignee. The assignment transfers the assets merely, not the franchise. Hence the assignee of an insurance company receives no power to make assessments upon premium notes transferred to him under the assignment. *N. Y. Supreme Ct.* 1855, *Hurlbut v. Carter*, 21 *Barb.* 221.

47. In New York an assignment by a manufacturing corporation, in contemplation of insolvency, of all its property in trust for payment of all its debts ratably, is void; under 1 Rev. Stat. 603, § 4. *N. Y. Supreme Ct.* 1853, *Harris v. Thompson*, 15 *Barb.* 62.

48. — of Ohio. That under statutes which provide that no bank shall make assignments in favor of creditors, and authorize a commissioner to take possession of assets in insolvency, and declare that all assignments shall be void as against the operation of the act, an assignment by a bank is not entirely void, but only so far as it conflicts with the action of the commissioners,—see *Rossman v. McFarland*; 9 *Ohio St.* 369.

49. That an assignment made by a corporation for the benefit of certain preferred creditors, of the general effects of the corporation, should not be held to include the capital stock,—see *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.* 11 *Humph.* 1.

50. — of Pennsylvania. Delivering to a creditor's bank, acting for itself and other creditors, notes and bills of exchange as collateral security, upon a condition: *Held*, not equivalent to an assignment for the benefit of creditors, and not therefore void

because unrecorded, as required in the case of such assignments by a State statute. See *Griffin v. Rogers*, 88 Pa. St. 382.

51. **Validity of assignments in particular cases.** An assignment of all the property and assets of a bank to trustees, for the benefit of creditors, executed by the president, and sealed with the seal of the bank, in pursuance of an ordinance of the board of directors, is valid; and the trustees may maintain a bill in equity against a part of the directors, who have obtained possession of the property of the bank, and refuse to deliver it to the trustees. That some of the trustees have not executed bonds, as required by the deed, is no objection to their right to maintain the bill, the assignment vesting the property in the trustees absolutely, or if on a condition, a condition subsequent. That a part only of the trustees have signed the deed, is no objection to the suit being maintained in the names of all, when they are all before the court, as the court could transfer the possession to those who had signed, holding it for the others to come in and execute the necessary bonds; and if they failed to do so in a reasonable time, remove them and appoint others. The remedy by an action of replevin is inadequate and incomplete. *Ark. Supreme Ct. 1842, Exp. Conway*, 4 Ark. 302.

52. A manufacturing company in embarrassed circumstances, made a general assignment of its effects to A, to secure him for his liabilities for the company as indorser and otherwise, with power to work up the stock on hand, and to make purchases of any materials necessary for that purpose, and to reimburse all expenses so incurred from the avails of the property assigned. *Held*, that such special power did not invalidate the assignment. *Conn. Supreme Ct. 1840, Kendall v. New England Carpet Co.* 18 Conn. 382.

53. Where a manufacturing company, subsequent to an assignment of its property to A, an indorser, to secure him for his liabilities contracted as such for the company, mortgaged the same property to B, and then C, a partner in the company, and agent for both the company and for A, under the assignment, applied \$1,000 of the avails of the mortgaged property to the payment of other debts of the company,—it appearing that A, after the mortgages, had received funds of the company not embraced in the mortgages, to the amount of \$4,000, which he had

credited in his account with the company and B,—*Held*, that neither the company nor B could take exception to the account on this ground. *Id.*

54. The president of a bank, by the authority of the directors, given before the time limited for closing the concerns of the bank, assigned certain notes to trustees, to whom the property of the bank had been transferred for the benefit of the stockholders. *Held*, that the assignment terminated the interest of the corporation in the notes, vested the legal interest in the trustees, and the beneficial interest in the stockholders. *Me. Supreme Ct. 1848, Stevens v. Hill*, 29 Me. 138.

55. A banking corporation, also authorized by its charter to construct and operate a railroad, having nearly completed the road, and exhausted its means, was compelled to make an assignment for the benefit of its creditors. The period for completing the road allowed by the charter of the company had nearly expired, the expiration of which, without the completion of the road, would cause a forfeiture of its charter. The road in its then unfinished condition was comparatively worthless, and its not being completed would be a total loss to the company of the amount expended, and would diminish the ability of the company to meet its debts.

In respect to completing and operating the company's railroad,—*Held*, 1, that a provision in the deed of assignment, authorizing the assignees to borrow \$250,000 to complete the road, and pledging the assets of the company and the profits of the road, for the payment of that sum when borrowed, before any other debts were paid, did not vitiate the assignment.*

2. That provisions in the assignment which conferred upon the trustees the power of managing and controlling the road, merely operated to assign the profits of the road, with its temporary control, to the assignees for the benefit of the creditors, and did not vitiate the instrument itself.

3. That a provision reserving power to the

* For views adverse to this position, but not stated in the text because they were advanced in cases not involving assignments by corporations, see *Dunham v. Waterman*, 17 N. Y. 9; 6 Abb. Pr. 357; *Van Nest v. Yoe*, 1 Sandf. Ch. 4; 3 N. Y. Leg. Obs. 70; *Hitchcock v. Cadmus*, 3 Barb. 381; *Jessup v. Hulse*, 21 N. Y. 168; *Schlusel v. Willett*, 84 Barb. 615; 12 Abb. Pr. 397; and *S. C. sub nom. Schlusel v. Willett*, 23 How. Pr. 15.

directory to appoint new trustees to fill any vacancies which might occur, did not vitiate the assignment.

4. That a provision requiring the assignees "to pay all the necessary expenses of the president, directors and company of the bank in the management of the corporation," would not avoid the assignment; as it did not show a fraudulent intent to secure a benefit to the assignors, but a design to obtain a future accruing profit for the benefit of creditors.

5. The fact that such assignment made the assignees the joint agents of the bank and the creditors of the bank in managing the road, and in receiving and disbursing the profits, did not vitiate it. *Miss. Superior Ct. of Chancery*, 1848, *Robins v. Embry*, 1 *Smodes & M.* 207.

56. In respect to collecting the company's assets and paying its debts,—*Held*, 1. That the assignment was not rendered void by a provision allowing twelve months for the collection of the debts (which were numerous and due from persons widely scattered), before any distribution should be made. The time was not unreasonable, under the circumstances.

2. That it was not vitiated by a power conferred upon the assignees to compromise with the debtors in such a manner as, in the judgment of the assignees, should be "for the interest of the creditors."

3. That it was no objection to such assignment that the assignees were prohibited from paying any claim not first declared valid by the board of directors.

4. That it was no objection to the assignment that the assignees were required thereby to account periodically, to the board of directors. *Id.*

57. An assignment by a banking and railroad corporation which showed upon its face an intention to postpone the creditors of the corporation, to use the effects of the bank for the completion of the railroad, pay the trustees enormous salaries, and make no dividend among the creditors of the bank until these objects were accomplished,—*Held*, void, under the circumstances, as fraudulent against creditors who had not become parties to it. *Bodley v. Goodrich*, 7 *Hew.* 277. Compare *Arthur v. Commercial &c. Bank*, 9 *Smodes & M.* 394; *Fellows v. Commercial &c. Bank*, 6 *Rob. La.* 246.

58. That the fact that the schedule attached

to a deed of assignment made by a corporation is defective, or that no schedule was attached at all, will not vitiate the assignment,—see *Hep. Conway*, 4 *Ark.* 302; *Robins v. Embry*, 1 *Smodes & M. (Ch.)* 207.

59. Rights of purchasers under assignments. That although the assignee of a corporation had notice of its insolvency, (which invalidated the transfer as to him, as against creditors of the corporation), yet a purchaser from him, in good faith and for value, without notice of the insolvency, obtains a valid title,—see *Hoyt v. Shelden*, 8 *Bow.* 267.

60. That if a company formed by the illegal union of other companies, can be regarded as existing *de facto*, its transfer of notes to the component companies upon its dissolution by order of court, passes a good title,—see *Farnsworth v. Drake*, 11 *Ind.* 101.

ASSOCIATIONS.

[This title embraces some general rules applicable to unincorporated companies, resembling in number of members, form of organization &c. corporate bodies. These rules, though not properly a part of the law of corporations, are inserted because, and so far as, they throw light upon the subject by their analogies. The peculiar nature of those companies over which some part but not all of the law of corporations has been extended by statute, is treated under JOINT STOCK COMPANIES.]

1. Nature. How far joint associations not incorporated are considered in law as being merely partnerships—see *Williams v. Bank of Michigan*, 7 *Wend.* 542; *Townsend v. Goewey*, 19 *Wend.* 424; *Crow v. Jackson*, 5 *Hill*, 478; *Wells v. Gates*, 18 *Barb.* 554; *Dennis v. Kennedy*, 19 *Id.* 517; *Babb v. Reed*, 5 *Rawle*, 151; *Atkins v. Hunt*, 14 *N. H.* 205; *Bullard v. Kinney*, 10 *Cal.* 60.

2. How far they are distinguished from partnerships, and treated as resembling corporations.* *Cox v. Bodfish*, 85 *Me.* 302;

* The true principle is, and upon this view the apparent discordance in the cases may be nearly reconciled, that the law allows associates to imitate the organization and methods of corporations so far as their rights between themselves are involved, and will enforce their articles of agreement (nothing illegal or unconscientious appearing) as between the parties to them. But the public and creditors have a right to invoke the application of the law of partnership to the dealings of any trading association, unless such association has the shield of incorporation. Thus, if the controversy is between members of the association, and relates to such subjects as mode of acquiring membership, tenure of the property, division of profits, transfer of shares, voting, expulsion, dissolution, or the like, the courts may deal with the association by analogy to the law of corporations, so far as the compact between the members contemplates. But if the

Commonwealth v. Green, 4 *Whart.* 531, 598; *Livingston v. Lynch*, 4 *Johns. Ch.* 578; *Irvine v. Forbes*, 11 *Barb.* 587.

8. The general assembly of the Presbyterian Church, in Pennsylvania, is not a *quasi* corporation; because it has not the capacity to sue and be sued as an artificial person; and a *quasi* corporation is also established by law, but that assembly is not. Neither does that assembly bear the same relation to the corporation of the trustees to the assembly, as the shareholders do to a bank or joint-stock company, for the latter are an integral part of the corporation. The assembly is a segregated association, which, though it is the reproductive organ of corporate succession, is not itself a member of the body. *Pa. Supreme Ct.* 1839, *Commonwealth v. Green*, 4 *Whart.* 531, 598.

4. The open board of brokers, in the City of New York, is not a corporation, nor is it a joint-stock association, nor is it, as respects questions relating to the continuance or termination of membership in it, a partnership. It is a voluntary association of persons, who, for convenience, have associated to provide, at the common expense, a common place for the transaction of their individual business as brokers. *N. Y. Common Pl.* 1867, *White v. Brownell*, 8 *Abb. Pr.* 318.

5. Membership. The agreement which the members of such an association have made upon the subject of membership, and what shall be the terms on which it shall be acquired, and the grounds and proceedings upon which it shall be terminated, must determine the rights of parties on that subject. A court of justice must recognize and enforce these provisions of the compact. It cannot substitute another contract for the one which the parties have made. One who becomes a member of such an association, submits himself to its rules. If those rules provide for expulsion upon certain grounds, and direct a mode of proceeding before a committee or tribunal of the association to ascertain whether in a given case such grounds exist, a member cannot, when they are invoked against himself (nothing unreasonable or unconscientious

question is between the association or its members and *third parties*, and relates to such points as in what name the association may sue, whether members are individually liable to the creditors for debts &c., a mere compact of association cannot vary the rights of strangers to it, but the associates must submit to the general rules of law applicable to the questions raised.

in them being shown), resort to a court of justice to prevent them from being put in force. An injunction against the tribunal of the association, or against an officer of the association charged with executing the decision of such tribunal, will not lie. *Id.* Compare *infra*, 16.

6. In the case of an unincorporated association, persons become members of the association by originally subscribing to the articles, and whether certificates of stock were issued to them or not, they are proper parties plaintiff in an action for redress against any persons who have committed a breach of trust, or who have fraudulently concealed the property of the association, or injured or destroyed it by negligence or intentional fraud. And it does not follow that because the articles of association provide that the government and management of the concern shall be subject to rules and regulations adopted by a majority of the associates, therefore an individual member shall be debarred from resorting to a court of justice for redress, in case of fraudulent appropriation or wilful destruction of the joint property by other members. *N. Y. Supreme Ct.* 1854, *Dennis v. Kennedy*, 19 *Barb.* 517.

7. Member of an unincorporated association allowed to be examined as a witness against it. *Ridgely v. Dobson*, 8 *Watts & S.* 118; *Lake v. Munford*, 4 *Smedes & M.* 812.

8. Subscription to stock. Where, by the articles of an unincorporated joint-stock association, it was agreed that all the property of the company should be vested in trustees thereafter to be elected, and that the subscribers would pay to such trustees the amount of their respective subscriptions,—*Held*, that an action to recover the amount subscribed by a member might be brought and maintained in the names of the trustees so elected. *N. Y. Supreme Ct.* 1843, *Cross v. Jackson*, 5 *Hill*, 478.

9. Transfer of shares. Articles of co-partnership of an association provided that a partner might assign his shares by a certificate in writing, which being lodged with the clerk of the company, should entitle the assignee to all the privileges, and subject him to all the liabilities, of a partner. *Held*, that a valid assignment might be made without such certificate, notwithstanding the articles. *Mass. Supreme Ct.* 1827, *Alvord v. Smith*, 5 *Pick.* 282.

10. Provisions of articles of an unincorporated association, relative to transfer of stock, construed, in a particular case. *Savage v. Putnam*, 32 *Barb.* 420; *Chappell v. Cadell, Jacob*, 587.

11. Articles of agreement of an unincorporated association, stipulated that the capital stock should be divided into shares which should be transferable; that no member "shall be discharged from his obligations, as a member of the company, by transfer of his share or shares, until the transfer is certified to the secretary; and no person becoming a party by the purchase of a share or shares shall be entitled to the privilege of membership, until he signs these articles;" and that trustees should be appointed to manage the affairs, in whom all the property should vest in trust. Accordingly trustees were appointed, who made purchases of real and personal property, and proceeded to the transaction of business. Shares were from time to time transferred, until twenty-nine fortieths of them were held by one person. *Held*, that a sale by him, not of his shares, but of twenty-nine fortieths of all the land and property which had belonged to the company, was a dissolution of the association; and that the persons who owned the shares at the time of the dissolution, were entitled, according to the number of their shares, to all the avails and assets of the company, and liable to contribute, in the same proportions, to all the debts of the company.

In a partnership at common law, with no provision in the agreement qualifying the rules ordinarily applicable, a dissolution takes place on the assignment of the interest of any member. The assignee may be received as a member; but he has no concern as a partner with the firm before the assignment, and is in no manner liable as such for its obligations. But such a rule cannot well be applied to the transfer of shares held under articles of association such as were shown in this case. They show an intent that the evidence of membership, and the times when it commenced and ended should be proved by the parties' own signature upon the books of the company. They clearly imply that when the transfer is certified to the secretary, the seller is relieved from all liability: and this involves a transfer of the liability to the purchaser, as an incident to the share. The last copartnership was, therefore, that com-

posed of those who were members and shareholders at the time of dissolution; and they were liable for the debts of the association beyond its assets. *Ma. Supreme Ct.* 1851, *Smith v. Virgin*, 33 *Me.* 148.

12. If by the articles of a trading association it appears that the society was designed to consist of many members, who might from time to time cease to be interested in the concern by voluntary withdrawal or death, and that the same business should be continued by those who should remain, and by such as might be added to their number under the articles, the death of one member does not relieve others from liability to contribute for debts subsequently contracted without their consent or knowledge. *Mass. Supreme Ct.* 1863, *Tyrrell v. Washburn*, 6 *Allen*, 466.

13. The constitution of a joint-stock association provided that each share should be \$500, and that each shareholder on engaging to render his personal services, should be entitled to another share. C. became a stockholder, but did not subscribe for personal services. He, however, authorized W. to act as his substitute, who was permitted to do so, but never subscribed; and soon deserted. Thereupon, in accordance with a provision of the constitution, C.'s interest in the association was declared to be forfeited. *Held*, that the substitution conferred upon W. no share in the stock, which could be forfeited by desertion, although such forfeiture had been declared by a unanimous vote of the company. *Me. Supreme Ct.* 1853, *Cox v. Bodfish*, 35 *Me.* 302.

14. Power to take by will. That unincorporated associations are not capable of taking property by will, for charitable purposes,—see *Baptist Association v. Hart*, 4 *Wheat.* 1; *Goesale v. Bimeler*, 5 *McLean*, 223; *Owens v. Missionary Society*, 14 *N. Y.* (4 *Kern.*), 880; *Green v. Allen*, 5 *Humph.* 170.

15. That a bequest or devise to such an association may be valid; or may be carried into effect indirectly,—see *Cahill v. Bigger*, 8 *B. Monr.* 211; *Preachers' Aid Society v. Rich*, 45 *Me.* 552; *Tucker v. Seaman's Aid Society*, 7 *Me.* 188; *Peabody v. Eastern Methodist Society in Lynn*, 5 *Allen*, 540; *Hamblett v. Bennett*, 6 *Allen*, 140; *McCartee v. Orphan Asylum Society*, 9 *Cow.* 437, 486; *Wright v. Methodist Ep. Ch.* 1 *Hoffm.* 202; *Zim-*

merman v. Anders, 6 *Watts & S.* 218; Pickering v. Shotwell, 10 *Pa. St.* 23; Evangelical Association's Appeal, 35 *Pa. St.* 315; Gibson v. McCall, 1 *Rich.* 174; Stone v. Griffin, 3 *Vt.* 400; Smith v. Nelson, 18 *Vt.* 511, 546.

16. Powers of officers and agents. A voluntary association—*a. g.* the order of Odd Fellows—cannot confer judicial powers on its officers or committees. The creation of judicial tribunals is one of the functions of the sovereign power, and an adjudication of such officers, as such, on rights of property, is not good as a judgment, nor, *it seems*, as an award. *N. Y. Ct. of Appeals*, 1857, Austin v. Searing, 16 *N. Y.* 112. Compare *supra*, 4, 5.

17. — to sue. That a cashier of an unincorporated banking association, holding a check for the use of the concern, may sue upon it in his own name,—see O'Brien v. Smith, 1 *Black*, 99.

18. Trustees de facto of a religious society, though it be not duly incorporated, have possession of the house under color of right, and may bring suit against a trespasser. *Supreme Ct.* 1832, Green v. Cady, 9 *Wend.* 414.

19. — to contract debts. As to the power of directors of a trading association to contract debts under peculiar articles of agreement,—see Tyrrell v. Washburn, 6 *Allen*, 466.

20. A Review was established by an association of shareholders, who passed certain written resolutions for its management and regulation. One of these provided for the appointment of a committee of shareholders to assist the editor in promoting the prosperity and circulation of the Review, and to obtain, as far as possible without expense, literary contributions, and to aid the editor as he might require in all matters connected with his department. *Held*, that this resolution did not empower one of the committee to contract for the supply of literary articles, or to bind the shareholders to pay for them when supplied and inserted in the Review. *O. P.* 1847, Herand v. Leaf, 17 *Law J.* 57.

21. That express proof is required of authority from the partners, or of a necessity to draw bills, in the conduct of the business, to justify directors in drawing bills on the credit of the association,—see Dickinson v. Valpy, 10 *Barn. & C.* 128; 5 *Mann. & R.* 126.

22. A certificate by the agent of an unin-

corporated banking company, that "M. had deposited with him \$480, in tickets, on deposit, subject to him only, on the return of the certificate," imports on its face no liability of the company. *Miss. Ct. of Errors*, 1845, Lake v. Munford, 4 *Smedes & M.* 312.

23. The articles of association of an unincorporated company provided that the agents and trustees should have no authority to bind it by any contract, unless containing a restriction that payment should be made solely out of the joint property of the association. The president made an oral contract with plaintiff for work to be done by him, without any such restriction. *Held*, that the contract was void, but that the company having had the benefit of the work, its members were liable to plaintiff for it on a *quantum meruit*. *N. Y. Superior Ct.* 1829, Sullivan v. Campbell, 2 *Hall*, 271.

24. — or incur expenses. Trustees of an unincorporated land company cannot be allowed in their account for expenditures made by them without authority from the company, although such expenditures greatly enhanced the value of the land. *Ala. Supreme Ct.* 1848, McKinley v. Irvine, 13 *Ala. N.S.* 681.

25. — after dissolution. After the dissolution of an unincorporated banking company, neither commissioners appointed to wind it up, nor their agents, have power to bind the members by any new engagement. *Miss. Ct. of Errors*, 1845, Lake v. Munford, 4 *Smedes & M.* 312.

26. After a manufacturing association had abandoned their enterprise, and all the other partners had determined to make no further advances, and to incur no further expense, a partner rendered services and incurred expenses tending to preserve the partnership building and to enhance its value. *Held*, that he could not be allowed therefor in the partnership accounting. *N. Y. Chancery*, 1824, Skinner v. White, *Hopk.* 107.

27. Their liabilities. The treasurer of a voluntary association for charitable purposes will be holden to account for the money in his hand, and to pay it over to those entitled to receive it according to the interests of the association. *Vt. Supreme Ct.* 1839, Penfield v. Skinner, 11 *Vt.* 296.

28. An agent of an unincorporated company, who does not disclose the fact of his agency at the time of making a contract for services to be rendered at a stipulated price,

is personally responsible therefor, unless by the subsequent facts, and the acts of the party who renders such service, in connection therewith, he has been discharged from such liability. *Mass. Supreme Ct.* 1862, *Hutchinson v. Wheeler*, 3 *Allen*, 577.

29. Suits between the association and its members. Inasmuch as, when the articles of association do not regulate the remedies of members as between themselves, the general law of partnership applies, an associate cannot maintain assumpsit for goods sold and delivered, against the association, neither can his assignee. *Cal. Supreme Ct.* 1858, *Bullard v. Kinney*, 10 *Cal.* 60.

30. Where an unincorporated joint-stock association is formed, and the members of it, by the articles of association, promise to pay the amount of stock by them severally subscribed, in calls to be made by trustees named in the articles, an action at law lies to enforce such promise, notwithstanding that both the plaintiffs and the defendants are members of the association, and consequently copartners. *N. Y. Supreme Ct.* 1838, *Townsend v. Goewey*, 19 *Wend.* 424.

31. That an action cannot be maintained by the treasurer of an association not incorporated, upon a written promise to pay money as a subscription, though payable to the "treasurer" of such association alone,—see *Ewing v. Medlock*, 5 *Port.* 82.

32. In a bill filed by a stockholder of an unincorporated company, for the settlement of its affairs, all the trustees should be made parties, or their representatives, if any be dead. *Ala. Supreme Ct.* 1848, *McKinley v. Irvine*, 18 *Ala.* 681.

33. A set-off in favor of a member of an unincorporated company, which has voted to close its business and divide its property, is not available in an action upon his note given to the treasurer, while the affairs of the association remain unadjusted. *Mass. Supreme Ct.* 1862, *Fargo v. Saunders*, 4 *Allen*, 878.

34. Suits against third persons. An unincorporated company cannot sue in the name of the trustees. *N. Y. Supreme Ct.* 1815, *Niven v. Spickerman*, 12 *Johns.* 401.

35. An unincorporated religious society may sue on a contract made with them in their associate capacity, and for the legitimate purposes of their association, though no persons are named as trustees or com-

mittee-men. *Pa. Supreme Ct.* 1853, *Phipps v. Jones*, 20 *Pa. St.* 260.

36. That one or more members of a very numerous association, unincorporated, may sue on behalf of all interested,—see *Dennis v. Kennedy*, 19 *Barb.* 517; *Wood v. Draper*, 24 *Barb.* 187; 4 *Abb. Pr.* 322; *Beekman Fire Ins. Co. v. First M. E. Church*, 29 *Barb.* 658; 18 *How. Pr.* 481; *Smith v. Logkwood*, 1 *Code R. N. S.* 819; 10 *N. Y. Leg. Obs.* 12.

37. An action cannot be maintained for the benefit of an unincorporated society in the name of a member, merely upon an allegation that the members are extremely numerous; but the complaint must set forth the articles of association to enable the court to determine whether they have a right of action in the case, and whether the plaintiff named has authority to sue for them. A statement that he is especially authorized to do so, is not enough. *N. Y. Superior Ct.* 1861, *Habicht v. Pemberton*, 4 *Sandf.* 657.

38. Proving the association. When a suit is brought by a creditor of a company, though the association was formed by contract in writing, or written articles of copartnership, the partnership may be proved by oral evidence of the actions, or declarations of the parties. But if the question be *inter se*, the only competent evidence of partnership is the articles themselves. *Vt. Supreme Ct.* 1852, *Cutler v. Thomas*, 25 *Vt.* 73.

39. Dissolution. A voluntary association for charitable purposes voted to transfer their funds to another society, appointed a committee to make the transfer, and ceased to meet for five years. *Held*, that the association was dissolved, and that subsequent proceedings were of no effect. *Vt. Supreme Ct.* 1839, *Penfield v. Skinner*, 11 *Vt.* 296.

40. Where a sale and distribution of the property in a certain period is positively provided for by private articles of association, any of the shareholders have a right to insist upon the sale and distribution according to the articles, though it may not be for the interests of the concern. *N. Y. Chancery*, 1847, *Mann v. Butler*, 2 *Barb. Ch.* 862.

41. Where such articles provide that the trustees shall sell the property, and convert the same into money, and close up the business within six years, the trustees should sell the lands held by them under such articles, at auction, if they cannot dispose of them for cash at private sale, after giving reasonable

notice to the shareholders, so that they may attend the sale and see that the property is not sold below its cash value; and the same disposition should be made of the bonds and mortgages, and other securities, if they can not be collected, or sold at private sale, within a reasonable time. *Id.*

42. That excluding a member from privileges of membership, or one elected a trustee from the exercise of his office, may be ground for decreeing a dissolution,—see *Gorham v. Russell*, 14 *Cal.* 531; 18 *Cal.* 688. *Berry v. Cross*, 3 *Sandf. Ch.* 1.

43. Application of assets. An association for purposes of mutual benevolence among its members only, is not an association for charitable uses. If not incorporated, its members are regarded in law as partners, in their relations to third persons, and the property of the association must be appropriated to pay the debts of creditors who are not members, before it can be applied towards payment of the claims of its members. *Pa. Supreme Ct.* 1835, *Babb v. Reed*, 5 *Rawls*, 151.

44. Individual liability of members. The members of an unincorporated association organized for carrying on a business without being incorporated, are liable, in general, as partners, to third parties, to the full extent of the indebtedness of the association.* *N. Y. Supreme Ct.* 1854, *Wells v. Gates*, 18 *Barb.* 554; *Vt. Supreme Ct.* 1852, *Cutler v. Thomas*,

* In England this general rule was at one time held applicable to persons who unite themselves for the purpose of obtaining incorporation (so to speak) as a joint stock company; and it was considered that each individual of such a preliminary association might be held liable, as a partner, for all the services employed or engagements made, by those who carried forward the necessary steps to procure incorporation. See *Wood v. Duke of Argyll*, 6 *Mann. & G.* 928; *Steigenberger v. Carr*, 8 *Mann. & G.* 191; *Upfill's case*, 14 *Jur.* 848; 2 *H. L. Cas.* 674.

But it has by later decisions been settled that there arises between those who unite merely in proceedings for the formation of a projected company, no relation of general partnership whatever, and no power to bind each other, for expenses incurred in carrying forward the enterprise. Each binds himself only, by his own acts and declarations, unless he acts by virtue of some authority conferred by the deeds of association. *House of Lords*, 1852, *Bright v. Hutton*, 3 *H. L. Cas.* 841; 19 *Eng. L. & Eq.* 1.

The directors and managing committee of such an intended company are, however, liable for services rendered to such an association, on their employment and credit; and so also are any other members of the association to whom employees are justified, by the terms of the association or by their own active agency in making engagements, in looking for compensation. *Q. B.* 1839, *Bell v. Francis*, 2 *Carr. & P.* 66.

25 *Vt.* 73. And see *Kearsley v. Codd*, 2 *Carr. & P.* 408 *n.*

45. Stipulations of unincorporated joint-stock companies, for the purpose of restricting the liability of shareholders, are of no avail; and whoever becomes a subscriber upon the faith of the restricting clause, or of the limited responsibility which that holds out, will have himself to blame, and be the victim of his ignorance of the known law of the land. *Chancery*, 1832, *Walburn v. Ingilby*, 1 *Mylne & K.* 61.

46. A number of persons signed a writing, commencing, "We, the subscribers, hereby form an association or company, for the purpose of establishing a scientific journal or paper." By this writing, three managers were appointed, who were authorized to establish and conduct the paper, when sufficient capital was subscribed, paid in, or secured. Materials necessary to establish the paper were purchased by an agent appointed by two of the managers. *Held*, that the subscribers to the writing were liable for the debt incurred, as partners, although it did not appear that the third manager conferred and acted with his associates. *N. Y. Supreme Ct.* 1854, *Wells v. Gates*, 18 *Barb.* 554.

47. Where an unincorporated association, carrying on a banking business, made promissory notes, which were expressed to be payable "out of their joint funds, according to the articles of association," and it appeared, in an action thereon, that they had no funds, and that the articles of association provided that such notes were to be paid in specie if convenient,—*Held*, that the members were individually liable, and that the clause mentioning the fund in the contract must be construed as directing the application as between themselves. *Pa. Supreme Ct.* 1818, *Hess v. Werts*, 4 *Serg. & R.* 356.

48. The members of an association are liable for goods furnished on the order of an agent of the association, if furnished with their concurrence and approbation. *Pa. Supreme Ct.* 1842, *Ridgely v. Dobson*, 3 *Watts & S.* 118.

49. A rented a room to an association of individuals at a monthly rent. After the contract, B became a member of the association, and, as such, used and occupied the room. *Held*, that B was not liable for the rent before or after he became a member, upon a count upon the special contract, or

upon an *indebitatus* or *quantum meruit* for work and labor done. *Tenn. Supreme Ct.* 1841, *Barry v. Nuckolls*, 2 *Humph.* 324.

50. A defendant who purchases a steamboat and has her repaired with the expectation of selling her to an association of which he and the plaintiff expect to become members, is liable for the repairs, unless by agreement the credit was to be given to the association. *Md. Ct. of Appeals*, 1860, *Wells v. Turner*, 16 *Md.* 133.

51. Persons admitted to be members, under articles of association of an unincorporated banking company, formed for the circulation of "change tickets," are not liable for tickets issued before they became members. *Miss. Ct. of Errors*, 1845, *Lake v. Munford*, 4 *Smedes & M.* 312.

52. The liability of individual members of an unincorporated joint-stock company, growing out of the association, must be determined by the law of the place where the association was formed, and where it had its place of business. But a bill of exchange drawn by the association may be governed by the laws of the place where it is made payable. *Vt. Supreme Ct.* 1852, *Cutler v. Thomas*, 25 *Vt.* 73.

53. Proof of membership. The appropriation of shares in a mining association to a party at his request, the payment of instalments on those shares, attendance at the counting-house of the association, and there signing some deed (not produced at the trial), and subsequent attendance at a general meeting of the shareholders (his conduct at which he was not allowed to show),—*Held* not enough to prove a party to be a partner. *K. B.* 1829, *Dickinson v. Valpy*, 10 *Barn. & C.* 128; 5 *Mann. & R.* 126.

54. Effect of subsequent incorporation of a voluntary association, upon its rights and powers in respect to previous dealings,—see *Inglis v. Sailors' Snug Harbor*, 3 *Pet.* 99; *Preachers' Aid Society v. Rich*, 45 *Ma.* 552; *Zimmerman v. Anders*, 6 *Watts & S.* 218; *Townsend v. Goewey*, 19 *Wend.* 424; *Davis v. Garr*, 6 *N. Y. (2 Seld.)* 124; *South Baptist Church v. Yates*, 1 *Hoffm.* 142.

55. Where an association became incorporated, and the corporation accepts a transfer of the property of the association, for the purpose of carrying out the same object, the corporation becomes liable for a debt of the association equitably chargeable on the

property. *Pa. Supreme Ct.* 1849, *Wesley Church v. Moore*, 10 *Pa. St.* 273; to nearly the same effect, *Chancery*, 1846, *Attorney General v. Corporation of Leicester*, 9 *Beav.* 546.

ATTACHMENT.

[This chapter embraces some general principles relative to attachment against the property of corporations, such as are incident to the nature of that proceeding, and are believed to be applicable wherever it is allowed. Space does not allow an endeavor to present the rules of procedure which govern the remedy, in the different States. For these rules the statutes and reports of the particular State, or the local works on remedies, should be consulted.

Attachments to punish the officers of a corporation for disobedience to a process are treated (so far as embraced within the scope of this work) under the name of the proceeding;—such as *ISJUNCTION*; *MANDAMUS*.]

1. When it may issue. That corporations, both foreign and domestic, are included under the general term "person," in a statute authorizing attachments,—see *Mineral Point R. R. Co. v. Keep*, 22 *Ill.* 9. Compare *Burns v. Provincial Ins. Co.* 13 *Abb. Pr.* 425; 35 *Barb.* 525.

2. An attachment may issue against a foreign corporation under an attachment law passed after the cause of action arose. It is not within the power of the legislature to take away vested rights, nor to create a cause of action out of an existing transaction, for which, at the time of its occurrence, there was no remedy; but it may, consistently with the constitution, alter, enlarge, modify, or confer a remedy for existing legal rights. Such statutes, relating only to the remedy, operate generally on existing causes of action, as well as those which afterwards accrue. *Ala. Supreme Ct.* 1857, *Coosa River Steamboat Co. v. Barclay*, 30 *Ala. N. S.* 120.

3. The corporation must be a defendant. Stockholders are distinct persons from the corporation, and legal proceedings against them cannot reach it or its assets. Hence, if an attachment is sued out in a proceeding in which the stockholders are made parties, but the corporation not, and is levied upon the effects of the corporation, no lien is acquired by virtue of the levy of said attachment. *Tenn. Supreme Ct.* 1858, *Lillard v. Porter*, 2 *Head*, 177. Compare *Thomas v. Merchants' Bank*, 9 *Paige*, 216.

4. What property may be levied on. The right of a foreign corporation to a deed from the sheriff, of land purchased by the corporation on sheriff's sale, may be attached. Such

a right is property. And where a foreign corporation had bought land on execution, and was entitled to a deed, and its interest in the land had been attached,—*Held*, that it could not relinquish its rights so as to defeat the lien of the attachment. *N. Y. Ct. of Appeals*, 1849, *Wright v. Douglass*, 2 *N. Y. (2 Comst.)* 373.

5. That property of a corporation which is not liable to be applied to the claims of an individual creditor, cannot be attached at his suit,—see *Ridge Turnpike Co. v. Peddle*, 4 *Pa. St.* 490.

6. When a statute provided that the State should subscribe for half the stock in all incorporated railroad and turnpike companies, and should have a lien on the property of the corporation to secure the payment of the other half of the stock by individual subscribers: *Held*, that the property of such a corporation was not attachable for its debts until the lien of the State was extinguished by payment for the stock. *Tenn. Supreme Ct.* 1844, *State v. Lagrange & Memphis Railroad*, 4 *Humph.* 488.

7. Effect of dissolution. Wherever a foreign attachment will lie against a corporation as defendant, civil death before judgment against it, produced by a decree of forfeiture of its charter by a judicial tribunal, dissolves the attachment. The primary intent being to procure an appearance, a foreign attachment is dissolved the instant the defendant has appeared, or lost his capacity to appear. *Pa. Supreme Ct.* 1844, *Farmers' & Mechanics' Bank v. Little*, 8 *Watts & S.* 207.

8. — or of transfer of assets to receiver. After the property of a foreign corporation has been transferred to a receiver, for the benefit of the creditors of the corporation, and the title thereto has become vested in the receiver, under an order of a court of the State where the corporation is situated, such property cannot be reached by an attachment in another State, as the property of the corporation. *N. Y. Chancery*, 1841, *Thomas v. Merchants' Bank*, 9 *Paige*, 215.

ATTORNEYS.

1. Seal when necessary to appointment, in England. That attorney to sue or defend for a corporation, should, in England, be constituted by an appointment under seal, as

a general rule,—see *Thames Haven Dock & Railway Co. v. Hall*, 5 *Mann. & G.* 274; *Regina v. Justices of Cumberland*, 17 *Law J. N. S. Q. B.* 102.

2. Attorney to sue or defend for an English municipal corporation not entitled to recover compensation for services under appointment, unless under corporate seal. See *Arnold v. Mayor &c. of Poole*, 2 *Dowl. N. S.* 574; 7 *Jur.* 658; 12 *Law J. N. S.* 97; 4 *Mann. & G.* 860; 5 *Scott N. R.* 741.

3. Statute salary. A statute prescribing the salary of "the attorney" of a State bank, will be construed only as fixing the compensation of the regular attorney elected as an officer of the bank; and not as restraining the directors, by implication, from employing additional attorneys in special cases. *Ala. Supreme Ct.* 1843, *State Bank v. Martin*, 4 *Ala. N. S.* 615. See also *Regina v. Prest*, 1 *Eng. L. & Eq.* 250; 15 *Jur.* 554; 20 *Law J. Q. B.* 17.

4. But a voluntary payment, by the corporate authorities, for such services, is not a misapplication of corporate funds. See *Regina v. Prest*, 1 *Eng. L. & Eq.* 250; 15 *Jur.* 554; 20 *Law J. Q. B.* 17.

5. A general retainer by resolution of a town council,—*Held* sufficient retainer to warrant the payment to the attorney of the costs of a successful defence of proceedings against the town. *Regina v. Lichfield*, 10 *Q. B.* 534.

6. Attorney for corporation, though not retained under seal, may nevertheless give a binding consent to a judge's order referring cause to arbitration. See *Faviell v. Eastern Counties Railway Co.* 2 *Exch.* 844, 17 *Law J. N. S. Exch.* 297.

7. Seal not necessary in the United States. A corporation can do an act *in pais* by means of an attorney in fact. Thus an attorney on behalf of a bank is competent to give the notice required by the statute of Alabama, providing for summary proceedings against debtors to banks. And such notice need not be under the seal of the bank. *Ala. Supreme Ct.* 1889, *Curry v. Bank of Mobile*, 8 *Port.* 360.

8. Authority from the president of a corporation to an attorney or solicitor to appear for the corporation, is sufficient to bind the corporation by the proceedings had by the attorney. The acts and assents of corporations, like those of individuals, when not

reduced to writing, may be inferred from other facts and circumstances without a violation of any known rule of evidence. And if the president exceeded his authority, in giving such power, the corporation should look to him for any damage it may have sustained by this act of his. *N. Y. Chancery*, 1842, *American Ins. Co. v. Oakley*, 9 *Paige*, 406; *S. P. Me. Supreme Ct.* 1849, *Lime Rock Bank v. Macomber*, 29 *Me.* 564; *N. H. Superior Ct.* 1817, *Eastman v. Coos Bank*, 1 *N. H.* 23.

9. To prove the withdrawal of a suit brought by a corporation, a vote of that corporation authorizing the withdrawal is not necessary; if the act be done by its agent or attorney, no other proof of authority will be required. *Conn. Supreme Ct.* 1841, *Union Manuf. Co. v. Pitkin*, 14 *Conn.* 174.

10. That the fact that the declaration, in a suit by a corporation, was signed and filed by an attorney at law for the plaintiff, is sufficient evidence that the plaintiff appeared, as a corporation must appear, by attorney,—see *State Bank v. Bell*, 5 *Blackf.* 127. See also *Brookville Ins. Co. v. Records*, 5 *Blackf.* 170; *Bridgton v. Bennett*, 23 *Me.* 422.

11. **Authority of city attorney or counsel.** Whether, in proceedings by or against a municipal corporation whose charter creates a law department as one branch of the municipal government, and provides for the designation of an official attorney or counsel for the city, the courts of New York will recognize any other person than such official attorney, who may claim to represent the city in a particular suit,—see *Mayor &c. of New York v. Exchange Fire Ins. Co.* 17 *How. Pr.* 880; *Parker v. City of Williamsburgh*, 13 *How. Pr.* 250; *Brady v. Mayor &c. of New York*, 1 *Sandf.* 562.

12. **His right in the office.** That a counsel to a municipal corporation has no such vested right in his office, during the term for which he is elected, as to render an ordinance abolishing the office void, for interfering with the obligation of a contract,—see *Primm v. City of Carondelet*, 23 *Mo.* 22.

13. **Town attorney.** When a town agent employs an attorney in a suit in favor of or against the town, the town is legally holden to pay the attorney's services, without an express vote to that effect; and the rule is the same, if the town agent, being himself an attorney, renders professional services for the

town. And if a town agent, being also an attorney at law, after his term as agent has expired, continues in the management of the suits in which the town are interested, without any objection from, or any express employment by the town or his successor, he is entitled to recover of the town for the professional services rendered after his term of office as town agent has expired. *Vt. Supreme Ct.* 1858, *Langdon v. Castleton*, 30 *Vt.* 285.

14. The town of C. held a public meeting in regard to the proposed alteration, by a railroad company, of the channel of a stream, and passed resolutions directing legal proceedings to be commenced against the company, to prevent such alteration. The plaintiff spoke at the meeting in favor of the resolutions, and said he would indemnify the town against all expenses arising from such legal proceedings, for six cents. It was the general expectation among the inhabitants of the town that the expenses of such legal proceedings would be borne by another railroad company, of which the plaintiff was a director, but there was no evidence that this expectation was based on anything said or done by the plaintiff or any one in behalf of that company. The officers of the town, in consequence of these resolutions, caused a bill for an injunction against the proposed alteration of the stream to be brought in the name of the town, in which the plaintiff, having subsequently been appointed town agent, rendered professional services for the town as a solicitor. *Held*, that the plaintiff was entitled to recover of the town for such services. *Ib.*

15. An offer by an agent, appointed by a town to prosecute and defend suits in which the town should be a party, of a certain sum in compromise of a suit against the town,—*Held*, not competent evidence against the town. See *Rollins v. Town of Chester*, 46 *N. H.* 411.

As to the rules governing appointment, powers, duties, and compensation of Attorneys of corporations, in common with other agents, see AGENTS.

How attorneys are to conduct Judicial proceedings, in which corporations, their clients, are parties, see SUITS, and the titles of various special proceedings: *e.g.* MANDAMUS; QUO WARRANTO.

BANKS.

[Throughout this work titles of particular kinds or classes of corporations, present, as a general rule, only matters presumed to be peculiar to the particular class mentioned. Rules which the reader would desire to consult with reference to corporations of more than a single class, are placed as far as possible under the appropriate general heads. Thus the decisions on bank *charters* which may be applicable to other corporations, are not under BANKS, but under CHARTERS; decisions on the execution, validity, interpretation &c. of *contracts* with banks, resting upon principles applicable to other corporate contracts, are under CONTRACTS and its co-related titles, such as ASSUMPTIONS; DEEDS; MORTGAGES; &c.; the general rights of banks in respect to PROPERTY, are treated under PROPERTY and titles there referred to; and the powers and duties of bank *officers*, except so far as they are peculiar to banks, are presented under the general head, OFFICERS, and the titles of the particular offices known in corporate organizations.

As this work is confined to the law of *Corporations*, much of the law of banking, considered as a vocation which might be carried on by a private individual or firm, equally as by a corporation, is excluded, or only very briefly indicated. Such matters should be sought for in works on *Contracts*. Our purpose is confined to a discussion of *Banks* considered as one species of corporations.]

I. THE FRANCHISE.

II. THE NATIONAL BANKING SYSTEM.

III. UNDER STATE BANKING SYSTEMS.

1. *Safety-fund acts.*
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IV. OFFICERS.

1. *Generally.*
2. *Directors.*
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V. BUSINESS AND DEALINGS.

1. *Generally.*
2. *Circulation.*
3. *Deposits.*
4. *Loans and discounts.*
5. *Collections.*
6. *Lien.*

VI. USAGES.

I. THE FRANCHISE.

1. What is "banking." Banking powers consist in the right of issuing notes,* making discounts, and receiving deposits. *N. Y. Supreme Ct.* 1824, *N. Y. Firemen Ins. Co. v. Ely*, 2 *Cow.* 678.

* As to what is meant by "banking,"—see also *United States Trust Co. v. Brady*, 20 *Barb.* 119; *Scott v. Depeyster*, 1 *Edw.* 518; *People v. Utica Ins. Co.* 15 *Johes.* 353; *Firemen Ins. Co. v. Sturges*, 2 *Cow.* 664; *Curtis v. Leavitt*, 15 *N. Y.* 9, 167; *Ohio Life Ins. & Trust Co. v. Debott*, 16 *How.* 416, 438; *People v. River Raisin &c. R. R. Co.* 12 *Mich.* 389; Act of Congress of July 13, 1866, § 9, 14 *U. S. Stat. at L.* 115.

2. The receiving of deposits by a chartered company, and loaning or investing the same for the benefit of depositors, is a business of banking. Banks, in the commercial sense, are of three kinds: 1. Of deposit; 2. Of discount; 3. Of circulation. It may be that all, or any two, of these functions, are exercised by the same association; but there are banks of deposit, without authority to make discounts, or issue a circulating medium. [*Ang. & A. on Corp.* § 55; *McCull. Com. Dic.* 78.] *U. S. Supreme Ct.* 1865, *Bank for Savings v. The Collector*, 8 *Wall.* 495.

3. Banking a common law right. When the constitution of a State does not restrict private banking, it may be carried on, as of right at common law, until forbidden by act of the legislature. *Ala. Supreme Ct.* 1840, *Nance v. Hemphill*, 1 *Ala. N. S.* 551.

4. Under the constitution of Indiana, no bank of issue can be established, except a State bank, and free or private banking institutions, pursuant to the general banking law of the State; and therefore an association of individuals for the purpose of banking, not in pursuance of any statute law, is illegal. The right to issue bills to circulate as money, is not a common law right. *Ind. Circuit Ct.* 1859, *Anderson v. Alexander*, 7 *Am. Law Reg.* 173.

5. At Common law, the right of banking in all its ramifications, belonged to individual citizens, and might be exercised by them at their pleasure. Undoubtedly, the sovereign authority may regulate and restrain this right. But a provision in the constitution of a State, which purports to be nothing more than a restriction on the power of the legislature in reference to banking, will not be construed, by the courts of the United States, in the absence of any declared policy of legislation or judicial decision in such State, to be intended as a restriction on the right of individuals or foreign corporations to deal in exchange. The effect of giving a restriction of this kind such a construction, would be that no individual citizen of the State could purchase a bill. And it will not be presumed that a State has intended, by its constitution, to prohibit its merchants and traders from purchasing or selling bills of exchange, and to make that business a monopoly in the hands of banks. *U. S. Supreme Ct.* 1839, *Bank of Augusta v. Earle*, 13 *Pet.* 516, 596.

For some account of the restrictions im-

posed by various State constitutions upon the powers of the legislatures in respect to banks in common with other corporations, see CONSTITUTIONS.

6. In New York, the common law right of banking has been, by statute, taken from individuals, and banking has been made a franchise derived from the grant of the Legislature.* *N. Y. Chancery*, 1817, Attorney General v. Utica Ins. Co. 2 *Johns. Ch.* 371; *N. Y. Supreme Ct.* 1818, *People v. Utica Ins. Co.* 15 *Johns.* 358. See *infra*, 64-69.

7. That the name "Bank" imports a corporation, and a statute referring to a bank by name, may be deemed a legislative recognition of its corporate existence—see *State v. Helmes*, 2 *Pennington*, 764.

As to what banking houses are deemed Corporations, and how banking corporations in common with other kinds should be Organized, see INCORPORATION; ORGANIZATION.

8. Power of Congress to create a bank. Congress has power to incorporate a bank, whenever such an institution is deemed the most appropriate means of carrying into effect any of the enumerated powers granted by the Constitution to the general government; and the degree of necessity for such a measure is a question of legislative discretion, not of judicial cognizance. *U. S. Supreme Ct.* 1810, *McCulloch v. State of Maryland*, 4 *Wheat.* 316; 1824, *Osborn v. Bank of the United States*, 9 *Wheat.* 738.

9. What enactments will confer "banking powers." A corporation whose charter, passed before the existence of any restraining acts, provides that "it shall be lawful for them to employ all such surplus capital as may belong or accrue to said company in the purchase of public or other stock, or in any other moneyed transaction or operation not inconsistent with the Constitution and laws of this State, or of the United States, for the sole benefit of said company;"—possesses banking powers; and even after the main object of their incorporation has been accomplished, they may continue the banking business. *So held*, where statutes passed subsequent to the charter recognized the corporation as a bank. *N. Y. Supreme Ct.* 1832, *People v. Manhattan Bank*, 9 *Wend.* 351, 383.

10. The right to make loans by way of

discount, and to lend upon bills, bonds, notes, and mortgages, is conveyed to a savings institution, by a clause in the charter conferring the power to invest deposits, made with it, in public stocks or other securities. *Md. Ct. of Appeals*, 1838, *Duncan v. Maryland Savings Institution*, 10 *Gill & J.* 299; and see *Gee v. Alabama Life Ins. & Trust Co.* 13 *Ala.* 579.

See CHARTER; POWERS.

11. What will not. A grant of a portion of the ordinary banking powers,—*e. g.* a grant to a life insurance and trust company, of a power "to buy and sell drafts and bills of exchange,"—does not confer the power to issue paper designed to circulate as money. *Ohio Supreme Ct.* 1830, *Matter of Ohio Life Ins. & Trust Co.* 9 *Ohio*, 291; *Md. Ct. of Appeals*, 1838, *Duncan v. Maryland Savings Institution*, 10 *Gill & J.* 299.

12. Incorporation for the sole purpose of insurance business, with power to invest capital in stocks, excludes, by implication, the power to discount notes by way of loan. *N. Y. Supreme Ct.* 1824, *N. Y. Fire Ins. Co. v. Ely*, 2 *Cow.* 679. And see *Utica Ins. Co. v. Scott*, 8 *Id.* 709.

13. The charter of an insurance company required its stock to be paid for in cash, and the capital to be invested in public stocks, or bonds and mortgages, before it should commence business; and in consequence of the difficulty of compliance with these requisites, an amendatory act was passed, enabling the president and directors to regulate the amount and terms of payment for the stock subscribed or to be subscribed, and the investment thereof. *Held*, that this did not confer banking powers, although there was no express prohibition in the original charter; mere authority to invest does not confer banking powers. *N. Y. V. Chan. Ct.* 1833, *Scott v. Depeyster*, 1 *Edw.* 513.

14. The charter of an insurance company, in authorizing the company to receive money on deposit, "and to give acknowledgments for deposits in such manner and form as they may deem convenient and necessary to transact such business," does not authorize the company to issue certificates of deposit to circulate as money, and with the intent that they shall so circulate. *Ala. Supreme Ct.* 1858, *Bliss v. Anderson*, 31 *Ala.* 612.

15. Banking powers, to be exercised by corporations, must be expressly granted; nor

* As to the power of a religious corporation in Ohio to engage in the business of banking,—see *Huber v. German Congregation*, 16 *Ohio St.* 371.

can they be inferred from such a general grant of power in the charter, as "to hold any estate, real or personal, and the same to sell, grant, dispose of, or bind by mortgage, or in such other manner as they shall deem most proper for the best interest of the corporation." *Ohio Supreme Ct.* 1841, *State v. Granville Alexandrian Society*, 11 *Ohio*, 1; *State v. Washington Social Library Co.* 11 *Ohio*, 96; and see *Blair v. Perpetual Ina. Co.* 10 *Mo.* 559.

16. A charter containing no allusion to banking powers does not confer them by implication from the fact that it creates a corporation with a money capital; and whether banking was or was not a franchise at the time is not material. *Ala. Supreme Ct.* 1828, *State v. Stebbins*, 1 *Stev.* 299.

17. A charter creating a library company a corporation and giving it a capacity of suing and being sued, a power to make by-laws, and the power to make contracts, and to dispose of any real and personal estate, in any mode the corporation may deem most proper, confers no authority to exercise the franchise of banking. *Ohio Supreme Ct.* 1841, *State v. Washington Social Library Co.* 11 *Ohio*, 96.

As to Banks for Savings, see SAVINGS BANKS.

II. THE NATIONAL BANKING SYSTEM.

18. **The statute.** The organization and conduct of national banks are chiefly regulated by the act of Congress of June 3, 1864, 13 *U. S. Stat. at L.* 99; and by regulations and decisions promulgated by the comptroller of the currency, to whom, by that act, the duty of superintending the execution of laws of Congress respecting the issue and regulation of a national currency secured by United States bonds, is entrusted.

The more important general provisions of that act, relating to the organization of national banks, are as follows:

19. **Associations authorized.** Associations for carrying on the business of banking may be formed by any number of persons, not less than five. They must enter into articles of association, stating in general terms the object for which the association is formed, and other provisions, adopted for the regulation of the business of the association and the conduct of its affairs, which articles shall be signed by the persons uniting to form the association, and a copy of them forwarded to the comptroller of the currency, to be filed and preserved in his office. Act of Congress of June 3, 1864, § 5. 113 *U. S. Stat. at L.* 99.

20. **Requisites of "organization certificate."** The associates must make, acknowledge and transmit to the comptroller an "organization certificate;" specifying, 1. The name of the asso-

ciation (which is subject to the approval of the comptroller); 2. Its proposed place of business; 3. The amount of its stock, and number of shares; 4. The names and residences of the shareholders and number of shares held by each; &c. *Ib.* § 6.

21. **The corporate powers defined.** An association formed under the act shall have power to adopt a corporate seal, and shall have succession by the name designated in the organization certificate, for 20 years, unless it is sooner dissolved or its franchise is forfeited. "By such name it may make contracts, sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons; it may elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss said officers or any of them at pleasure, and appoint others to fill their places, and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act; and its board of directors shall also have power to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed; and its usual business shall be transacted at an office or banking-house located in the place specified in its organization certificate." *Ib.* § 8.

22. **Suits against national banks.** National banks doing business in one State, are not, as such, exempt from liability to be sued in the courts of another State. The general provision of section 8,—that they may be sued in any court,—are not restricted by the permissive language of section 57,—that proceedings against them may be had in courts of the United States. The latter section was intended to give the federal courts jurisdiction they might not otherwise have had. *N. Y. Supreme Ct. Sp. T.* 1867, *Cooke v. State National Bank of Boston*, 3 *Abb. Pr. N. S.* 339.

23. **Qualifications and oath of directors.** "The affairs of every association shall be managed by not less than five directors, one of whom shall be the president. Every director shall, during his whole term of service, be a citizen of the United States; and at least three-fourths of the directors shall have resided in the State, Territory, or District, in which such association is located, one year next preceding their election as directors, and be residents of the same during their continuance in office. Each director shall own, in his own right, at least ten shares of the capital stock of the association of which he is a

director. Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this act, and that he is the bona fide owner, in his own right, of the number of shares of stock required by this act, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt; which oath, subscribed by himself, and certified by the officer before whom it is taken, shall be immediately transmitted to the comptroller of the currency, and by him filed and preserved in his office." *Id.* § 9. See, also, DIRECTORS.

24. Elections. "The directors of any association first elected or appointed shall hold their places until their successors shall be elected and qualified. All subsequent elections shall be held annually on such day in the month of January as may be specified in the articles of association; and the directors so elected shall hold their places for one year, and until their successors are elected and qualified. But any director ceasing to be the owner of the requisite amount of stock, or having in any other manner become disqualified, shall thereby vacate his place. Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election. If from any cause an election of directors shall not be made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if the election should not be held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise: *Provided*, That if the directors fail to fix the day, as aforesaid, shareholders representing two-thirds of the shares may." *Id.* § 10. See, also, ELECTIONS.

25. Votes. "In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such association shall act as proxy; and no shareholders whose liability is past due and unpaid shall be allowed to vote." *Id.* § 11.

26. Stock and stockholders. "The capital stock of any association formed under this act shall be divided into shares of one hundred dollars each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such

shares, and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired. The shareholders of each association formed under the provisions of this act, and of each existing bank or banking association that may accept the provisions of this act, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the comptroller of the currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this act: and if at any time there shall be a deficiency in said surplus of twenty per centum, the said banking association shall not pay any dividends to its shareholders until such deficiency shall be made good; and in case of such deficiency, the comptroller of the currency may compel said banking association to close its business and wind up its affairs under the provisions of this act." *Id.* § 12.

27. Increase or reduction of capital. "It shall be lawful for any association formed under this act, by its articles of association, to provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this act: *Provided*, That the maximum of such increase in the articles of association shall be determined by the comptroller of the currency; and no increase of capital shall be valid until the whole amount of such increase shall be paid in, and notice thereof shall have been transmitted to the comptroller of the currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association. And every association shall have power, by the vote of shareholders owning two-thirds of its capital stock, to reduce the capital of such association to any sum not below the amount required by this act, in the formation of associations: *Provided*, That by no such reduction shall its capital be brought below the amount required by this act for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the comptroller of the currency and his approval thereof obtained." *Id.* § 13.

28. Paying in the capital. Fifty per cent. of the capital stock must be paid in before the association is authorized to commence business; and the remainder at least as fast as ten per cent. on the whole amount, every month. *Id.* § 14.

29. "If any stockholder, or his assignee, shall fail to pay any instalment on the stock when the same is required by the foregoing section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous

notice thereof in a newspaper published and of general circulation in the city or county where the association is located, and if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, and not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be cancelled and deducted from the capital stock of the association; and if such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by this act, the capital stock shall, within thirty days from the date of such cancellation, be increased to the requirements of the act; in default of which a receiver may be appointed to close up the business of the association." *Ib.* § 15.

80. Securing the circulation. "Every association, after having complied with the provisions of this act, preliminary to the commencement of banking business under its provisions, and before it shall be authorized to commence business, shall transfer and deliver to the Treasurer of the United States any United States registered bonds bearing interest to an amount not less than thirty thousand dollars nor less than one-third of the capital stock paid in, which bonds shall be deposited with the Treasurer of the United States, and by him safely kept in his office until the same shall be otherwise disposed of, in pursuance of the provisions of this act; and the Secretary of the Treasury is hereby authorized to receive and cancel any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run; and the deposit of bonds shall be, by every association, increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount of at least one-third of its capital stock actually paid in." Provision for allowing associations to take up their bonds, on reducing their capital or closing their business. *Ib.* § 16.

81. Commencing business. Comptroller to examine the condition of each association; and may give it a certificate authorizing it to commence the business of banking. *Ib.* §§ 17, 18.

82. Transfer of securities. Mode of transferring bonds by banking associations, to fulfil the requirements of the law; and mode of recording assignments and transfers,—prescribed. *Ib.* §§ 19, 20.

83. Circulating notes, how issued. Upon the transfer and delivery of bonds to the treasurer, as provided in the foregoing section, the association making the same shall be entitled to receive from the comptroller of the currency, circulating notes of different denominations, in blank, "equal in amount to ninety per centum of

the current market value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of said bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum." *Ib.* § 21.

84. Limit prescribed to the amount of circulating notes which may be issued to any association, in proportion to the aggregate amount of its capital. *Ib.* § 21, as amended by act of April 6, 1865, 13 *U. S. Stat. at L.* 498.

85. "The entire amount of notes for circulation to be issued under this act shall not exceed three hundred millions of dollars." Authority to engrave and print circulating notes conferred. Their form and denomination. *Ib.* § 22.

86. "After any such association shall have caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association is hereby authorized to issue and circulate the same as money; and the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except for duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency. And no such association shall issue post notes or any other notes to circulate as money than such as are authorized by the foregoing provisions of this act." *Ib.* § 23.

87. Provision for supplying the place of worn out or mutilated notes; and for burning them. *Ib.* § 24.

88. Custody of securities. The bonds deposited with the Treasurer by any banking association for the security of its circulating notes, shall be held exclusively for that purpose, until such notes shall be redeemed, except as provided in this act; but the comptroller shall give to such association powers of attorney to receive to its own use the interest; but such powers shall become inoperative whenever such banking association shall fail to redeem its circulating notes. Whenever the market value of any bonds deposited shall be reduced below the amount of the circulation issued for the same, the comptroller is authorized to demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association, to be deposited with the Treasurer as long as the depreciation continues. Bonds deposited may be exchanged for others, on certain terms. *Ib.* § 26.

89. Powers in respect to real property. Any such association may purchase, hold and convey real estate, as follows:

"1. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"2. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"4. Such as it shall purchase at sales under judgments, decrees or mortgages held by such association, or shall purchase to secure debts due to said association.

"Such association shall not purchase or hold real estate in any other case or for any other purpose than as specified in this section. Nor shall it hold the possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years." *Ib.* § 28. See, also, PROPERTY.

40. — to loans. Not more than one-tenth of the capital may become loaned to any one person, company or firm, &c.; discounts of bills of exchange for value, and of business paper, not being deemed loans. *Ib.* § 29.

41. — to interest. "Every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest." *Ib.* § 30. See, also, INTEREST.

42. Reserve fund. Every association required to keep a reserve fund on hand. Its amount, and in what assets it may consist, prescribed. One half of it may be kept on deposit with an association designated in one of certain cities, by whom its notes will be redeemed. And every association under this act "shall take and receive at par for any debt or liability to said association, any and all notes or bills issued by any association existing under and by virtue of this act. *Ib.* §§ 31, 32; qualified as to assets in which the reserve fund may consist, by act of March 2, 1867; 14 *U. S. Stat. at L.* 558.

43. Dividends may be declared semi-annually; but one-tenth of profits must be carried to a surplus fund until it amounts to twenty per cent. of capital. *Ib.* § 33.

44. Reports. Associations must make quarterly reports to comptroller, according to form prescribed by him, which shall exhibit the resources and liabilities of the association, on the first Monday of January, April, July, and October. Penalty for failure to report. Provisions for publication of reports. In addition to these quarterly reports, "every association shall, on the first Tuesday of each month, make to the comptroller of the currency a statement, under the oath of the president or cashier, showing the condition of the association making such statement, on the morning of the day next preceding the date of such statement, in respect to the following items and particulars, to wit: average amount of loans and discounts, specie, and other lawful money belonging to the association, deposits, and circulation;" also amounts due, available for redemption of circulation. *Ib.* § 34.

45. Restrictions. Associations restricted in respect to lending upon or purchasing their own capital stock. *Ib.* § 35.

46. Or becoming indebted. *Ib.* § 36.

47. Or pledging or using their notes to pay, create, or increase their capital stock. *Ib.* § 37.

48. Or withdrawing their capital, in the form of dividends or otherwise. *Ib.* § 38.

49. Or paying out depreciated notes. *Ib.* § 39.

See, also, MONEYED CORPORATIONS.

50. Stock-list. List of names and residences of shareholders must be kept; subject to inspection of shareholders, creditors, and State tax-assessors; and a verified copy transmitted on the first Monday of July in each year, to the comptroller. *Ib.* § 40.

51. Provision for expenses of the bureau. Provisions for the collection of an annual tax from the associations, payable to the Treasurer of the United States, and applicable to expenses of the currency bureau. *Ib.* § 41.

As to Taxation of these banks, in general, see TAXATION.

52. Conversion of State banks.* State banks may become national associations under this act. The articles of association and organization certificate may be executed by a majority of the directors of the bank. The certificate shall declare that the owners of two-thirds of the capital stock have authorized the conversion. The shares shall continue to be for the same amount as they were before the conversion, and the directors may continue such until others are elected, &c. But no such association shall have a less

* The "Bank of Commerce," a corporation organized under the laws of Massachusetts, being summoned as trustee, denied that it had any goods &c. of the defendant in its hands; saying that prior to the service of the writ upon it, it had transferred all its funds to the "National Bank of Commerce," a corporation formed under the laws of the United States. An amendment was then allowed, changing the name of the supposed trustee to the "National Bank of Commerce." The latter corporation answered the process, saying that it had never been summoned as trustee, but that at the time of the service of the writ upon the Bank of Commerce it had funds of the defendant in its hands;—*Held*, that the National Bank of Commerce was chargeable as trustee, it having filed no plea in abatement. *Misc. Supreme Ct.* 1866, *Sears v. Columbian Ins. Co.* 12 *Alt.* 367.

See, also, SUCCESSION.

capital than the amount prescribed for banking associations under the act. *Ib.* § 44.

53. Agencies for the government. "All associations under this act, when designated for that purpose by the secretary of the treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the government, as may be required of them. And the secretary of the treasury shall require of the associations thus designated satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government: *Provided*, That every association which shall be selected and designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid in to the government for internal revenue, or for loans or stocks." *Ib.* § 45.

54. Proceedings in case of default to pay notes. Protest authorized to be made by a notary when any association makes default to redeem its circulating notes on demand. A copy to be forwarded to the comptroller. "And after such default, on examination of the facts by the comptroller, and notice by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits." *Ib.* § 46.

55. Authority conferred upon the comptroller to appoint an agent to ascertain whether the association has refused to pay its circulating notes; and, if satisfied it is in default, to declare the securities pledged by the association forfeited to the United States; and to give notice to the holders of circulating notes of such association to present them for payment at the treasury of the United States; and, as they are paid, to cancel an equal amount of the bonds pledged. Or the comptroller, instead of cancelling the bonds, may cause them to be sold, to redeem the circulating notes. *Ib.* §§ 46, 47, 48.

56. On becoming satisfied that an association has refused to pay its circulating notes, and is in default, the comptroller may appoint a receiver (with security) who, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to such association, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller of the currency, and also make

report to the comptroller of the currency of all his acts and proceedings. The comptroller shall cause advertisement to be made for claims against the association. And, from time to time, after provision is made for redemption of circulating notes, the comptroller shall make dividends out of the proceeds paid over to him by the receiver, on such claims as shall be proved; and the remainder of such proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. Provisions, however, enabling the association to litigate the question whether it has failed to redeem its circulating notes, before the nearest circuit, district or territorial court of the United States, by injunction suit against the comptroller. *Ib.* § 50. See DISSOLUTION; RECEIVER.

57. Transfers in contemplation of insolvency, void. All transfers of the notes &c. and other evidences of debt owing to any association, or of deposits to its credit; all assignments of mortgages &c. in its favor; all deposits of money &c. for its use or the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, declared void. *Ib.* § 52.

58. Violations of the law. Any violation of the act declared a ground of forfeiture of the franchises of the association, and of personal liability against every director participating in, or assenting to it. *Ib.* § 53.

59. Embezzlement of assets of association; or issuing its notes without authority; or making &c. without authority any certificate of deposit, order, bill of exchange, acceptance or assignment of evidence of debt, or any false entry in the books &c. of the association, with intent to defraud, when committed by any president, director, cashier, teller, clerk or agent of any association, declared a misdemeanor, punishable by imprisonment not less than 5 nor more than 10 years. *Ib.* § 55.

60. Jurisdiction of national courts. "Suits, actions, and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, however*, That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located." *Ib.* § 57.

61. Offences. Mutilating, or forging, counterfeiting &c. the notes of national banking associations; or uttering &c. forged notes as true; or engraving &c. plates like their notes,—how punished. *Ib.* §§ 58, 59, 60.

62. Who are stockholders. "Persons holding stock as executors, administrators, guardians, and trustees, shall not be personally subject to any

liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in said trust-funds would be if they were respectively living and competent to act and hold the stock in their own names." *Id.* § 63. See STOCKHOLDERS.

III. UNDER STATE BANKING SYSTEMS.

1. Safety-fund Acts.*

63. The New York safety-fund act was a general act, applicable to all moneyed corporations "hereafter to be created" within the State. It provided for the creating and keeping up a

* At the present time a great majority of the banks throughout the United States are conducted under the National Banking law; being either new banks organized under that law in the first instance, or State banks which have been converted into National banks under the provisions of section 44 of the act.

See *Homans' Merchants' & Bankers' Almanac*, for 1893, pp. 1-75, for a list of 1650 National banks in business, January, 1893, with statistics as to their location, chief officers, amount of capital, &c.; against only 270 banks still operating under State laws.

In consequence of this extensive and remarkable change in the banking business of the country, the decisions of the State courts in former years, upon the organization and corporate character and management of banks, will possess less general interest and value than formerly, unless there shall be, in future, some return to the State systems. In this work, decisions on banks conducted under special charters, are placed under general heads of law, where they may be useful as illustrating principles applicable to other corporations than banks. We give in the text a sketch of the "safety fund" and "free banking" systems, with many decisions under them adapted to illustrate the National Banking law.

In addition to the decisions cited in the text, reference may be made to the following cases depending more or less upon local or temporary laws, or on provisions of particular charters: *Banking laws*; their constitutionality, construction, &c. *Wilson v. Tesson*, 12 *Ind.* 285; *Green v. Graves*, 1 *Dougl.* 851; *Smith v. Barstow*, 2 *Dougl.* 155; *Falconer v. Campbell*, 2 *McLean*, 195; *White v. How*, 8 *McLean*, 111; *Newsmith v. Shelton*, 7 *How.* 819; *Blackney v. Farmers & Bank*, 17 *Serg. & R.* 64; *State v. Lehre*, 7 *Rich.* 284. *Organization of banks*; articles; capital; subscriptions; branch banks. *Charitable Society of Hartford v. Farmers' & Mechanics' Bank*, 26 *Conn.* 60; *State v. Bank of Charleston*, *Dudl.* 187; *McCulloch v. State of Maryland*, 4 *Wheat.* 316; *Osborn v. Bank of United States*, 9 *Wheat.* 736; *Murphy v. State Bank*, 2 *Eng.* 57; *Wallace v. State Bank*, *Id.* 61; *State v. Ashley*, 1 *Pike*, 518; *McNell v. Wyatt*, 8 *Humph.* 125; *Nashville v. Henderson*, 5 *Yerg.* 104; *State v. Thompson*, 27 *Mo.* 365; *Bank of the State v. Smith*, 33 *Mo.* 364; *Bank of Ulca v. Magher*, 18 *Johne.* 341. *Enforcement of bank obligations*; visitation by commissioners; periodical reports; taking security for circulation. *Colgin v. State Bank*, 11 *Ala.* 222; *Young v. Hughes*, 12 *Smed. & M.* 98; *Montgomery v. Commissioners of Banking Fund*, 7 *How. (Miss.)* 18; *People v. Campbell*, 14 *Ill.* 400; *Rich v. Shaw*, 10 *Shepl.* 243; *Townsend v. Smith*, 1 *Bond.* 350; *Collins v. Central Bank*, 1 *Kelly*, 425; *Conwell v. Hill*, 14 *Ind.* 121; *Ewing v. Robeson*, 15 *Ind.* 26; *Marine Bank v. Auditor of State*, 14 *Ill.* 185; *People v. Holmes*, 2 *Mc* 544; *People v. State Treasurer*, 4 *Mich.* 27. *Suits by and against banks*; and special remedies and proceedings allowed in them. *Logwood v. Huntsville Bank*,

fund, raised by prescribed contributions from the banks, to be equal ultimately to three per cent. on their capital, to be paid into the treasury of the State and held by the State as a "bank fund," inviolably appropriated and applied to the payment of the debts of any of the banks which might become insolvent. Meantime the fund was declared the property of the banks contributing to it, and any net income from it, was payable to them. Detailed provisions were made for ascertaining and discharging from the fund, debts of insolvent banks, and for winding up their business. Bank commissioners were constituted, whose duty it was made to inspect from time to time the affairs of the banks, according to directions given in the act. Banks were limited to a circulation not exceeding twice their capital; were required to have all their capital paid in before making any loans or discounts; were placed under special restrictions in respect to loans and discounts, and were forbidden to issue any bills or notes, except such as should be made payable on demand and without interest. *N. Y. Laws of 1829*, 167, ch. 94.*

64. New York restraining act of 1804. No person, unauthorized by law, can become a member of an association &c. or proprietor of any bank, or fund for issuing notes, receiving deposits, making discounts, or transacting other banking business. *N. Y. Laws of 1804*, 615; re-enacted 2 *Rev. L. of 1813*, 234, ch. 71, § 2.†

65. — of 1818. No person, association, or body corporate, to keep any office of deposit for discounting promissory notes, or for carrying on any kind of banking business, or to issue bills or promissory notes as a private bank, unless specially authorized by law. *N. Y. Laws of 1818*, 242, ch. 236, § 1.

66. Prohibitions of Revised Statutes. No corporation, not expressly incorporated for banking, possesses the power of discounting bills, notes, or other evidences of debt, of receiving deposits, of buying bullion and foreign coin, of buying and selling bills of exchange, or of issuing bills, notes, or other evidences of debt

Minor, 23; *Duncan v. Tombeckbee Bank*, 4 *Port.* 181; *Hancock v. Branch Bank*, 5 *Ala.* 440; *Ford v. Branch Bank*, 6 *Ala.* 286; *Leigh v. State Bank*, 10 *Ala.* 389; *Morgan v. Ramsey*, 15 *Ala.* 190; *Bussey v. Branch Bank*, 15 *Ala.* 316; *Jemison v. Planters' & Merchants' Bank*, 17 *Ala.* 754; *Stanley v. Bank of Mobile*, 23 *Ala.* 652; *Bank of Chillicothe v. Yoe*, 4 *Ham.* 125; *Bank v. Turner*, 3 *Marsh.* 567; *State v. Commercial & Railroad Bank*, 12 *Smed. & M.* 276; *Clinton Bank v. Hart*, 19 *Ohio*, 373. *Winding up the business of banks.* *Duncan v. Biscoe*, 2 *Eng.* 175; *Emerson v. Washington County Bank*, 11 *Shepl.* 445; *Bank of Circleville v. Iglehart*, 6 *McLean*, 568; *Miners' Bank v. Thomas*, 4 *Greene*, 336; *Commercial Bank of Natches v. Chambers*, 8 *Smed. & M.* 9.

* The "safety fund act" of 1839 was amended, and the banks subject to its provisions were further regulated by *N. Y. Laws of 1833*, ch. 374; 1835, ch. 307; 1837, ch. 74, ch. 102, ch. 305, ch. 450, ch. 476; 1840, ch. 18; 1841, ch. 292; 1842, ch. 247; 1843, ch. 218; 1845, ch. 114; 1846, ch. 97; 1847, ch. 419; 1848, ch. 344; 1849, ch. 97; 1850, ch. 382; 1851, ch. 197; 1854, ch. 138, ch. 243; 1857, ch. 370.

† By these restraining acts a monopoly of the business of banking within the State of New York was secured to the chartered and the safety-fund banks.

upon loan, or for circulation as money. 1 *N. Y. Rev. Stat.* 600, § 4.

67. No person, unauthorized by law, can become interested in any association or fund for the purpose of receiving deposits, making discounts, or issuing notes or other evidences of debt, to be loaned or put in circulation as money. No corporation, unauthorized by law, can employ effects or be interested in a fund for such purposes. Notes and securities, given in violation, void. 1 *N. Y. Rev. Stat.* 712, §§ 1, 3, 5.

68. No person, association of persons, or body corporate, except such bodies corporate as are expressly authorized by law, shall keep any office for the purpose of receiving deposits, or discounting notes or bills, or issuing any evidences of debt, to be loaned, or put in circulation as money; nor shall they issue any bills or promissory notes, or other evidences of debt as private bankers, for the purpose of loaning them, or putting them in circulation as money, unless thereto specially authorized by law. 1 *N. Y. Rev. Stat.* 712, § 6. See partial repeal, *infra*, 315.

69. Enforcement of restraining acts. An information in the nature of a *quo warranto* lies against an incorporated company, for carrying on banking operations without authority from legislature. *N. Y. Supreme Ct.* 1818, *People v. Utica Ins. Co.* 15 *Johns.* 358.

70. Contributions to the safety fund. Under both the act of 1829 and that of 1841 (*N. Y. Laws* of 1841, 380), a sum once designated &c. by the comptroller, must continue to be paid annually till the fund is reimbursed. An annual designation was not necessary. Continuing for several successive years to pay, without annually repeated notice, may be deemed as putting a practical construction on the law which binds the bank. *N. Y. Supreme Ct.* 1856, *People v. Walker*, 21 *Barb.* 630.

71. The provision requiring payment to be made, "on or before the first of January in each year," means that the payment may be made any indefinite time, no matter how long, before January 1st. The use of the words, "on or before" a particular day, implies that the ground or cause of payment, the consideration or indebtedness, was, prior to the limit, complete; so that a payment made on December 31st inures for the year then closed; it is not in advance for the coming year. *Id.*

72. Duties of the State. By the whole of the New York act providing for the creation of a safety-fund, and by all the subsequent provisions, in different statutes, relating to it, the State has taken on itself, by and through its public officers, such duties, and has such powers as make it, in law, trustee of

the whole fund, for the benefit of all who may have claims on it. And the State is the proper, and the only proper party plaintiff, in an action to enforce payments to the fund. *N. Y. Ct. of Appeals*, 1858, *People v. Walker*, 17 *N. Y.* 502.

73. Discounts. Paper discounted by directors of a safety-fund bank, in violation of the provision limiting interest taken on paper maturing in 63 days to six per cent., is void in their hands. *N. Y. Supreme Ct.* 1858, *Seneca Co. Bank v. Lamb*, 26 *Barb.* 595.

74. A special charter authorizing the bank to discount bills &c. and to make by-laws touching the time, manner, and terms &c. of discounts, does not exonerate the bank from the operation of the provisions of *N. Y. Laws* of 1829, 173, ch. 94, § 33, restricting discounts by moneyed corporations to six per cent. *Id.*

75. Continuing the business of a safety-fund bank more than ten days after payment of its protested draft for \$10,000 had been demanded at the bank and payment neglected,—*Held* a violation of its charter, notwithstanding that the cashier's neglect to pay it was based on the erroneous information that the president had made arrangements to pay it elsewhere. *N. Y. Chancery*, 1837, *Bank Commissioners v. Bank of Buffalo*, 6 *Paige*, 497.

76. Power to decree dissolution. Under the safety-fund act, the court of chancery had power to decree a dissolution of a company whose board of directors had violated the provisions of their charter restricting the amount of loans or discounts made to directors, or had authorized or permitted the officers of the bank to violate the same. *Id.*

77. Commissioners' petition. It is no objection to a petition of the bank commissioners created by the New York safety-fund act, presented in the names of all, by one of them, as solicitor for all, that it does not appear that all met and consulted on the propriety of proceeding. *Id.*

78. The Vermont act. That under the Vermont banking law of 1831, the entire safety-fund was made liable for the payment of all the debts of any insolvent bank, exclusive of capital stock, without reference to the time when the debts accrued, or when the insolvency accrued, or at what time any particular bank began to contribute,—see *Elwood v. Treasurer of Vermont*, 28 *Vt.* 701.

79. When a contributing bank in Vermont ceases to do business in consequence of its insolvency, the bank fund of the State then becomes chargeable for the indebtedness of the corporation in excess of its property and effects, and it becomes the duty of the State treasurer to pay over such amount to the receiver, upon the order of the court of chancery. *Vt. Supreme Ct. 1866, Receiver of Danby Bank v. State Treasurer, 39 Vt. 92.*

80. The bank fund of Vermont is a specific fund in which the State has no property. Therefore, upon petition of a receiver of an insolvent bank for a writ of *mandamus* to compel the treasurer of the State to pay over said fund pursuant to a chancery decree, the order should not require him to pay to the receiver any money of the State as distinguished from the bank fund. Nor should it require him to pay money of his own, on the ground of his having subjected himself to liability for the deficit of that fund, by reason of his having wrongfully paid it over to banks not entitled to it. *Id.*

81. Under section 87, ch. 84, p. 495, of the Compiled Laws of Vermont, providing that a bank, on giving certain bonds, shall be exempt from payments required to be made to the "bank fund," and from all provisions for its establishment, preservation and regulation,—*Held*, that the bond required is a mere substitute for the liability and duty of the bank to pay in towards the bank fund, for its creation or replenishment; and the giving of such bond has no effect upon the fund already accumulated, nor upon the right of the bank to draw out its proportionate share. *Id.*

82. A bank was in business several years without contributing to the bank fund, the directors giving bonds instead for the security of the bills and deposits. After 1856, the directors did not give bonds but paid into the fund; *Held*, that the liability of the fund attached at once upon the failure of the directors to give bonds. *Vt. Supreme Ct. 1865, Danby Bank v. State Treasurer, 37 Vt. 541.*

2. Under Free Banking Laws.

83. The New York free banking law. The free banking law of New York State was originally passed in 1838; but was amended in many details by subsequent statutes. Upon the system introduced by the whole legislation on the subject, taken together, any individual or association might engage in banking upon the condition of first depositing with the State comptroller

stocks of the United States or of New York State, or bonds and mortgages on real property, of a certain value; on depositing which, they might receive from the comptroller a corresponding amount of circulating notes, numbered, registered and signed. The securities were held by the bank department of the State, as a means of paying the notes, in case of insolvency of the bank. Upon its closing business, and paying its circulation, the securities became returnable to it.* *N. Y. Laws of 1838, 245, ch. 260; amended, 1840, ch. 363; 1841, ch. 56, ch. 319; 1844, ch. 41, ch. 281; 1847, ch. 160; 1848, ch. 340; 1849, ch. 313; 1850, ch. 251; 1851, ch. 68, ch. 203; 1854, ch. 185, ch. 242; 1857, ch. 103, ch. 189.* Many auxiliary enactments were also passed; the more important of which are mentioned in the text, §§ 84–91, 116.

84. Periodical reports required. Every company, association, individual banker, and savings bank, required to publish annual statement and make report. *N. Y. Laws of 1835, 302, ch. 262, amended by Laws of 1839, ch. 347; Laws of 1849, ch. 437; Laws of 1843, ch. 218; Laws of 1847, ch. 419; Laws of 1853, ch. 250.*

85. Redeeming agents. Banks, banking associations, and individual bankers to appoint redeeming agents. *N. Y. Laws of 1840, 154, ch. 202, amended 1851, 375, ch. 203.*

86. List of stockholders. Banking corporations and associations directed to keep a list of stockholders &c. which shall be presumptive evidence of the facts required to be entered therein, in proceedings under the act to enforce responsibility of stockholders. *N. Y. Laws of 1849, 340, ch. 226; Laws of 1859, 880, ch. 365.*

87. Bank department organized and regulated. *Laws of 1851, 309, ch. 164; 1857, ch. 103; 1859, 503, ch. 236; 1854, 551, ch. 242.*

88. Consolidation of banking associations authorized. *N. Y. Laws of 1862, 755, ch. 422.*

89. The securities hereafter to be deposited with the superintendent of the banking department for notes for circulation, shall be not to exceed two-thirds in United States stocks, and not less than one-third in stocks of this State. *N. Y. Laws of 1863, 436, ch. 241.*

90. Number of directors. Any banking association, whose articles of association do not prescribe as to the number of directors necessary to constitute a quorum, and make no provision for determining the same, may, by its direction, fix the number necessary, which shall not be less than five. *N. Y. Laws of 1863, 35, ch. 22.*

91. Redemption of securities. Whenever any banking association, individual banker, receiver of a banking association, assignee, or assignees of an individual banker, shall have given notice to the superintendent of their intention to close the business of banking; or the trustees or legal representatives of any incorporated bank whose

* The substantial principles of the New York free banking law were adopted by many other States. By Michigan in 1849; New Jersey in 1850; Virginia, Illinois, Ohio, Vermont, 1851; Indiana, Tennessee, 1853; Louisiana, 1853; Wisconsin, 1854; Missouri, 1856; Iowa, 1856; Minnesota, 1853. We give in the text such cases from any of these States, as are capable of useful application to questions arising upon the operation of the National Banking law.

charter has expired, or the receiver of any incorporated bank, which shall have been declared insolvent, shall have redeemed at least seventy-five per cent. of the largest amount of circulating notes outstanding at any time, as shown by the books of the bank department—they may deposit with the superintendent money equal to the amount of their outstanding circulation, upon which the superintendent may give up all other securities theretofore deposited with him for the redemption of circulating notes issued thereon. *N. Y. Laws of 1859*, 503, ch. 236, § 1, subd. 1, as amended, *Laws of 1866*, 791, ch. 348, § 1.

92. The distinction between the system of banking established in the State of New York by the act of 1838 and that previously established—explained.* *Curtis v. Leavitt*, 15 *N. Y.* 9, 78.

93. Corporate character of banking associations. Associations formed for banking purposes under the New York general act of 1838 are corporations. *N. Y. Ct. of Appeals*, 1860, *Robinson v. Bank of Attica*, 21 *N. Y.* 406;† *Ill. Supreme Ct.* 1860, *Metropolitan Bank v. Godfrey*, 23 *Ill.* 579.

94. Thus the prohibition of 1 *N. Y. Rev. Stat.* 603, § 4,—that no incorporated company shall make an assignment in contemplation of insolvency,—applies to associations organized under the general banking law. *N. Y. Ct. of Appeals*, 1860, *Robinson v. Bank of Attica*, 21 *N. Y.* 406.

95. That such associations are taxable as corporations,—see *Bank of Watertown v. Assessors of Watertown*, 25 *Wend.* 686 & 1 *Hill*, 616; *People v. Supervisors of Niagara*, 4 *Hill*, 20, & 7 *Hill*, 504.

96. The provisions of the New York Revised Statutes, in relation to “moneyed corporations,” have no application to banking associations organized under the general act of 1838. The regulations for the purpose of preventing the insolvency of moneyed corporations are entirely unsuited to the free bank-

ing system. Under this system, the sole object of the legislature was to secure the currency which these institutions might put in circulation. This object was accomplished, not by regulations to prevent insolvency, which had been tried and found ineffectual, but by requiring adequate security, beforehand, for all the circulation which any individual or association might be allowed to issue. The very structure of the general banking act shows that the legislature could not have intended that associations formed under that law should be subject to the statutes then in force, relating to a very different class of moneyed institutions. They intended to introduce a new and independent system of banking, and to establish, for the government of institutions organized under such new systems, new and independent regulations, and to leave all previous statutes relating to moneyed corporations to be applied to the chartered banks then in existence. [Approving 15 *N. Y.* 9, 78, 182; and overruling 3 *N. Y.* (3 *Comst.*) 489; 7 *N. Y.* (3 *Seld.*) 328; and 13 *N. Y.* (3 *Kern.*) 114.] *N. Y. Ct. of Appeals*, 1858, *Leavitt v. Blatchford*, 17 *N. Y.* 521. To the same effect is *Tracy v. Talmage*, 18 *Barb.* 456. To the contrary were *Mabey v. Adams*, 3 *Bosw.* 346; *Leavitt v. Tylee*, 1 *Sandf. Ch.* 207; *Leavitt v. Yates*, 4 *Edw.* 184. And see *Matter of Bank of Dansville*, 6 *Hill*, 370; *Leavitt v. Blatchford*, 5 *Barb.* 9.

97. Banking associations made subject to the provisions of *N. Y. Rev. Stat.* 595, art. 2, entitled, Regulations concerning election of directors of moneyed corporations. 1 *N. Y. Laws of 1847*, 154, ch. 160, § 1.

98. The United States Trust Co. of New York is not a corporation created for banking purposes within the meaning of art 8, § 4, of the constitution of the State. The word “banking” is there used in its familiar and popular sense; and means that business which might be carried on by banking associations under the general law. The duties of the Trust Company are prescribed by the second section of its charter, which does not include banking powers. *N. Y. Supreme Ct.* 1855, *United States Trust Co. of N. Y. v. Brady*, 20 *Barb.* 119.

99. — of individual bankers. A private banker, though carrying on business under the act of 1838, is not a corporation; and the provision of the act of 1835 (*Laws of 1835*, ch. 307, § 1)—making it unlawful for “any moneyed corporation” to charge, or in any

* See a full account of both systems, and a collection of the statutes and principal cases, in *Cleveland's Banking Laws*, 2d ed. 1864.

† Previous New York cases to the same effect are *Thomas v. Dakin*, 23 *Wend.* 9; *Talmage v. Pell*, 9 *Paige*, 410; *Willoughby v. Comstock*, 3 *Hill*, 389; *Matter of Bank of Dansville*, 6 *Hill*, 370; *Bolsigerard v. N. Y. Banking Co.* 3 *Sandf. Ch.* 23; *Case v. Mechanics' Banking Association*, 1 *Sandf.* 493. See to the contrary, *Warner v. Beers*, 23 *Wend.* 103; *Gifford v. Livingston*, 2 *Den.* 380; *Farmly v. Tenth Ward Bank*, 3 *Edw.* 395.

Whether the associations contemplated by the Michigan banking law of 1837, are corporations,—see *Green v. Graves*, 1 *Dougl.* 361; *Nesmith v. Esheldon*, 7 *How.* 312; *Falconer v. Campbell*, 2 *McLean*, 195; *White v. How*, 3 *McLean*, 111.

manner receive, the premium of exchange on any draft made by such corporation, which shall be used or applied in payment of any bill, note, or other demand, due to, or discounted by, such corporation—does not apply to an individual banker. *N. Y. Supreme Ct.* 1850, *Cuyler v. Sanford*, 8 *Barb.* 225.

100. An individual banker, under the New York act of 1838, is not a corporation. There is no provision for succession; the heir or legatee may continue his business [Laws of 1837, ch. 189], and the banker may sell the business [Laws of 1854, ch. 242]. The business is his individual affair, and he may sue in relation to it in his individual name.* *N. Y. Ct. of Appeals*, 1859, *Codd v. Rathbone*, 19 *N. Y.* 37.

101. Associations are not subject to safety-fund act. Banking associations, formed under the New York act of 1838, are not subject to the provisions of the safety-fund act (Laws of 1829, ch. 94, *supra* 63), and therefore are not affected by the provisions of that act, which prohibit the issuing of "bills or notes," unless payable on demand, and without interest, and restrict the interest to be reserved on discounts. Though the terms of the first section of the act of 1829 are sufficiently comprehensive to include them, the total incompatibility of the provisions imply an exception. *N. Y. Ct. of Appeals*, 1857, *Curtis v. Leavitt*, 15 *N. Y.* 9, 171; 1859, *International Bank v. Bradley*, 19 *Id.* 245.

102. The organization certificate. *It seems*, that until the certificate required by section 16 of the New York banking associations act of 1838—which prescribes that the associates shall make a certificate, stating their names, residence, associate name, place of business, capital &c.—is made, there is no legal institution existing,† and those who do not unite in the certificate, are not members of the association. *Burrows v. Smith*, 10 *N. Y.* (6 *Seld.*) 550.

103. Where the statute requires the certificate to be signed by the stockholders, one signed by the directors only is insufficient, and

the proceedings, though in good faith, are void; and a bond and mortgage given by one of the officers to the company to secure a stock subscription cannot be enforced. *N. Y. A. V. Chan. Ct.* 1843, *Valk v. Crandall*, 1 *Sandf. Ch.* 179.

104. In an action by a banking association in New York, the original certificate recorded in the county clerk's office, with proof that the association had done business and issued bills which were countersigned, is sufficient evidence of its due organization, without direct proof that the certificate was filed in the banking department of the State. *N. Y. Ct. of Appeals*, 1862, *Leonardsville Bank v. Willard*, 25 *N. Y.* 574.

105. From the time a certificate is made, acknowledged, and recorded, pursuant to the act, every individual is precluded from denying its legal or corporate existence in any suit or controversy whatever. *N. Y. Superior Ct.* 1849, *Palmer v. Lawrence*, 3 *Sandf.* 161.

106. Second certificate supersedes the first. If a certificate, executed under section 16, is abandoned by the association, and a new and different certificate executed, and the organization takes place under the latter, the association cannot hold the subscribers under the provisions of the former. *N. Y. Ct. of Appeals*, 1853, *Burrows v. Smith*, 10 *N. Y.* (6 *Seld.*) 550.

107. Actual payment of the capital is not required to precede the making and filing of the certificate. The whole capital of an association must be paid, or secured to be paid, when it is organized; but it is secured to be paid in the sense of the law, by force of the subscriptions of the associates, just as certainly as if each had given his note or bond for the amount of his shares. *N. Y. Superior Ct.* 1849, *Palmer v. Lawrence*, 3 *Sandf.* 161.

108. Security for subscriptions for stock. That it is competent to a banking association formed under the general act of 1838, to take a security—*e. g.* a mortgage—for the payment of a subscription to the stock,—see *Curtis v. Swartwout*, 1 *N. Y. Leg. Obs.* 406; *Valk v. Crandall*, 1 *Sandf. Ch.* 179.

109. Conditional security. The subscribers for shares executed mortgages to the banking association upon the promise of the association to remove certain incumbrances on the lands mortgaged; and the mortgages were delivered to the attorney of the association, with the agreement that they were not to be

* See also *Bank of Havana v. Magee*, 20 *N. Y.* 355; *Hallett v. Harrower*, 33 *Barb.* 587; and INCORPORATION.

† In the case of *Taylor v. Hutton*, in the Supreme Court of New York in 1864 (13 *Abb. Pr.* 16), it was *Held*, that under the National Banking law of 1863, the articles of association, when approved by the comptroller of the currency, are in the nature of a charter; and that the directors have power to remove the president and any other officers at pleasure, and to fill their places and vacancies in the board.

used unless the incumbrances were removed. The bank never removed them, nor treated the mortgagors as shareholders in any way. *Held*, that the receiver of the bank could not maintain an action to foreclose the mortgages. 1. The delivery was conditional. 2. The mortgages were not received in payment of stock. *N. Y. Ct. of Appeals*, 1858, *Burrows v. Smith*, *N. Y.* (6 *Seld.*) 550.

110. Mortgage given before due organization. The defendant C. and a number of other persons intending to organize a banking association, signed articles of association and subscribed for stock, and chose directors, who elected a president, pursuant to the articles. The directors signed, sealed, acknowledged, and recorded a certificate of organization, instead of this being done by the shareholders, as required by section 16 of the act of 1838, and the defendant executed his bond and mortgage for his stock in the name of the president of the bank as mortgagee, C.'s wife uniting in the mortgage with him. Subsequently, the shareholders met and signed a certificate as required by the statute, but C. did not sign it. This certificate was duly filed, and the bank regularly organized; and for three years thereafter, C. paid his semi-annual interest. *Held*, that as against C., the bond and mortgage was valid. 1. Though they were executed before the association was in existence, the subsequent recognition by C. of the association by payment of interest, amounted to a re-delivery. 2. In the absence of proof that C. received no shares in the association, they were not to be deemed as executed without consideration. 3. That as against C.'s wife, who was not an associate, the mortgage was void. As to her, it was a mortgage to a fictitious person, which her husband had subsequently delivered to a person in being; and her interest in the lands was unaffected by such a mortgage. *N. Y. A. V. Chan. Ct.* 1848, *Valk v. Crandall*, 1 *Sandf. Ch.* 179.

111. Capital. In general, the capital stock of a bank is a trust fund for the payment of the note-holders and creditors of the bank. *Miss. Ct. of Errors*, 1845, *King v. Elliott*, 5 *Smedes & M.* 428; *Ga. Supreme Ct.* 1858, *Schley v. Dixon*, 24 *Ga.* 273; *U. S. Circ. Ct. Ma.* 1824, *Wood v. Dummer*, 3 *Mas.* 308.

112. The right of the stockholders, as against bill holders, is not to the capital stock, but to the residuum after all demands

on it are paid. Thus, where an incorporated bank divided three-fourths of its capital stock, before the expiration of its charter, among the stockholders, without providing funds which proved sufficient to pay its outstanding bank notes:

Held, 1. That the capital stock was a trust fund for the payment of the bank notes, and might be followed into the hands of the stockholders.

2. That a bill in equity for such purpose might be maintained by some of the holders of the bank notes, against some of the stockholders, the impossibility of bringing all before the court being sufficient to dispense with the ordinary rule of making all parties in interest parties.

3. That in such case, the decree against the stockholders before the court should be only for the contributory share of the debt, in the proportion which the stock held by them bore to the whole capital stock. *U. S. Circ. Ct. Ma.* 1824, *Wood v. Dummer*, 3 *Mas.* 308. To nearly same effect is *Schley v. Dixon*, 24 *Ga.* 273.

113. In Mississippi the payment of its capital stock, *in specie*, is an essential requisite to the existence of a bank; a general law requiring the capital of all banks to be thus paid in. Thus where the charter of a banking company enacted that the subscribers should pay at the time of subscription, twenty dollars on each share taken, *in specie*, or in the notes of specie paying banks, and was silent as to how or when the residue of the stock should be paid, but conferred all the usual rights, powers, and privileges of banking which were exercised by other banks in the State: *Held* that the residue of the capital stock was payable by the stockholders in specie only. *Miss. Ct. of Errors*, 1845, *King v. Elliott*, 5 *Smedes & M.* 428.

114. Transfers of the corporate stock. The stockholders, in associations organized under the New York banking law, have the general right to transfer their stock, free from any restriction, except such as may be imposed by the original articles of association. *N. Y. Ct. of Appeals*, 1859, *Bank of Attica v. Manufacturers' & Traders' Bank*, 20 *N. Y.* 501.

115. Associations may purchase public stocks. An association formed under the New York act of 1838, may, for the purpose of transferring the same to the comptroller, as security for circulating notes, lawfully ac-

quire title to State stocks and bonds and mortgages. Though the power is not conferred in express terms, it is plainly implied. Such securities may be purchased by the association with the capital paid in by the shareholders or other funds of the institution, and there is no objection to shareholders making payment for the stock they receive on subscription in the same manner. The terms on which these securities should be received in payment for stock, so as to make the same equal to cash, and therefore just between the several associates and shareholders, is material and important among themselves, but cannot affect the capacity of the association thus to acquire such property, or the validity of the title conveyed upon such consideration and for such purpose. *N. Y. Supreme Ct. 1844, Comstock v. Willoughby, Hill. & D. Supp. 271, 301; S. P. N. Y. V. Chan. Ct. 1843, Leavitt v. Yates, 4 Edw. 184, 164.*

116. Incorporated banks, banking associations, and individual bankers, authorized to become owners of any stock of the United States or of the State of New York. *N. Y. Laws of 1862, 181, ch. 62, § 1.*

117. May not traffic in stocks. Banking associations formed under the New York act of 1838, possess only authority to carry on the business of banking in the manner and with the powers specified in that act. They have no power to purchase State or other stocks, for the purpose of selling them for profit, or as a means of raising money, except when such stocks have been received in good faith, as security for a loan made by, or a debt due to, such association, or when taken in payment, in whole or in part, of such debt. *N. Y. Ct. of Appeals, 1852, Talmage v. Pell, 7 N. Y. (3 Seld.), 828; Bank Commissioners v. St. Lawrence Bank, 7 N. Y. (3 Seld.), 518; 1856, Tracy v. Talmage, 14 N. Y. (4 Kern.), 162. To the same effect, N. Y. V. Chan. Ct. 1843, Leavitt v. Yates, 4 Edw. 184, 166.*

118. Securing the bill holders. That the notes or bills of a bank, which form the common currency or circulating medium of a country, should be protected in preference to every other class of bank debts; and by § 3 of the Georgia act of 1842, for winding up insolvent banks, are expressly directed to be first paid off and redeemed,—see *Robinson v. Bank of Darien, 18 Ga. 65.*

119. Collection of the securities. That a bank cannot maintain an action upon a security which it has assigned to the State treas-

urer, under a State banking law,—see *South Royalton Bank v. Downer, 28 Vt. 635.*

120. When a mortgage or other security is transferred to the comptroller under the New York act of 1838, the legal title becomes vested in him, and he may on default foreclose it. The right to foreclose a mortgage or collect a security is incident to the ownership. *N. Y. Ct. of Appeals, 1854, Flagg v. Munger, 9 N. Y. (5 Seld.), 488.* See to the same effect, under the banking law of New Jersey, *Townsend v. Smith, 1 Beasl. 350.*

121. Transfers of them. A transfer by the comptroller, either directly or indirectly, to any other person than the person or association by whom they were transferred (except by sale on failure to redeem notes), cannot be sustained. Where M. furnished the president of a banking association with its circulating notes, to an amount equal to a certain bond and mortgage held by the comptroller; and the president, acting for M., surrendered them to the comptroller, and received from him an assignment of the bond and mortgage to himself, and delivered them to M., but without assignment from the bank;—*Held*, that M. had no title to them, and could not maintain a foreclosure suit. Such a transaction cannot be deemed a sale by the bank to M. *N. Y. Ct. of Appeals, 1852, Mitchell v. Cook, 7 N. Y. (3 Seld.), 538.* And see *Valk v. Crandall, 1 Sandf. Ch. 179.*

122. One who has given a security to a private bank, which has in turn deposited the same with the comptroller, to secure the redemption of the notes of the bank, and who thereafter pays an amount due on the security to an officer of the bank, though not the owner of the bank, with intent to have the amount paid credited upon such security, is not entitled to be protected in such payment, as against an innocent assignee of the security from the comptroller. *N. Y. Supreme Ct. 1858, Mitchell v. Cook, 17 How. Pr. 110.*

123. Though the comptroller cannot transfer a security, deposited with him, to a person other than the depositor, notwithstanding he is paid the amount for which the security was deposited, a third person may afterwards, by virtue of a previous agreement to purchase, on the consideration paid to the comptroller, perfect his title by a reassignment from the owner after the comptroller has assigned to him. *Id.*

124. Redemption of them. Where a bank,

organized under the Ohio act of March 21, 1851, has done, and continues to do, all the acts necessary to perfect and maintain its organization in pursuance of said act, and has also complied with the provisions thereof to entitle itself to notes of circulation, which the auditor of State refuses to give, a writ of *mandamus* is the proper remedy. *Ohio Supreme Ct.* 1856, *Citizens' Bank of Steubenville v. Wright*, 6 *Ohio St.* 318.

125. **Embezzlement of them.** A public officer who holds securities deposited with him by a bank for the redemption of its issues, is not liable to the bank for embezzling them, unless the bank suffers pecuniarily by his act. *Ind. Supreme Ct.* 1858, *State v. Dunn*, 10 *Ind.* 269.

126. That a bank organized under the general banking laws of Illinois, which has filed a certificate of its desire to withdraw its notes from circulation, is nevertheless liable to answer for deposits subsequently received, unless the depositor knew of the filing of the certificate.—see *Northern Bank of Illinois v. Zepp*, 28 *Ill.* 180.

127. **Liquidation.** That an appointment of a receiver suspends the bank's corporate functions; and statute damages for allowing bills to be protested cannot be recovered after that time,—see *Sanford v. Kentucky, &c. Bank*, 1 *Metc. (Ky.)* 106.

128. That assignees of a bank in liquidation (under the laws of Illinois) are not bound to sell assets to the person who first offers to pay the appraised value,—see *Atwood v. Caldwell*, 12 *Ill.* 96.

IV. OFFICERS.

1. Generally.

129. **Their power to bind the bank.** That the officers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of their business; and their acts within the scope of such usage &c. will, in general, bind the bank, in favor of third persons possessing no other knowledge,—see *Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46.

For cases sustaining this and other rules stated under this head, in relation to **Officers** of corporations generally, see **OFFICERS**.

130. The authority of officers of banks is restricted to such modes of binding the company as result from the nature of their duty

and the powers vested in them by their offices. The property of stockholders is not bound by the irregular transactions, or by the declarations or confessions of their officers, beyond the legal sphere of their action. *Mass. Supreme Ct.* 1817, *Wyman v. Hallowell & Augusta Bank*, 14 *Mass.* 58; 1820, *Salem Bank v. Gloucester Bank*, 17 *Mass.* 1, 29.

131. The officers of a bank have no authority to bind the bank as an indorser for accommodation; and such indorsement is void in the hands of every one who has notice that it is for accommodation. *N. Y. Ct. of Appeals*, 1855, *Bank of Genesee v. Patchin Bank*, 13 *N. Y. (8 Kern.)* 309; *S. C.* again, 19 *N. Y.* 312.

132. That the officers of a bank have no power to pledge the corporation for their individual engagement,—see *Austin v. Daniels*, 4 *Den.* 299.

133. **Liability of the bank for their frauds.** A bank is a corporation which can only act by agents; all the transactions of the bank, in buying or selling, borrowing and lending, every act by which they can convey property or acquire it, must be done by agents. When any one of these transactions is of such a character, that false representations, practice of fraud, or knowledge of fraud practised by another, would avoid the transaction, if done by an individual, it will equally affect a corporation, if done or had by the agent in the same transaction for a corporation. *Mass. Supreme Ct.* 1858, *Atlantic Bank v. Merchants' Bank*, 10 *Gray*, 532.

134. An action of *assumpsit* was brought against a bank, to recover the amount of a large special deposit in gold, which had been fraudulently or feloniously taken from the vaults of the bank by the cashier and chief clerk, and converted by them to their own uses. There was no evidence of gross neglect on the part of the bank,—the directors, who represented the company, being wholly ignorant of the nature or amount of the deposit, or of the transactions of the cashier and chief clerk, and these having no right, *in the course of their official employment*, to intermeddle with the deposit, except to close the doors of the vault upon it when banking hours were over: *Held*, that the bank was not liable for the loss, inasmuch as it only warranted the skill and faithfulness of its officers *in their employments*, and not their *general honesty*

and uprightness. *Mass. Supreme Ct.* 1821, *Foster v. Essex Bank*, 17 *Mass.* 479.

135. — or mistakes. A bank is liable for the fraud or mistakes of its cashier or clerk, in the entries in its books, and in the false accounts of deposits. *Mass. Supreme Ct.* 1820, *Salem Bank v. Gloucester Bank*, 17 *Mass.* 1; *Gloucester Bank v. Salem Bank*, 17 *Mass.* 33; 1821, *Foster v. Essex Bank*, 17 *Mass.* 479.

136. That a bank is liable for the mistakes of its officers,—see *Andrews v. President, &c. of Suffolk Bank*, 12 *Gray*, 461.

137. Liability for acts of president and cashier. A president or cashier cannot charge a bank with any special liability for a deposit, contrary to its usage, without the previous authority or subsequent assent of the corporation. *Mass. Supreme Ct.* 1821, *Foster v. Essex Bank*, 17 *Mass.* 479.

138. The president and cashier of a banking corporation have no power *virtute officii* to make any assignment of the corporate property requiring the use of the corporate seal, without the assent and authority of the board of directors, where the charter creates or provides for such a board and intrusts the management of the affairs of the corporation to such board. *N. Y. Ct. of Appeals*, 1851, *Hoyt v. Thompson*, 5 *N. Y.* (1 *Seld.*) 320. Compare a further decision in this case, *sub nom.* *Hoyt v. Shelden*, 3 *Bow.* 267, 285.

139. The president and cashier of a bank, and a "finance committee" of the board of directors, as such merely, have no power to execute a mortgage of the lands of the corporation, without the concurrence of the board of directors. *N. J. Chancery*, 1832, *Leggett v. New Jersey Banking Co.* 1 *Sant.* 541.

140. Therefore, where such mortgage was executed by such officers of a banking corporation without the authority of the directors, to whom, by the charter, the management of its affairs was committed, the mortgage was held to be void, although, in fact, the management of its affairs was committed, for the most part, to the president and cashier. *Id.*

141. — of treasurer. An agreement by an officer of a bank to give notice to a surety in case of a default on the part of the makers of a note pledged as collateral, does not bind the bank in the absence of some authority, either express or implied, conferred upon such

officer to make the agreement. *N. H. Superior Ct.* 1844, *New Hampshire Savings Bank v. Downing*, 16 *N. H.* 187.

142. Where the by-laws of a bank relative to loans made on personal security alone, prescribe that the treasurer shall notify the principal and sureties, personally or in writing, of any dues unattended to, and require prompt payment of the same, an omission of this duty does not discharge the sureties upon a note due to such bank. *Id.*

143. — of manager. The local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account, that higher interest might be obtained for her money if she purchased two houses for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She assented, and gave him her deposit note, for which he gave her a fresh deposit note for the difference between the amount of the former note and the purchase-money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss. Held, in an action against them, that they were liable; the jury having found that the manager intended and induced the lady to believe that he was acting as the agent of the bank; and, having also found that, as local manager, he had authority from the bank to make an assignment of an equitable mortgage. *Exch.* 1854, *Thompson v. Bell*, 26 *Eng. Law & Eq.* 536; 10 *Exch.* 10.

144. — of notary. A bank, when responsible for the acts of its notary. *Gerhardt v. Boatman's Savings Institution*, 38 *Mo.* 60.

145. Redress from unfaithful officer. Bank officers are but agents of the corporation, and, if they transcend or abuse their powers, are as much responsible to their principal as the agent of an individual is to him. *N. Y. Supreme Ct.* 1847, *Austin v. Daniels*, 4 *Den.* 299. And see *Franklin Ins. Co. v. Jenkins*, 3 *Wend.* 130.

146. That where an officer of a bank fraudulently abstracts the funds, and invests them in his own name, the court can not declare him a trustee, and indemnify the bank out of the investment—see *Pascoag Bank v. Hunt*, 3 *Edw. Ch.* 583.

As to the proper mode for bank officers to authenticate contracts to bind the bank, see CONTRACTS.

As to Bonds given by bank officers, see SECURITY.

2. Directors.

147. Election. The courts have no power to set aside an election of trustees or directors in a New York banking association. Such officers may be removed at the pleasure of the associates. *N. Y. Supreme Ct.* 1844, *Matter of Bank of Dansville*, 6 *Hill*, 370.

148. Organization of the board. A New York banking association formed under the general law of 1838, may, by its articles of association and by-laws, divide the business it is authorized to transact into several distinct departments, and constitute a separate board of directors for each department; or may intrust to a separate committee of the directors the exclusive charge of each department, clothing that committee with all the powers of a board, in relation to the business which its department embraces. *N. Y. Superior Ct.* 1849, *Palmer v. Yates*, 3 *Sandf.* 137.

149. By articles of association, the directors as a board were authorized to make such by-laws, rules, and regulations for the management of the business of the company, and the government of themselves, their officers, and agents, as they might think expedient, not inconsistent with law and the articles of association. The by-laws which they made declared that the business of the company should be conducted under two divisions: the first to embrace the business relating to bonds, mortgages, and other securities, and the second the business of discount and deposit; and also established two departments corresponding with the divisions, and placed them under distinct committees.

Held, 1. That such a system was neither inconsistent with law nor with the articles of association; that this provision was intended to cover the whole business of the company, and that the business of the first department included the transfer and assignment as well as the taking of mortgages and other securities.

2. That under such a division of the business, a resolution of the committee of investments and finance must be deemed a "resolution of the board of directors," within the meaning of 1 N. Y. Rev. Stat. 591, relating to moneyed corporations. *Id.*

150. Powers. A board of bank directors

is a body recognized by the law; and does not exercise a *delegated* authority in the sense of the rule which forbids an agent, without express power so to do, to delegate his authority. By the by-laws of banking corporations, and by a usage so general and uniform as to be regarded as part of the law of that State, bank directors have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation. Accordingly directors of a bank may not only mortgage its real estate to secure a debt due from the bank, but may delegate such an authority to a committee of their own number. *Mass. Supreme Ct.* 1840, *Burrill v. Nahant Bank*, 2 *Metc.* 163.

151. The directors of a bank alone have power to make discounts and fix any conditions which may be proper in loaning money. *U. S. Supreme Ct.* 1832, *Bank of United States v. Dunn*, 6 *Pet.* 51; *N. Y. Chancery*, 1837, *Bank Commissioners v. Bank of Buffalo*, 6 *Paige*, 497.

152. The directors of a bank are its agents, held out to the public as possessing the power, according to the general usage, practice, and course of business in banks, to issue bills, and their fidelity in the discharge of this duty is impliedly warranted. Consequently the bank is bound, notwithstanding an over issue, to redeem the bills thus put into circulation, when in the hands of innocent holders; as are also stockholders, who have guaranteed the ultimate redemption of the bills issued by the bank. *Ga. Supreme Ct.* 1855, *McDougald v. Bellamy*, 18 *Ga.* 411.

153. The authority of banks to borrow money under the general banking laws of New York, must be exercised by the directors, who are mere agents for the shareholders, and are to exercise their powers for the benefit of the shareholders, within the legitimate business of banking. If this power be improperly exercised, the shareholders and others interested in the bank will not be liable to the lenders of money. *N. Y. V. Chan. Ct.* 1843, *Leavitt v. Yates*, 4 *Edw.* 184.

154. Where a surrender of a bank charter had been accepted by the legislature, but the corporate existence of the bank was continued for a limited time, to enable it to close its affairs, it was *held*, under the general banking law of Maine, that the directors

might legally elect a cashier. *Ms. Supreme Ct.* 1849, *Cooper v. Curtis*, 30 *Ms.* 488.

155. The directors of a bank have power to authorize the president and cashier to borrow money or obtain discounts for the use of the bank. *Pa. Supreme Ct.* 1835, *Ridgway v. Farmers' Bank*, 12 *Serg. & R.* 256.

156. The directors of a bank have authority to make a settlement with the cashier, whose accounts exhibit a deficit in the funds. *Ms. Supreme Ct.* 1844, *Frankfort Bank v. Johnson*, 24 *Ms.* 490.

157. But their fraudulent conduct, in making a settlement with the cashier, would not annul or make the settlement void, unless the cashier was also guilty of fraud. *Id.*

158. That the board of directors of the Bank of the United States have power to assign its property and effects in trust, to pay certain preferred creditors, without the authority of its stockholders,—see *Dana v. Bank of United States*, 5 *Watts & S.* 223.

159. That one director cannot bind a bank by contract, without express authority from the board,—see *Harper v. Calhoun*, 7 *How. (Miss.)* 203.

160. Liability. The liability of the directors of a bank, under the act of Michigan of Mar. 15, 1837, for debts incurred in violation of the statute—explained. *White v. How*, 8 *McLean*, 111.

161. That a proceeding by the bank commissioners under that statute is no bar to an action against the directors to make them personally liable; all that the holders of the notes could claim from such a proceeding, would be a *pro rata* payment of the assets,—see *Id.*

As to the Directors in corporations generally, see BOARD; DIRECTORS.

3. The President.

162. His power to take an assignment. Under the provisions of the New York general banking law, an assignment to the president, as such, of a banking association is equivalent to an assignment to the association itself by name. *N. Y. Superior Ct.* 1854, *Leavitt v. Fisher*, 4 *Duer*, 1.

163. — to transfer assets. The president of such an association is the person to whom mortgages for shares should be made payable, and he is the proper person to assign the same; and (although his assignment would be good without seal) he may assign under

his own instead of the corporate seal. *N. Y. A. V. Chan. Ct.* 1843, *Valk v. Crandall*, 1 *Sandf. Ch.* 179.

164. The president of a bank may transfer, by his endorsement, a note made payable to the corporation, if he has a general authority for that purpose from the directors; and the seal of the corporation need not be affixed to the transfer, nor a particular vote therefor be passed. *Mass. Supreme Ct.* 1814, *Spear v. Ladd*, 11 *Mass.* 94; *Northampton Bank v. Pepoon*, 11 *Mass.* 288.

165. — to sign checks. In the absence of the regular cashier, a person was appointed to discharge the duties of cashier; yet, notwithstanding this, upon proof of a general custom for the president of a bank to sign checks &c. in the absence of the cashier,—*Held*, that a check which the president had signed was binding upon the bank. *Tenn. Supreme Ct.* 1858, *Neiffer v. Bank of Knoxville*, 1 *Head*, 162.

166. — to receipt for deposits. A receipt signed by the president of a bank, without the addition of his name of office, for money "to be deposited in the bank to the credit of A," is admissible as evidence (though not conclusive) from which the jury may presume that the money went to the use of the bank. *Pa. Supreme Ct.* 1824, *Sterling v. Marietta & Susquehanna Trading Co.* 11 *Serg. & R.* 179.

167. — to authorize use of bank funds. The president and the cashier of a bank were engaged in establishing a new banking association, and purchased State stocks for the purpose, on credit, and assumed to give the security of the bank of which they were officers for it. Subsequently the cashier, with the assent of the president, took money of the bank in order to pay for it. *Held*, that the cashier was liable to the receiver of the bank for the amount. The assent of the president could afford no protection to him. *N. Y. Supreme Ct.* 1847, *Austin v. Daniels*, 4 *Den.* 299.

168. — to sue and defend. It is to be presumed that the president of a bank has authority to institute and carry on proceedings for the collection of demands due to the bank; and to appoint an attorney therefor. *N. Y. Chancery*, 1842, *American Ins. Co. v. Oakley*, 9 *Paige*, 496; *N. Y. Supreme Ct.* 1848, *Mumford v. Hawkins*, 5 *Den.* 355.

169. A banking association organized un-

der the New York banking law of 1838, may be sued (or sue) in the name of its president;* but in such suit the debt or contract must be laid as that of the corporation, not as that of "the defendant." *N. Y. Supreme Ct.* 1840, *Delafield v. Kinney*, 24 *Wend.* 345; 1848, *Ogdensburgh Bank v. Van Rensselaer*, 6 *Hill*, 240. Compare *Hunt v. Van Alstyne*, 25 *Wend.* 605.

As to powers, duties &c. of Bank presidents in common with similar officers of other corporations, see **PRESIDENT**.

170. **His compensation.** There is no implied contract on the part of a banking corporation, whose objects are partly charitable, to pay for official services rendered to it by its president. Nor is such contract established by proof that the president informally mentioned to some of its directors that he should expect compensation, and that they made no reply. *Mass. Supreme Ct.* 1863, *Sawyer v. Pawnors' Bank*, 6 *All.* 207.

4. The Cashier.

171. **General definition of his powers.** The cashier of a bank is the regularly authorized agent thereof, and whatever is done by him in that capacity, within the scope of his duties, is the act of the bank. *Pa. Common Pleas*, 1846, *Bank of Kentucky v. Schuylkill Bank*, 1 *Pars. Sol. Cas.* 180, 243; *Me. Supreme Ct.* 1847, *Badger v. Bank of Cumberland*, 26 *Me.* 428.

172. The cashier is the executive officer of the bank, by whom its debts are received and paid, and its securities taken and transferred, and his acts, to be binding upon the bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank, when they have been deposited, and, as the executive officer of the bank, transacts most of its business.

* A verdict in the president's name, in such a case, sustained by disregarding words of description,—see *Penta v. Beckett, Hill & D. Supp.* 118.

The phrase "ordinary duties," as thus used, does not comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the customary way. Nor has it ever been decided that a cashier could purchase or sell the property of, or create an agency of any kind for a bank, without authority so to do. *U. S. Supreme Ct.* 1858, *United States v. City Bank of Columbus*, 21 *How.* 356.

173. Where the cashier of a bank wrote to the secretary of the treasury of the United States, saying that the bearer of the letter, who was one of the directors, was authorized to contract for the transfer of moneys for the government; but, in fact, this act of the cashier was unknown to the board, and the director bearing the letter was not authorized by them,—*Held*, that the transaction was not within the scope of the powers of the cashier, and not being authorized by the directors, the bank was not liable for money which the secretary of the treasury advanced to be transferred, and which the bank never received from the director. *So held*, notwithstanding the cashier was the officer who kept the minutes of the meetings of the board, and his letter stated that the bearer was a director, and was "authorized on behalf of this institution." *Id.*

174. The acts of the cashier or other officer of a bank, within the scope of the general usage, practice, and course of business of banking institutions, are binding on the corporation in favor of third persons transacting business with it, and who did not know, at the time, that the officer was transcending his authority. *Pa. Supreme Ct.* 1850, *Lloyd v. West Branch Bank*, 15 *Pa. St.* 172.

175. **Restriction.** The acts of a cashier of a bank are only binding upon the bank when he acts within the sphere of his agency. If there be no express regulation or restriction, all acts which appertain to his office will affect the bank; if he be restricted or limited, his acts in violation of the restriction, or beyond the limit, will not be the act of the bank. Presumptively, the acts of a cashier in the discharge of his ordinary duties are binding on the bank; if there is any special restriction, the corporation must show it. *Miss. Ct. of Errors*, 1846, *State v. Commercial Bank*, 6 *Smedes & M.* 218.

176. **Extension.** Where the directors of a bank allow its cashier to conduct all its business without interference, for several years together, they thereby confer upon him authority, as to third persons, to transact any business on behalf of the bank which he is not prohibited by its charter from transacting. *N. Y. Superior Ct.* 1859, *City Bank of New Haven v. Perkins*, 4 *Bow.* 420.

177. That the extent of the general authority of a cashier of a bank is a question of law,—see *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 *Dougl.* 457; *Peninsular Bank v. Hanmer*, 14 *Mich.* 208.

178. **Form of address, indorsement or signature.** The usage is universal for the presidents and cashiers of incorporated companies, acting as the executive officers and agents of such companies, to make, in their behalf, indorsements and transfers of negotiable paper by simply indorsing their names, with the addition of their titles of office. Such an indorsement is sufficient to transfer the note to the indorsee, so that the latter can maintain an action thereon in his own name. *U. S. Cir. Ct. N. Y.* 1856, *State Bank of Ohio v. Fox*, 3 *Blatchf.* 481.

179. The indorsement of negotiable paper by the cashier of a bank by writing his name on the back of it, with the addition of the name or designation of his office merely, without writing the words "for the bank of," &c. is a sufficient indorsement by the bank to charge it as indorser. Such an indorsement by the cashier sufficiently shows that it was made in behalf of the bank; and if that were not sufficiently certain, the holder has a right to prefix the name of the corporation. *N. Y. Supreme Ct.* 1864, *Robb v. Ross County Bank*, 41 *Barb.* 586. See, also, *Bank of Genesee v. Patchin Bank*, 18 *N. Y.* (8 *Kern*), 309.

180. Where the marks of an official character predominate upon the instrument, it is not necessary to the validity of the act of countersigning, that the cashier should add to his name his official character as cashier. *N. Y. Supreme Ct.* 1820, *Jackson v. Claw*, 18 *Johns.* 346.

181. Where a check was signed by the cashier of a bank, without the addition of the word "cashier" to his name, dated at the bank, and made payable to its teller, it appearing doubtful upon the face of the instrument whether it was a private or an official act;—*Held*, that parol evidence was admissible to show that it

was an official act, though the check was credited on the books of the bank to the cashier's private account. *U. S. Supreme Ct.* 1820, *Mechanics' Bank v. Bank of Columbia*, 5 *Wheat.* 326. To the same effect, *Ga. Supreme Ct.* 1846, *Merchants' Bank v. Central Bank*, 1 *Kelly*, 418. And see *Farmers' & Manufacturers' Bank v. Haight*, 3 *Hill*, 498, 495; *McWhorter v. Lewis*, 4 *Ala.* 198; *Cahill v. Kalamazoo Mutual Insurance Company*, 2 *Dougl.* 124; *Ghent v. Adama*, 2 *Kelly*, 214.

For illustrations of these rules, together with the cases on the general subject of the Execution of contracts negotiated by agents of corporations, see *CONTRACTS*.

182. **His power to indorse and transfer negotiable paper.** In the absence of any proof that the charter of a bank contains any restriction on the power of the bank to negotiate or indorse notes or bills of exchange, or on the authority of its cashier to indorse such negotiable paper for the bank, the presumption is that the bank has power, and its cashier authority, to indorse such paper. *N. Y. Supreme Ct.* 1864, *Robb v. Ross County Bank*, 41 *Barb.* 586.

183. Since the cashier of a bank is, by virtue of his office, generally entrusted with its securities and funds, and held out to the world as its general agent, he has *prima facie* authority to transfer and indorse, on behalf of the bank, negotiable securities held by it.* No special authority to do so need be shown, and any restriction upon this authority must be proved. *U. S. Cir. Ct. Ma.* 1825, *Wild v. Bank of Passamaquoddy*, 3 *Mass.* 505.

184. The cashier of a bank is usually considered the executive officer through whom, and by whom, the whole of the moneyed operations in paying or receiving debts, dis-

* In earlier cases in Massachusetts it was said that neither a president nor a cashier has, *ex officio*, authority to transfer the property or securities of the company; but must have an express authority to that effect, proved by a vote of the corporation, or of the directors. *Hallowell & Augusta Bank v. Hamlin*, 14 *Mass.* 180; *Hartford Bank v. Barry*, 17 *Id.* 94. The general current of the American authorities is, however, (as respects transfers made in the ordinary course of banking business, of negotiable securities owned by the bank, and such as banks ordinarily deal in,) accordant with the cases stated in the text. See, in addition, *Lafayette Bank v. State Bank of Illinois*, 4 *McLean*, 203; *Ridgway v. Farmers' Bank of Bucks County*, 12 *Serg. & R.* 265; *Bank of Kentucky v. Schuylkill Bank*, 1 *Pars. Sel. Cas.* 243; *Stamford Bank v. Benedict*, 15 *Conn.* 445; *Crockett v. Young*, 1 *Smed. & M.* 241; *State v. Commercial Bank of Manchester*, 6 *Smed. & M.* 227; *Carey v. Giles*, 10 *Ga.* 9; *Ryan v. Dunlap*, 17 *Ill.* 40.

charging or transferring securities, are conducted. It would not seem too much to infer, in the absence of any positive restrictions, that it is his duty to apply as well the negotiable funds as the moneyed capital of a bank, to discharge its obligations. And hence a transfer of paper by his indorsement for the use of the bank may be, in the absence of evidence to the contrary, regarded as within his powers. *U. S. Supreme Ct. 1828, Fleckner v. Bank of United States, 8 Wheat. 338.*

185. The cashier of a bank is, by virtue of his office, intrusted with the notes, securities and other funds of the bank, and is held out to the world by the bank, as its general agent in the negotiation and management of them. Hence *prima facie* he must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use; and purchasers thereof, from the cashier, without notice of any special limitation of his powers, acquire perfect title. *Ind. Supreme Ct. 1863, State Bank v. Wheeler, 21 Ind. 80.*

186. The indorsement of a cashier upon the bills receivable of a bank is presumptive evidence of his authority from the bank to indorse them. *Miss. Ct. of Errors, 1843, Harper v. Calhoun, 7 How. 203.*

187. A bank, just before the expiration of its corporate existence, by its cashier indorsed and assigned to a trustee for the stockholders, all unpaid paper belonging to the bank. *Held*, that the assignment was valid, and the trustee might sue, after the expiration of the bank charter, on paper so indorsed to him. *Ma. Supreme Ct. 1849, Cooper v. Curtis, 30 Ma. 488.*

188. — In payment of debts. The cashier of a bank is presumed, in the absence of proof to the contrary, to have authority to turn out the notes and assets belonging to the bank, in payment of its debts. *Mich. Supreme Ct. 1857, Kimball v. Cleveland, 4 Mich. 606; Miss. Ct. of Errors, 1843, Crockett v. Young, 1 Smed. & M. 241.*

189. The cashier of a bank, in the course of his ordinary duties, and by virtue of the general powers appertaining to his office, has a right to transfer the paper securities of the bank in payment of the bank debts. The inducement to the transfer need not appear; but the courts will presume the transfer to have been properly made by the cashier, in

the absence of proof to the contrary. This presumption, however, is not conclusive, and a party may show that it was not made in the regular course of business, but in prejudice of the rights and interests of the bank, and thus defeat the effect of a transfer to an assignee. *Ala. Supreme Ct. 1837, Everett v. United States, 6 Port. 166.*

190. — to transfer bills of exchange. A cashier of a bank, which, by its charter, is authorized to deal in bills of exchange, may assign such bills as the agent of the bank, in payment of its debts, and indorse them for the purpose. This, by universal usage, is within the scope of the cashier's powers. *U. S. Circ. Ct. Ill. 1847, Lafayette Bank v. State Bank of Illinois, 4 McLean, 208.*

191. — to accept bills. That a cashier has no power to accept bills of exchange, on behalf of the bank, for accommodation, merely, of the drawers, and the holder, with notice of bills so accepted, cannot recover against the bank,—see *Farmers' & Mechanics' Bank v. Troy City Bank, 1 Dougl. (Mich.) 457.*

192. — to transfer non-negotiables. A cashier of a bank cannot transfer non-negotiable paper without authority from the bank, evidenced by a resolution of the board of directors, usage in similar cases, or in some other way. *N. Y. Supreme Ct. 1855, Barrick v. Austin, 21 Barb. 241.*

193. Presumptively, the cashier of a bank has no authority to transfer judgments in its favor, or to dispose of its property. His authority extends only to negotiable instruments. The president and directors are the only persons who can legally make transfers of non-negotiables; and if the cashier acts as their agent in such matter, the fact ought to be shown in evidence. *Miss. Ct. of Errors, 1853, Holt v. Bacon, 25 Miss. 567.*

194. — to indorse for collection. A cashier has authority *ex officio* to indorse a note, the property of the bank, as a measure preliminary to a suit, and to authorize a demand upon the maker, and notice to the indorser. *Mass. Supreme Ct. 1821, Hartford Bank v. Barry, 17 Mass. 94.*

195. That a cashier has power, *prima facie*, to indorse for collection notes discounted, or notes deposited to be collected, or as collateral security,—see *Elliot v. Abbot, 12 N. H. 549; Corser v. Paul, 41 N. H. 24.*

196. A bank having received paper for collection, does not become liable as an in-

dorser, even to *bona fide* holders, by the act of its cashier, who is authorized to indorse for the purpose of transmitting to other banks for collection, but not especially authorized to indorse for the purpose of making the bank liable, in indorsing it in his own name, as cashier, for the purpose of collection merely, and without any intention of binding the bank. [Distinguishing 13 N. Y. (3 Kern.) 318; 16 N. Y. 125.] *N. Y. Supreme Ct.* 1862, *Bank of State of N. Y. v. Farmers' Branch, &c. of Ohio*, 36 *Barb.* 332.

197. That a cashier indorsing a bill of exchange, for the purpose of collection merely, is a party to the paper, within the New York act of 1833, § 8, relating to notarial certificates as evidence,—see *Bank of United States v. Davis*, 3 *Hill*, 451.

198. — to transfer funds. A transfer of a deposit belonging to a bank, though made in bad faith, by the cashier, will be good against the bank in favor of a *bona fide* holder, for value and without notice. *Mo. Supreme Ct.* 1845, *St. Louis Perpetual Ins. Co. v. Cohen*, 9 *Mo.* 416.

199. — to borrow. That the cashier, in virtue of his general employment, may borrow on behalf of the bank,—see *Barnes v. Ontario Bank*, 19 *N. Y.* 152; *Ballston Spa Bank v. Marine Bank*, 16 *Wis.* 120.

200. — to collect debts. The cashier of a bank is its executive officer, and has authority to take such measures for the security and eventual collection of a debt as he deems proper, and to act in reference to the collection or compromise of the same according to the general usage, practice and course of business. *N. Y. Supreme Ct.* 1860, *Bridenbecker v. Lowell*, 32 *Barb.* 9. Compare *Bank of State of N. Y. v. Farmers' Branch &c. of Ohio*, 36 *Barb.* 332.

201. The cashier of a bank has a general authority to superintend the collection of notes under protest, and to make such arrangements as may facilitate that object, and to do anything in relation thereto that an attorney might lawfully do. His authority does not, however, extend so far as to justify him in altering the nature of the debt, or in changing the relation of the bank from that of a creditor to that of an agent of its debtor; although a subsequent acquiescence of the bank in such an exercise of power may ratify and confirm it. *Pa. Supreme Ct.* 1841, *Bank of Pennsylvania v. Reed*, 1 *Watts & S.* 101;

Miss. Ct. of Errors, 1846, *Payne v. Commercial Bank of Manchester*, 6 *Smed. & M.* 24.

202. Bank held bound by acts of its cashier, within the scope of his authority in discharging a mortgage and note, though without a sealed authority, as being acts within the general power of a cashier. *Ill. Supreme Ct.* 1855, *Ryan v. Dunlap*, 17 *Ill.* 40.

203. The power of a cashier, acting in consultation with two or more of the directors, to make an agreement, which, if carried out, would have the effect to discharge sureties on a note held by the bank, may be implied from the usual course of the bank in such particulars. *Miss. Ct. of Errors*, 1846, *Payne v. Commercial Bank of Natchez*, 6 *Smed. & M.* 24.

204. The cashier of a bank has no authority, by virtue of his position, to receive payment of the amount due upon a mortgage given to such bank, and transferred by it to the State comptroller as security for its notes. *N. Y. Supreme Ct.* 1859, *Mitchell v. Cook*, 29 *Barb.* 243.

205. — to receive a deposit. The receipt of the cashier is evidence of a deposit, to charge the bank. *Ill. Supreme Ct.* 1823, *State Bank v. Kain*, 1 *Brees*, 45.

206. When money has been received by the cashier of a bank as its agent, for and on account of a third party, it will form no ground of defence to an action in favor of such party against the bank, that after the reception of the money it was misapplied by the cashier. His acts are the acts of the bank, while acting as their agent and within the scope of his authority, and any misapplication by him is a misapplication by the bank itself. *N. H. Superior Ct.* 1844, *Town of Concord v. Concord Bank*, 16 *N. H.* 26.

207. Where the statute of a State, relative to banks, was construed not to authorize the receiving, as a special deposit, of a sealed package of small notes, issued contrary to law: *Held*, that the receipt of the package, on special deposit, by the cashier, without the knowledge of the directors, raised no implied promise on the part of the bank for the safe-keeping of it, and that, in the absence of gross negligence or fraud, the bank was not liable therefor. *Pa. Supreme Ct.* 1850, *Lloyd v. West Branch Bank*, 15 *Pa. St.* 172.

208. — to appear and defend. It is not within the scope of the powers ordinarily conferred upon a cashier, to appear and de-

fend suits against the bank. An answer, therefore, by the cashier, when the bank is garnisheed, will not support a judgment against the bank. *Ala. Supreme Ct.* 1840, *Branch Bank at Mobile v. Poe*, 1 *Ala. N. S.* 396.

209. — to give a bond of indemnity. A cashier's general powers do not include an authority to bind the bank to indemnify an officer for levying upon property on an execution in favor of the bank. If such power is claimed to exist, it must be shown by evidence. *N. Y. Supreme Ct.* 1851, *Watson v. Bennett*, 12 *Barb.* 196.

210. Thus where an indemnity, purporting to be the bond of the bank of S., was given to indemnify the sheriff for levying upon certain goods; but it was not sealed, and was signed "B., cashier of the bank of S.;" and B. was sued for trespass in directing the levy,—*Held*, that the court could not assume the paper to be the act of the bank, but that B., if he would exonerate himself, must show his authority to execute the paper for his bank. As cashier, B. was not to be presumed to have such authority. *Id.*

211. — to appeal. That a bank may take an appeal by its cashier—see *Moreland v. State Bank*, 1 *Bresse*, 205.

212. — to bind the bank by declarations. And he has power to bind the corporation by his acts and statements in relation to the sale of bills of exchange held by them. *Ohio Supreme Ct.* 1860, *Sturges v. Bank of Circleville*, 11 *Ohio St.* 153. But compare *Pendleton v. Bank*, 1 *T. B. Monr.* 171; and cases under OFFICERS.

213. The cashier of a bank possesses no incidental power to make any declarations binding upon the bank, not within the scope of his ordinary duties. He has no authority, upon a note being offered for discount, to bind the bank by his declaration to a person about to become an indorser on it, that he will incur no risk or responsibility by his becoming an indorser upon such discount. *U. S. Supreme Ct.* 1834, *Bank of Metropolis v. Jones*, 8 *Pet.* 12; *Pa. Supreme Ct.* 1842, *Harrisburg Bank v. Tyler*, 3 *Watts & S.* 373; *Md. Ct. of Appeals*, 1845, *Merchants' Bank v. Marine Bank*, 3 *Gill*, 96. And see *infra*, 455.

214. That the promise of a cashier to pay a debt which the corporation does not owe, or his admission—that forged bills of the

bank are genuine, will not bind the bank, unless it has authorized or adopted his act—see *Salem Bank v. Gloucester Bank*, 17 *Mass.* 1; *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 *Dougl.* 457.

215. If the cashier of a bank should pay to a bona fide holder the amount of a forged check drawn on the bank, or of forged notes of the bank, the payment cannot be recalled; because he is intrusted by the bank with an implied authority to decide on the genuineness of the handwriting of the drawer of the check, and of the paper of the bank. The act of payment is to be distinguished, in this respect, from a mere admission. *U. S. Supreme Ct.* 1825, *Bank of United States v. Bank of Georgia*, 10 *Wheat.* 383; *Mass. Supreme Ct.* 1820, *Salem Bank v. Gloucester Bank*, 17 *Mass.* 1; *Md. Ct. of Appeals*, 1845, *Merchants' Bank v. Marine Bank*, 3 *Gill*, 96.

216. Violations of duty. No act or vote of the board of directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders of the bank, can amount to a justification of the cashier of the bank in acts on his part which are in violation of the stipulation in his official bond, "well and truly" to execute the duties of his office. Acts done by a cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trusts assumed by them, are on the responsibility of the cashier and his sureties. Every act of fraud, every known departure from duty by the board, in connivance with the cashier, for the plain purpose of sacrificing the interest of the stockholders, would be an excess of power, from its illegality,—and, as such, void, as an authority to protect the cashier in his wrongful compliance. *U. S. Supreme Ct.* 1828, *Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46, 71.

217. A cashier, who receives money for deposit, out of the bank, and not in banking hours, or receives its funds at places distant from the bank, and does not account for them, is liable on his official bond. *Ky. Ct. of Appeals*, 1824, *Pendleton v. Bank of Kentucky*, 1 *T. B. Monr.* 177.

218. Where a cashier applies the notes of the bank to his own use, he is liable for the full nominal amount, and cannot avail himself of their depreciation. *Ky. Ct. of Appeals*, 1824 *Pendleton v. Bank of Kentucky*, 1 *T. B. Monr.* 177.

219. By mistake, a credit was erroneously entered in the account of a cashier with the receiver of the bank, which had stopped payment, and after the books were balanced, the cashier disposed of bills of the bank belonging to him at the time of the settlement, at a large discount. *Held*, that on the discovery of the mistake, the cashier was entitled to set off, against the balance found due from him, bills of the bank purchased by him subsequent to the discovery of the mistake. *S. C. Ct. of Appeals*, 1880, *Beers v. Maynard*, 1 *Bailey (Ct.)*, 168.

220. A cashier of a bank is not entitled to the benefit of the statute of limitations as to his own note lying in the bank, unless he shows that he has exhibited it as due and unpaid to the board of directors. *Pa. Supreme Ct.* 1839, *Harrisburg Bank v. Forster*, 8 *Watts*, 12.

221. The payment of overdrafts, by a cashier appointed to keep money and pay it to the checks of persons entitled to draw, is, without some special excuse, a violation of duty. *S. C. Ct. of Appeals*, 1849, *Bank of St. Mary's v. Calder*, 8 *Strobb.* 403.

222. A provision in a statute enacted for the protection of incorporated banks, prescribing a penalty for the conversion by a cashier of any "money, bank bill, or note," does not extend to promissory notes (other than bank notes) or to other commercial paper. *N. J. Supreme Ct.* 1853, *State v. Stimson*, 4 *Zabr.* 9.

223. What will support an indictment against a cashier of a bank for a conversion of its funds, under the statute of New Jersey (*N. J. Rev. Sta.* 125),—see *Id.*; *State v. Stimson*, 4 *Zabr.* 478.

As to principles governing cashiers in common with other Officers of corporations, see OFFICERS.

5. Tellers.

224. His authority to receive money. Receiving a note of a foreign bank, in violation of a statute prohibiting circulation of such notes, is not an act within the general scope of a teller's employment, in the absence of an express authority to receive such bills. His employment and duty is to receive money. In the discharge of that duty he has no right to receive anything but money in the legal sense of the term. His receiving what the legislature has declared shall not pass as money, can-

not charge the bank with a penalty therefor, unless it was done in pursuance of express authority or was subsequently ratified. *N. Y. Superior Ct.* 1854, *Clark v. Metropolitan Bank*, 8 *Duer*, 241.

225. — to issue due bills. Where a teller of a bank, having authority to issue "due bills" for the corporation for special purposes, issued them to raise money for his own use;—*Held*, that the want of power in the bank to make such issues could not be set up either by the teller or his surety; nor could the fact that the due bills were not properly stamped. *Pa. Supreme Ct.* 1866, *Wayne v. Commercial National Bank*, 52 *Pa. St.* 343.

As to power and effect of Certifying checks, see *infra*, 393-400.

V. BUSINESS AND DEALINGS.

1. Generally.

226. Dealing by agents. A bank may appoint an agent to transact any business which it may lawfully do, and such appointment may be made by a mere corporate vote. *Ala. Supreme Ct.* 1841, *Bates v. State Bank*, 2 *Ala. N. S.* 451.

227. Whether a bank located by its charter in one county, may appoint an agency in another county,—see *People v. Oakland County Bank*, 1 *Dough. (Mich.)* 282; *Attorney General v. Oakland County Bank*, 1 *Walk.* 90; *City Bank of Columbus v. Beach*, 1 *Blatchf. Ct.* 425.

See AGENTS; POWERS.

228. Charter restriction on place of business. The charter of a bank declared that their "operations of discount and deposit should be carried on in the village of I. and not elsewhere." *Held*, that the act of the cashier in discounting, at another place, a note, paying to H. the indorser of the note, its full amount, partly by giving up an acceptance held by the bank against him, and partly in cash, was not a violation of the charter, no other transaction of a similar character appearing to have taken place, and there being some evidence that the cashier's object in making the discount was to collect a debt due the bank from H. *N. Y. Ct. of Errors*, 1844, *Potter v. Bank of Ithaca*, 7 *Hill*, 530.

229. Acquiring property, generally. The debts contracted with a bank must sometimes, from necessity, be paid in prop-

erty, or in stock of the bank itself, or some other stock. In either case it constitutes a part of the capital stock, to which the stockholders have no immediate claim; and is a fund to which the creditors of the bank must look for payment of their claims; and for the unpaid instalments upon such stock the corporation, and not the stockholder, is responsible. *Ga. Supreme Ct. 1855, Robinson v. Bank of Darien, 18 Ga. 65.*

See CAPITAL; PROPERTY.

230. That a bank, by its charter declared "capable of buying, receiving, and holding property and estate of whatsoever nature, and the same to alien and dispose of at pleasure," may receive cotton as collateral security, and ship and sell the same,—see *Commercial Bank v. Nolan, 7 How. (Miss.) 508.*

231. Personal property. A bank existing under the laws of Wisconsin may purchase personal property at a sale on an execution in its own favor, or under a mortgage or pledge of the property taken by it as security for loans. *Wis. Supreme Ct. 1863, Farmers' & Millers' Bank of Milwaukee v. Detroit & Milwaukee R. R. Co. 17 Wis. 872.*

As to the power of banks to take and hold Real property, or Mortgages upon it, see *supra* 39; also MORTGAGES; PROPERTY.

232. Borrowing money. Banking associations formed under the New York general law of 1838, have implied power, as incident to their banking powers, to borrow money, when necessary, in the prosecution of their business. *N. Y. Ct. of Appeals, 1857, Curtis v. Leavitt, 15 N. Y. 9, 53; 1859, Barnes v. Ontario Bank, 19 Id. 152. And see Leavitt v. Blatchford, 5 Barb. 9; Leavitt v. Yates, 4 Edw. 184, 164.*

233. Issuing evidences of debt. Under an act which provides that no corporation created, or to be created, shall issue bills, notes, or other evidences of debts, upon loans, or for circulation as money,—*Held*, that corporations may borrow money and issue the ordinary evidences of debt. *Cal. Supreme Ct. 1855, Magee v. Mokelumne Hill Canal & Mining Co. 5 Cal. 258.*

234. Taking securities for debts. A corporation not invested with banking powers may take a note for a debt, and allow the debtor to pay interest and renew the note. This is not banking. *N. Y. Supreme Ct. 1824, N. Y. Firemen Ins. Co. v. Sturges, 2 Cow. 664.*

235. Where it was provided, in the charter of a corporation established for loaning money, that "nothing therein contained should be construed to authorize the company to discount notes, or exercise any banking privileges whatever," the taking of a note for the sum loaned, and receiving the interest in advance, was held to be thereby prohibited, and that there could be no recovery on the note thus discounted,—though the sum loaned might be recoverable under the money counts. *Conn. Supreme Ct. 1849, Philadelphia Loan Co. v. Towner, 13 Conn. 249.*

236. Dealing by way of trade. A provision in a charter of a bank of discount and deposit that it "shall not deal or trade in anything except bills of exchange, gold and silver," &c. is to be construed as not forbidding them to purchase by way of discount, or receive in payment of a debt, promissory notes of individuals. Its intent is to forbid buying and selling in trade for profit, as distinguished from a banking business. Banking operations are always carried on in this country by discounting notes; and such a charter of course contemplates authority to make loans and discounts. By the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances, or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank. *U. S. Supreme Ct. 1823, Fleckner v. Bank of the United States, 8 Wheat. 338.*

237. The discounting by a bank of bills of exchange, secured by a deposit of cotton to be shipped by the bank, and the proceeds credited to the borrower, is not a violation of a provision forbidding it to "deal in goods, wares and merchandise, in any manner whatever unless it be to secure a debt due the said bank incurred by the regular transactions of the same." The word "deal," in such a clause, means "to buy and sell for the purpose of gain," perhaps including receiving to sell on commission. The same rule of construction which is applied to a clause giving power to deal, &c., is not proper in the case of a clause forbidding dealing. *Ala. Supreme Ct. 1841, Bates v. State Bank, 2 Ala. N. S. 451.*

238. Although a clause in the charter of a

bank forbids it "to deal or trade, directly or indirectly, in anything except bills of exchange, promissory notes, gold or silver bullion, or in the sale of goods, the produce of its lands," it may nevertheless receive and hold bonds and mortgages as securities for its debts; and, in the absence of proof to the contrary, such bonds and mortgages will be presumed to have come into the hands of the bank lawfully and within the scope of its corporate powers; the clause being designed merely to restrain the bank to its proper business of banking. *N. J. Chancery*, 1888, *Trenton Banking Co. v. Woodruff*, 1 *Green's Ch.* 117.

239. A statute authorized any bank to take and discount paper having longer time than twelve months to run, from any debtor, when deemed advisable for the better security of any debt due to such bank. *Held*, 1. That a bank previously chartered, though forbidden by its charter to discount paper which had more than twelve months to run, was within the provision of the subsequent statute.

2. That such paper, when discounted, must be presumed to have been taken for an existing debt, and for the security of the bank. *Tenn. Supreme Ct.* 1849, *Dockery v. Miller*, 9 *Humph.* 731.

240. A debtor to a bank pledged to it, as collateral security for existing and future liabilities, certain stocks, which were afterward, by virtue of a power of attorney executed by the debtor, transferred to the bank. A credit was entered the next year in the books of the bank therefor, for a less amount than the debt at the time of the pledge, and the securities were sold and transferred by the bank to its own officers without notice or judicial sale. In an action by the bank against the accommodation indorser of the debtor, on two notes given subsequently to the pledge, on an affidavit of defence, alleging the wrongful conversion, and an increase in the value of the stocks pledged, exceeding the debt at the time of the pledge and the amount of the notes sued on:

Held, 1. That the bank held the stocks as a pledge, pawn, or collateral security for existing and future indebtedness, and that the notes in suit were such a future debt as was protected by the pledge after the payment of the prior debt.

2 That it was the duty of the bank, as the holder of the pledge for an indefinite time, to

have called upon the pledgor to redeem, and if he failed, upon due notice, to have sold the stocks and applied the proceeds to the debt.

3. That the bank, in instituting no proceedings for a judicial sale, nor calling on the debtor to redeem, nor giving notice of a sale, nor making public sale, had failed in its duties to the pledgor, and that the private sale to its own officers was an illegal mode of dealing with the collateral held in trust.

4. That the indorser could not avail himself of the equities which had arisen between the bank and the principal debtor, and that the entry of judgment for want of a sufficient affidavit, was error. *Pa. Supreme Ct.* 1865, *Sitgreaves v. Farmers' and Mechanics' Bank*, 49 *Pa. St.* 359.

241. Taking bills for collection. A clause in a bank charter authorizing the bank "to deal in bills of exchange" includes authority to the bank to take bills of exchange for collection merely. It does not restrict the bank to buying and selling bills. It ought to be construed to extend to all transactions with bills of the bank which are lawful and considered by the bank expedient to enable it to transact its business or increase its profits. *Ala. Supreme Ct.* 1840, *Bank at Montgomery v. Knox*, 1 *Ala. N. S.* 148. And see *Bates v. Bank of Alabama*, 2 *Ala. N. S.* 451.

242. Selling assets. A bank has, by implication, the same power that any other holder has to transfer by an indorsement, or by a delivery under a blank indorsement, a negotiable note. In discounting notes, and managing its property in legitimate banking business, it must be able to assign or sell those notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for its banking house, and for any goods and effects connected with banking which it may properly own. Indeed, its right to sell any of its property, when not restricted in the charter or any previous law, is perhaps as unlimited as that of an individual, if not carried into the transaction of another separate and unauthorized branch of the business. *U. S. Supreme Ct.* 1847, *Planters' Bank v. Sharp*, 6 *How.* 301.

As to the application of this rule to Corporations generally, see CONTRACTS; POWERS.

243. So held, also, in a case of a transfer after maturity. *N. Y. Ct. of Appeals*, *Marvine v. Hammers*, 12 *N. Y. (3 Kern.)* 223.

244. The City Bank of New Orleans, three days before the expiration of its charter, in good faith, sold and transferred all its banking assets, by assignment, to the Louisiana State Bank, in consideration of an undertaking by the latter bank to discharge all the liabilities of the former, which were warranted not to exceed a specified amount. *Held*, that this transaction was within the corporate powers of the contracting parties, and that the latter bank thereby became an assignee, within the meaning of the statutes of Ohio, competent to prosecute an action in the name of the former. *Ohio Supreme Ct.* 1861, *Stetson v. City Bank of New Orleans*, 12 *Ohio St.* 577.

See PROPERTY.

245. Exchange of securities. The liabilities held by the bank against the directors exceeded a limit prescribed by the law of the State, and the cashier, to reduce the amount, procured notes to be made and indorsed for his accommodation, and had them substituted and absolutely exchanged for notes which had been indorsed by a director and discounted by the bank for his accommodation. *Held*, that the transaction, having been in good faith, and not as a mere shift to present a temporary appearance of soundness, was legal, and the new notes were valid. *N. Y. Supreme Ct.* 1848, *Seneca Co. Bank v. Neass*, 5 *Den.* 329.

246. A bank held a note which it had discounted, made by the president and indorsed by the defendant. Before maturity, the president, wishing to reduce the amount of discounts appearing to be made to the directors, obtained a note to be made by the cashier, for the same amount, and payable at the same time, which he indorsed and substituted for the first note, and delivered the first note to the cashier as security, on the understanding that the cashier might make a re-exchange whenever he chose. On the discount books the second note was entered as discounted, and the first as paid. Before maturity, the cashier restored the first note, took back and destroyed the second, and canceled the entries in the books. *Held*, that the first note was not to be deemed, as a matter of law, as having been paid, but that the indorser was chargeable upon it. The transaction was an exchange of securities; and inasmuch as the amount due from directors, including that note, would have been less than the limit pre-

scribed by statute, the exchange was not void as an attempt to conceal an unlawful act. *N. Y. Supreme Ct.* 1848, *Highland Bank v. Du-bois*, 5 *Den.* 558.

247. Usury. Banking corporations are within the prohibition of the statute against usury, although chartered since that statute, and by their charters authorized to loan "on banking principles." Such an expression does not authorize them to exceed the legal rate of interest. *Mass. Supreme Ct.* 1812, *Maine Bank v. Butts*, 9 *Mass.* 49.

For cases upon the Corporate powers of banks, held in common with other corporations, see POWERS.

2. Circulation.*

248. Bank notes not bills of credit. By a fair construction of the terms "bills of credit," as used in the provision of the Constitution of the United States which prohibits States to issue such bills, they do not include ordinary bank notes, even where the State owns the whole of the stock in question. *U. S. Supreme Ct.* 1837, *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 *Pet.* 251, 317; 1851, *Darlington v. Bank of Alabama*, 13 *How.* 12. And see *Owen v. Branch Bank of Mobile*, 8 *Ala.* 258.

249. Form. That a promissory note made by a bank in the course of business, and not intended to circulate as money, may be valid, although not made in the manner required in the case of bank notes—see *Rockwell v. Elkhorn Bank*, 13 *Wis.* 653.

250. Issuing. That a bank is answerable for the acts of its agent; and it is immaterial how notes get into circulation, if they come into the hands of the owner *bona fide*—see *White v. How*, 8 *McLean*, 291.

251. *It seems*, that where bills of a bank are legally pledged for the security of a debt or a demand due to any other person or institution, so as to entitle the pledgee to hold and use such bills for his indemnity in case the debt is not paid, such bills must be con-

* The scope of this work only embraces bank notes so far as they are connected with *Corporations* issuing them. The power of banks to issue circulating notes, their obligations in respect to them, the mode of enforcing redemption, &c., rights and liabilities of private parties, as between themselves in respect to payments made in bank notes, and the like, belong more appropriately to the law of *Contracts*; and punishable offences, like issuing notes for circulation as money in violation of law, forging and counterfeiting notes, &c., to the law of *Crimes*.

sidered as issued and in circulation within the true intent and meaning of the statute limiting such issues; and such bills are no longer under the control of the bank. *N. Y. Chancery*, 1841, *Davenport v. City Bank of Buffalo*, 9 *Paige*, 12.

252. An attempt was made by the cashier to hypothecate bills of the bank by sealing them up in a package and depositing them in its vaults, with his indorsement that they were security for a loan to the bank; such bills were not entered upon the books of the bank as a part of its circulation. *Held*, that they were not legally hypothecated, and the creditor obtained no lien. *Id.*

253. The mere receipt by the officers of a new bank, of the bills of an old bank of the same name, and their paying out the same bills, does not make the new bank responsible to pay all the bills of the old bank. *Mass. Supreme Ct.* 1817, *Wyman v. Hallowell & Augusta Bank*, 14 *Mass.* 58; *U. S. Circ. Ct. Mass.* 1819, *Bellows v. Hallowell & Augusta Bank*, 2 *Mass.* 31. And see *Bank of United States v. Davis*, 2 *Hill*, 451.

254. Distinction between "paying out" notes, and "issuing" them as money. *United States v. Ray*, 2 *Cranch C. Ct.* 141; *People v. Wells*, 8 *Mich.* 104.

255. A note which a banking association could not lawfully issue for circulation as money, may nevertheless be deemed presumptive evidence of an indebtedness which it was competent for the bank to contract, for some purpose incidental to the banking business. Until shown not to have been issued for the benefit of the bank, it must be deemed obligatory on the association; and the holder of it is entitled to be regarded as a creditor of the bank, and may proceed as such against them under the statute. *N. Y. V. Chan. Ct.* 1840, *Parmly v. Tenth Ward Bank*, 8 *Edw.* 395.

256. That bank bills complete in form, but not issued by the bank, are its property, and may be so treated in an indictment for stealing them,—see *The People v. Wiley*, 8 *Hill*, 194.

257. Destroyed and lost notes. The owner of bank notes which have been destroyed, may recover the amount from the bank which issued them, on proof of their destruction. Thus, where notes, issued by a bank, were sent to it, through an express company, and while in transit a part were

stolen by an agent, who destroyed them after the amount had been paid to the bank by the company: *Held*, that the property in the notes was transferred by that payment to the company, who, on proving the destruction, were entitled to the amount from the bank. *Pa. Supreme Ct.* 1863, *Hagerstown Bank v. Adams Express Co.* 45 *Pa. St.* 419. And see *Bank of Louisville v. Summers*, 14 *B. Monr.* 306; and, as to lost bank notes, *Waters v. Bank of Georgia*, *R. M. Charlt.* 193.

258. Cutting a bank note into two parts, for the purpose of remitting them separately by mail, does not discharge the bank from the debt, but it may be recovered by the true and *bona fide* holder of one of the parts, upon sufficient proof that the other part has been lost or destroyed. *Va. Ct. of Appeals*, 1818, *Bank of Virginia v. Ward*, 6 *Munf.* 166; 1826, *Farmers' Bank v. Reynolds*, 4 *Rand.* 186; *N. C. Supreme Ct.* 1834, *Allen v. State Bank*, 1 *Dev. & B. Ch.* 3; *Ky. Ct. of Appeals*, 1857, *Commercial Bank v. Benedict*, 18 *B. Monr.* 307; *Northern Bank v. Farmers' Bank*, *Id.* 506; *Ill. Supreme Ct.* 1841, *State Bank v. Aersten*, 3 *Scamm.* 185.

259. To enforce bank notes, alleged to have been destroyed, against the bank, there must be such certainty of description as to enable the bank to see that it issued such notes, and such as will enable the court to extend an adequate indemnity to the bank. *Tenn. Supreme Ct.* 1839, *Irwin v. Planters' Bank*, 1 *Humph.* 145.

260. That the owner of bank bills which cannot be identified or distinguished from other similar bills, cannot maintain an action against the bank which issued them, upon circumstantial evidence that they have been destroyed, and a tender of a bond of indemnity,—see *Tower v. Appleton Bank*, 3 *Allen*, 387.

261. Whether a demand of bank notes is necessary. There is no ground for a distinction between the notes of banks and other corporations, and natural persons, in reference to the necessity of demand at a particular place before suit. Where the statute constituting the bank provides that the notes shall be made payable at the bank, a demand there is not necessary if the note be not in terms expressed to be payable there. *N. J. Supreme Ct.* 1817, *State Bank v. Van Horn*, 1 *South.* 332.

262. A bank bill, like any other note of

hand payable on demand, but having no place of payment appointed therein, may be sued, and the action may be sustained without proof of any special demand. *Me. Supreme Ct.* 1841, *Bryant v. Damariscotta Bank*, 18 *Me.* 240.

263. If a bank note is payable on demand, at a particular time and place, a demand at the specified place is necessary, and at the specified time or afterwards, and must be averred and proved. If the place is not specified in the bill with distinctness and precision, no demand is necessary. *Ga. Supreme Ct.* 1853, *Dougherty v. Western Bank*, 13 *Ga.* 287.

264. When, for any purpose, demand of payment of bank notes is necessary, the demand must be made at the place where the notes are, upon their face, made payable. *Tenn. Supreme Ct.* 1859, *Ware v. Street*, 2 *Head.* 609.

265. In order to sustain an action upon a bank bill promising payment upon demand, there must be a demand of payment, or circumstances must exist excusing a demand, although a bill is not made payable at any particular place. A material difference exists, in this respect, between a promissory note and a bank bill issued for the purpose of being circulated as money. *N. H. Superior Ct.* 1846, *Thurston v. Wolfborough Bank*, 18 *N. H.* 391.

266. If a bank closes its doors, and has no place of business, a demand is not necessary in order to sustain an action upon its bills. *Ib.*

267. The Massachusetts statute of 1816, ch. 91, section 2, so far as it enacted that every bank which had issued any bill &c. payable at any other place than where the bank was established by law and kept, should be liable to pay the same on demand at said bank, without a previous demand at the place where it might on its face be payable,—*Held* inoperative, and not binding on the parties to such bills, nor on the courts. *Mass. Supreme Ct.* 1819, *King v. Dedham Bank*, 15 *Mass.* 447.

268. How demand may be made. One demand of payment in the aggregate is sufficient on presenting to a bank a number of its own bills. *U. S. Circ. Ct. Me.* 1821, *Suffolk Bank v. Lincoln Bank*, 3 *Mas.* 1. And see *Reapers' Bank v. Willard*, 24 *Ill.* 433; *Boatman's &c. Institute v. Bank of Missouri*, 33 *Mo.* 497, 522.

269. The amount payable. That the fact that bank notes are below par does not render their circulation illegal; but the bank must pay the face of them to the holder, although he took them below par,—see *Robison v. Beall*, 26 *Ga.* 17.

270. How payment should be made. Under a statute (*Mass. Act of 1809*, ch. 38), imposing a penalty of two per cent. per month, on default in paying any of the bills issued by a bank, from the time of its neglect or refusal—the penalty accrues where the bank, upon the seasonable presentation of its bills for payment, causes delay by the process of counting out the money, so as to be unable to pay the same day. The holder of bank bills is entitled to be paid in specie the amount of the bills, upon a demand within the usual banking hours of the bank; and the bank is bound to keep its money counted or weighed, or to employ servants sufficient to count it or weigh it, so as to pay all demands made within the usual bank hours. *U. S. Circ. Ct. Me.* 1821, *Suffolk Bank v. Lincoln Bank*, 3 *Mas.* 1.

271. Whether there was unreasonable delay in payment must depend on the circumstances of the case. Banks should have sums counted, or sufficient servants to count them, so that a demand of ordinary magnitude may be paid within the banking hours of the day; and the fact that demands for specie are made as the result of a combination to create a run upon the bank does not excuse the bank from diligence in paying out specie. *N. Y. Supreme Ct.* 1827, *Hubbard v. Chenango Bank*, 8 *Cow.* 88.

272. The plaintiff demanded \$1,000; the teller, with more than \$10,000 specie in boxes, commenced by selecting the small pieces to make payment with. The plaintiff offered to take a box at the bank mark, but such offer was refused, and the teller was unable to count \$1,000 in the four business hours of the day; so that the demand could not be paid on the day made. *Held*, a refusal to pay on demand. *Ib.*

273. That no bank has a right to unnecessarily delay a bill-holder by paying him in ten-cent pieces, and stopping to count them—see *Reapers' Bank v. Willard*, 24 *Ill.* 439.

274. As to paying in quarter-dollars—see *People v. Dubois*, 18 *Ill.* 338.

275. Under the laws of the United States, the holder of bank bills is not obliged to take foreign gold or coin at the bank count, but

the payment must be by weight. *U. S. Circ. Ct. Ma.* 1821, *Suffolk Bank v. Lincoln Bank*, 3 *Ma.* 1.

276. Consequences of refusal to redeem. The mere act of suspending payment, without any general derangement of the business of the bank, is not, intrinsically, and apart from any statute provision, a forfeiture of its charter, especially where the legislature have provided a remedy by imposing a penalty or damages for refusal to redeem notes. *Ohio Supreme Ct.* 1841, *State v. Commercial Bank of Cincinnati*, 10 *Ohio*, 535. See also *Livingston v. Bank of N. Y.* 26 *Barb.* 304; 5 *Abb. Pr.* 383; *Rockwell v. The State*, 11 *Ohio*, 130.

277. But the suspension of specie payments may be carried so far as to afford evidence of an entire misuser of its powers, and thus extinguish its chartered privileges. *Ohio Supreme Ct.* 1841, *State v. Commercial Bank of Cincinnati*, 10 *Ohio*, 535.

278. Banks are not exempt from the rules of the common law in regard to corporations, and the application of the law of *quo warranto* to them for forfeiture of charter; but are subject to them, at least so far as to have a judgment of forfeiture entered against them for a failure to pay specie on their notes. *Miss. Ct. of Errors*, 1846, *Planters' Bank v. State*, 7 *Smed. & M.* 163.

279. That a bank's continued refusal to pay specie is not sufficient evidence of insolvency to prevent a *bona fide* purchaser of its bills, after that time, from setting them off—see *Jefferson County Bank v. Chapman*, 19 *Johns.* 322.

280. Where a State, by becoming a stockholder in a banking corporation, is made liable by charter for the ultimate redemption of the bills of the bank, in proportion to the value of the shares held by the State, which amount to one half of the whole number, this is a liability to redeem a portion of the whole circulation, and not a portion of each bill; and the State having already redeemed more than one half of the outstanding circulation of the bank, is discharged from further liability to the bill-holders. *Ga. Supreme Ct.* 1855, *Robinson v. Bank of Darien*, 18 *Ga.* 65.

281. One bank held a large sum in the notes of another, and the latter agreed to give in payment of them drafts on a distant place, the creditor bank to deposit the notes in the hands of third persons as security for the

drafts, and the debtor bank also deposited a further sum to secure payment of the damages in case the drafts should be protested. *Held*, that this agreement was no bar to an action against the debtor bank as drawer of the drafts, after the same had been protested. *U. S. Circ. Ct.* 1843, *Stickney v. Bank of Illinois*, 3 *McLean*, 181.

282. The charter of a bank prohibiting the institution from at any time suspending or refusing payment in gold or silver of its obligations, provided that, in case of a refusal of the bank to redeem its bills, &c. in gold or silver, the holder should be entitled to recover the amount with twelve per cent. interest. On April 1, 1862, the plaintiff demanded of the bank payment of its notes in coin, which was refused, but the amount was tendered in United States legal tender notes. *Held*, that the provision in the charter in question did not amount to a restriction of the right of the bank to avail itself of the privilege of using anything else as money, as a tender, which the United States, by their laws, might legally declare to be such. *Ind. Supreme Ct.* 1862, *Reynolds v. Bank of Indiana*, 1 *Am. Law Reg. N. S.* 669.

283. No action will lie by one bank against another for collecting its bills, and presenting them for payment in a harassing manner with a malicious intent to injure its credit. *Vt. Supreme Ct.* 1854, *South Royalton Bank v. Suffolk Bank*, 27 *Vt.* 505.

284. Redemption at agency. Under section 5 of the New York act of 1840—relative to the redemption of bank notes by the agents of banks and of banking associations—it is necessary to leave the circulating notes at the agency until the termination of twenty days from their first presentment for payment, or to present them a second time, at or after the expiration of that period, in order to render a neglect to redeem such bills at the agency, and to pay the extra interest thereon, an absolute forfeiture of the charter of the bank, or of the franchises of the association. The second and third clauses of this section are highly penal, and must be construed in such a manner as to enable the bank to save the forfeiture by redeeming the particular bills at its agency, and paying the interest thereon, before it shall be subjected to such serious consequences. *N. Y. Chancery*, 1842, *Bank Commissioners v. James Bank*, 9 *Faige*, 457.

285. An application for an injunction &c. should be denied, if it is not satisfactorily shown that the bills were at the agency for redemption at the end of the twenty days, or were presented there for payment afterwards, so as to enable the defendant to redeem them at that place, even though there is sufficient reason to disbelieve the bills would have been redeemed if they had been thus presented the second time at the agency. *Id.*

286 — by comptroller. All the holders of circulating notes of an insolvent banking association, organized under the New York general banking law of 1838, are entitled to participate equally and ratably in the fund pledged to the comptroller for the payment of all the circulating notes. Protesting such notes gives the holder no priority. *N. Y. Chancery*, 1841, *Shepherd v. Guernsey*, 9 *Paige*, 357. Compare *Willard v. Dubois*, 29 *Ill.* 48; *Woodward v. Central Bank*, 4 *Ga.* 323.

287. Banks compellable to receive their own notes in payment of debts or by way of set-off, at par,—see *Robinson v. Bank of Darien*, 18 *Ga.* 65; *Niagara Bank v. Roosevelt*, 9 *Cow.* 409; *Bruyn v. Receiver, &c.* 9 *Cow.* 418, note; *Tillon v. Britton*, 4 *Halst.* 120; *Atwood v. Bank of Chillicothe*, 10 *Ohio*, 526; *Moise v. Chapman*, 24 *Ga.* 249; *Dunlap v. Smith*, 12 *Ill.* 399; *King v. Elliot*, 5 *Smed. & M.* 428. And see *Fagan v. Stilwell*, 19 *Ark.* 282; *Paup v. Drew*, 4 *Eng.* 205.

288. Though, as between individuals, where a note is payable in the issues of a bank, the value of the notes of the bank, at the time the debt becomes due, is the measure of recovery, yet a different rule prevails where a bank is suing upon a note payable in its own issues. In such case, the bank will be entitled to recover the full amount of the note and interest, because the defendant can, if he choose, even after judgment, discharge the debt with the issues of the bank. *Miss. Ct. of Errors*, 1848, *Abbott v. Agricultural Bank*, 11 *Smed. & M.* 405.

That one indebted on a Subscription for stock, cannot discharge his debt in notes of the bank,—see SUBSCRIPTION.

289. A statute which provides that all debts due to the banks of the State may be paid at any time in the notes of such banks, gives to the maker of such a note his option to pay either in the notes of the bank or in

the constitutional currency of the country. The law is so far a part of the contract as to define what both parties meant by the word "dollars," as used in the note. *Miss. Ct. of Errors*, 1853, *Railey v. Bacon*, 26 *Miss.* 455.

290. Bills of a bank in the hands of a public administrator, and the moneys deposited to his credit, may be offset against a demand due the bank from him individually. *So held*, where he did not administer by virtue of his office as public administrator, but by virtue of a regular letter granted to him as administrator of the estate in each particular case. *N. Y. Chancery*, 1829, *Miller v. Receiver of Franklin Bank*, 1 *Paige*, 444.

291. A bank holding the bank bills of another bank, and demanding payment of the same, at the banking-house of the latter, is not bound to receive its own bills in payment, but may demand specie. *U. S. Circ. Ct. Ma.* 1821, *Suffolk Bank v. Lincoln Bank*, 8 *Mas.* 1.

292. There is no obligation on a bank, in making an assignment of its effects, to provide that its notes shall be received in payment of debts due to it; on the contrary, if the object is, in contemplation of insolvency, an equal and fair distribution among its creditors, the notes cannot be so received, unless held in such a manner by the debtors of the bank as to become legally the subject of set-off. *Ark. Supreme Ct.* 1853, *Ringo v. Real Estate Bank*, 8 *Eng.* 563.

293. That assignees of an insolvent bank must receive payment of debts due the bank, in its own paper, whenever the bank would be obliged to,—see *Union Bank of Tennessee v. Ellicott*, 6 *Gill & J.* 363; *Bank of Maryland v. Ruff*, 7 *Id.* 448; *Bank of Pennsylvania v. Spangler*, 32 *Pa. St.* 474; *Commercial Bank of Columbus v. Thompson*, 7 *Smed. & M.* 443; *Robson v. Benton & Co. R. R. & Banking Co.* 7 *Smed. & M.* 724.

294. Where the property of a bank has been assigned on application of bank commissioners under the statute of New Hampshire, the bills of the bank cannot be received by the assignee in payment of debts due to the corporation,—see *Matter of White Mountains Bank*, 46 *N. H.* 143.

295. Whenever an instrument would be payable in bills of the bank if payment were claimed by the bank itself, it is also so pay-

able to the receiver of the bank. *Ga. Supreme Ct.* 1858, *Moise v. Chapman*, 24 *Ga.* 249.*

296. Foreign notes. A person lawfully holding a foreign bank note, and paying or delivering it to a domestic bank or banker, not intending it to go into circulation, but with the expectation and understanding that it is to be sent to the maker for redemption, is not to be deemed an offender against a domestic statute—*e. g.* N. Y. Laws of 1853, 428, ch. 223—which prohibits any person from circulating foreign notes at a discount greater than that fixed for the redemption of bills of banks of the State, on the ground that the bank exacted unlawful discount from him. It is only the bank or banker receiving the notes in such case that offends against the act; and this does not exonerate him from liability on an obligation which he assumes in the course of the dealing. *N. Y. Ct. of Appeals*, 1858, *Sackett's Harbor Bank v. Codd*, 18 *N. Y.* 240.

297. The New York act of 1853, above mentioned, does not prohibit banks or individual bankers from selling or delivering such notes for any purpose except for circulation as money within the State. *Id.*

298. A sale at a discount by one banking association to another, for the purpose of effecting their redemption, of foreign bank bills under the denomination of five dollars, received by the former not in payment of debts but at a lawful rate discount, is not a violation of the New York statute of 1830, ch. 295, prohibiting the circulation of foreign bank notes under the denomination of five dollars. The bank may send them home for redemption itself, or employ another to do it. This is not passing, issuing, uttering, or circulating them within the prohibition of the statute. *N. Y. Ct. of Appeals*, 1862, *Buffalo City Bank v. Codd*, 25 *N. Y.* 163.

299. Where the selling bank takes in payment a time draft made by the purchasing bank, this is not a discount or loan by the seller, in violation of ch. 355 of N. Y. Laws of 1839, § 3; and the issuing such draft is unlawful—the statute declaring it to be unlawful for banking institutions within the State to purchase discounts in depreciated paper—only on the part of the purchaser.

* But compare *Pancoast v. Ruffin*, 1 *Ham.* 381; *Hallowell &c. Bank v. Howard*, 13 *Mass.* 285, to the effect that if a bank has in good faith parted with an evidence of debt, the debtor cannot pay the assignee in paper of the bank.

The seller may surrender the illegal draft, and recover, as upon an implied assumpsit, the value of the bills as measured by the discount agreed upon. *Id.*

300. A bill of exchange was discounted at Cincinnati by a foreign corporation, and was paid for in notes of that bank upon an agreement that the notes should be put into circulation in the northern part of Ohio,—*Held*, that such acts do not fall within the prohibition, or contravene the policy of the act of February 24, 1848, "to amend the act supplementary to the act to prevent unauthorized banking, and the circulation of unauthorized bank paper." *Ohio Supreme Ct.* 1857, *Reznor v. Hatch*, 7 *Ohio St.* 248.

301. The circulation of foreign currency is not prohibited by the laws of Wisconsin, and therefore incorporated banks may receive and pay it out, and their notes given for it are valid. *Wis. Supreme Ct.* 1862, *Ballston Spa Bank v. Marine Bank*, 16 *Wis.* 120.

302. A bill of a bank in another State is a promissory note within the meaning of the Massachusetts Rev. Sts. ch. 127, § 2, prescribing a penalty for uttering and publishing forged and counterfeit notes. *Mass. Supreme Ct.* 1858, *Commonwealth v. Woods*, 10 *Gray*, 477; *Commonwealth v. Thomas*, 10 *Gray*, 483; *Commonwealth v. Paulus*, 11 *Gray*, 305.

303. Forged notes. Where the bills of a bank, after being prepared by the cashier for the president's signature, were stolen, and a forged signature of the president added,—*Held*, that the bank was not liable to pay a *bona fide* holder, on the ground that the cashier had declared them to be genuine, nor by reason of the negligence of the directors in so keeping the paper prepared for signature. *Mass. Supreme Ct.* 1820, *Salem Bank v. Gloucester Bank*, 17 *Mass.* 1.

304. Where a bank paid notes on which the president's name had been forged, and neglected to return them till fifteen days afterwards,—*Held*, that it had lost its remedy against the person from whom the notes were received. *Mass. Supreme Ct.* 1820, *Gloucester Bank v. Salem Bank*, 17 *Mass.* 33.

305. Restrictions upon circulation. The Massachusetts statute of 1812, ch. 57, which prohibits banks, after the expiration of their charters, from issuing or putting into circulation any securities for money, does not extend to the assignment of a note for the purpose

der the New York banking law of 1838, may be sued (or sue) in the name of its president;* but in such suit the debt or contract must be laid as that of the corporation, not as that of "the defendant." *N. Y. Supreme Ct.* 1840, *DeLafield v. Kinney*, 24 *Wend.* 345; 1843, *Ogdensburgh Bank v. Van Rensselaer*, 6 *Hill*, 240. Compare *Hunt v. Van Alstyne*, 25 *Wend.* 605.

As to powers, duties &c. of Bank presidents in common with similar officers of other corporations, see **PRESIDENT**.

170. **His compensation.** There is no implied contract on the part of a banking corporation, whose objects are partly charitable, to pay for official services rendered to it by its president. Nor is such contract established by proof that the president informally mentioned to some of its directors that he should expect compensation, and that they made no reply. *Mass. Supreme Ct.* 1863, *Sawyer v. Pawnors' Bank*, 6 *All.* 207.

4. The Cashier.

171. **General definition of his powers.** The cashier of a bank is the regularly authorized agent thereof, and whatever is done by him in that capacity, within the scope of his duties, is the act of the bank. *Pa. Common Pleas*, 1846, *Bank of Kentucky v. Schuylkill Bank*, 1 *Pars. Sel. Cas.* 180, 243; *Me. Supreme Ct.* 1847, *Badger v. Bank of Cumberland*, 26 *Me.* 428.

172. The cashier is the executive officer of the bank, by whom its debts are received and paid, and its securities taken and transferred, and his acts, to be binding upon the bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank, when they have been deposited, and, as the executive officer of the bank, transacts most of its business.

* A verdict in the president's name, in such a case, sustained by disregarding words of description,—see *Pentz v. Sackett*, *Hill & D. Supp.* 113.

The phrase "ordinary duties," as thus used, does not comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the customary way. Nor has it ever been decided that a cashier could purchase or sell the property of, or create an agency of any kind for a bank, without authority so to do. *U. S. Supreme Ct.* 1858, *United States v. City Bank of Columbus*, 21 *Hov.* 356.

173. Where the cashier of a bank wrote to the secretary of the treasury of the United States, saying that the bearer of the letter, who was one of the directors, was authorized to contract for the transfer of moneys for the government; but, in fact, this act of the cashier was unknown to the board, and the director bearing the letter was not authorized by them,—*Held*, that the transaction was not within the scope of the powers of the cashier, and not being authorized by the directors, the bank was not liable for money which the secretary of the treasury advanced to be transferred, and which the bank never received from the director. *So held*, notwithstanding the cashier was the officer who kept the minutes of the meetings of the board, and his letter stated that the bearer was a director, and was "authorized on behalf of this institution." *Id.*

174. The acts of the cashier or other officer of a bank, within the scope of the general usage, practice, and course of business of banking institutions, are binding on the corporation in favor of third persons transacting business with it, and who did not know, at the time, that the officer was transcending his authority. *Pa. Supreme Ct.* 1850, *Lloyd v. West Branch Bank*, 15 *Pa. St.* 172.

175. **Restriction.** The acts of a cashier of a bank are only binding upon the bank when he acts within the sphere of his agency. If there be no express regulation or restriction, all acts which appertain to his office will affect the bank; if he be restricted or limited, his acts in violation of the restriction, or beyond the limit, will not be the act of the bank. Presumptively, the acts of a cashier in the discharge of his ordinary duties are binding on the bank; if there is any special restriction, the corporation must show it. *Miss. Ct. of Errors*, 1846, *State v. Commercial Bank*, 6 *Smedes & M.* 218.

176. **Extension.** Where the directors of a bank allow its cashier to conduct all its business without interference, for several years together, they thereby confer upon him authority, as to third persons, to transact any business on behalf of the bank which he is not prohibited by its charter from transacting. *N. Y. Superior Ct.* 1859, *City Bank of New Haven v. Perkins*, 4 *Bow.* 420.

177. That the extent of the general authority of a cashier of a bank is a question of law,—see *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 *Dougl.* 457; *Peninsular Bank v. Hanmer*, 14 *Mich.* 208.

178. **Form of address, indorsement or signature.** The usage is universal for the presidents and cashiers of incorporated companies, acting as the executive officers and agents of such companies, to make, in their behalf, indorsements and transfers of negotiable paper by simply indorsing their names, with the addition of their titles of office. Such an indorsement is sufficient to transfer the note to the indorsee, so that the latter can maintain an action thereon in his own name. *U. S. Circ. Ct. N. Y.* 1856, *State Bank of Ohio v. Fox*, 3 *Blatchf.* 481.

179. The indorsement of negotiable paper by the cashier of a bank by writing his name on the back of it, with the addition of the name or designation of his office merely, without writing the words "for the bank of," &c. is a sufficient indorsement by the bank to charge it as indorser. Such an indorsement by the cashier sufficiently shows that it was made in behalf of the bank; and if that were not sufficiently certain, the holder has a right to prefix the name of the corporation. *N. Y. Supreme Ct.* 1864, *Robb v. Ross County Bank*, 41 *Barb.* 586. See, also, *Bank of Genesee v. Patchin Bank*, 18 *N. Y. (3 Kern)*, 309.

180. Where the marks of an official character predominate upon the instrument, it is not necessary to the validity of the act of countersigning, that the cashier should add to his name his official character as cashier. *N. Y. Supreme Ct.* 1820, *Jackson v. Claw*, 18 *Johns.* 846.

181. Where a check was signed by the cashier of a bank, without the addition of the word "cashier" to his name, dated at the bank, and made payable to its teller, it appearing doubtful upon the face of the instrument whether it was a private or an official act;—*Held*, that parol evidence was admissible to show that it

was an official act, though the check was credited on the books of the bank to the cashier's private account. *U. S. Supreme Ct.* 1820, *Mechanics' Bank v. Bank of Columbia*, 5 *Wheat.* 826. To the same effect, *Ga. Supreme Ct.* 1846, *Merchants' Bank v. Central Bank*, 1 *Kelly*, 418. And see *Farmers' & Manufacturers' Bank v. Haight*, 3 *Hill*, 498, 495; *McWhorter v. Lewis*, 4 *Ala.* 198; *Cahill v. Kalamazoo Mutual Insurance Company*, 2 *Dougl.* 124; *Ghent v. Adams*, 2 *Kelly*, 214.

For illustrations of these rules, together with the cases on the general subject of the Execution of contracts negotiated by agents of corporations, see CONTRACTS.

182. **His power to indorse and transfer negotiable paper.** In the absence of any proof that the charter of a bank contains any restriction on the power of the bank to negotiate or indorse notes or bills of exchange, or on the authority of its cashier to indorse such negotiable paper for the bank, the presumption is that the bank has power, and its cashier authority, to indorse such paper. *N. Y. Supreme Ct.* 1864, *Robb v. Ross County Bank*, 41 *Barb.* 586.

183. Since the cashier of a bank is, by virtue of his office, generally entrusted with its securities and funds, and held out to the world as its general agent, he has *prima facie* authority to transfer and indorse, on behalf of the bank, negotiable securities held by it.* No special authority to do so need be shown, and any restriction upon this authority must be proved. *U. S. Circ. Ct. Me.* 1825, *Wild v. Bank of Passamaquoddy*, 8 *Mas.* 505.

184. The cashier of a bank is usually considered the executive officer through whom, and by whom, the whole of the moneyed operations in paying or receiving debts, dis-

* In earlier cases in Massachusetts it was said that neither a president nor a cashier has, *eo officio*, authority to transfer the property or securities of the company; but must have an express authority to that effect, proved by a vote of the corporation, or of the directors. *Hallowell & Augusta Bank v. Hamlin*, 14 *Mas.* 180; *Hartford Bank v. Barry*, 17 *Id.* 94. The general current of the American authorities is, however, (as respects transfers made in the ordinary course of banking business, of negotiable securities owned by the bank, and such as banks ordinarily deal in,) accordant with the cases stated in the text. See, in addition, *Lafayette Bank v. State Bank of Illinois*, 4 *McLean*, 203; *Ridgway v. Farmers' Bank of Bucks County*, 12 *Serg. & R.* 285; *Bank of Kentucky v. Schuykill Bank*, 1 *Para. Sel. Cas.* 243; *Stamford Bank v. Benedict*, 15 *Conn.* 443; *Crockett v. Young*, 1 *Smed. & M.* 241; *State v. Commercial Bank of Manchester*, 6 *Smed. & M.* 287; *Carey v. Giles*, 10 *Ga.* 9; *Ryan v. Dunlap*, 17 *Ill.* 40.

charging or transferring securities, are conducted. It would not seem too much to infer, in the absence of any positive restrictions, that it is his duty to apply as well the negotiable funds as the moneyed capital of a bank, to discharge its obligations. And hence a transfer of paper by his indorsement for the use of the bank may be, in the absence of evidence to the contrary, regarded as within his powers. *U. S. Supreme Ct.* 1823, *Fleckner v. Bank of United States*, 8 *Wheat.* 338.

185. The cashier of a bank is, by virtue of his office, intrusted with the notes, securities and other funds of the bank, and is held out to the world by the bank, as its general agent in the negotiation and management of them. Hence *prima facie* he must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use; and purchasers thereof, from the cashier, without notice of any special limitation of his powers, acquire perfect title. *Ind. Supreme Ct.* 1863, *State Bank v. Wheeler*, 21 *Ind.* 90.

186. The indorsement of a cashier upon the bills receivable of a bank is presumptive evidence of his authority from the bank to indorse them. *Miss. Ct. of Errors*, 1843, *Harper v. Calhoun*, 7 *Hov.* 203.

187. A bank, just before the expiration of its corporate existence, by its cashier indorsed and assigned to a trustee for the stockholders, all unpaid paper belonging to the bank. *Held*, that the assignment was valid, and the trustee might sue, after the expiration of the bank charter, on paper so indorsed to him. *Me. Supreme Ct.* 1849, *Cooper v. Curtis*, 80 *Me.* 488.

188. — in payment of debts. The cashier of a bank is presumed, in the absence of proof to the contrary, to have authority to turn out the notes and assets belonging to the bank, in payment of its debts. *Mich. Supreme Ct.* 1857, *Kimball v. Cleveland*, 4 *Mich.* 606; *Miss. Ct. of Errors*, 1843, *Crocket v. Young*, 1 *Smed. & M.* 241.

189. The cashier of a bank, in the course of his ordinary duties, and by virtue of the general powers appertaining to his office, has a right to transfer the paper securities of the bank in payment of the bank debts. The inducement to the transfer need not appear; but the courts will presume the transfer to have been properly made by the cashier, in

the absence of proof to the contrary. This presumption, however, is not conclusive, and a party may show that it was not made in the regular course of business, but in prejudice of the rights and interests of the bank, and thus defeat the effect of a transfer to an assignee. *Ala. Supreme Ct.* 1837, *Everett v. United States*, 6 *Port.* 166.

190. — to transfer bills of exchange. A cashier of a bank, which, by its charter, is authorized to deal in bills of exchange, may assign such bills as the agent of the bank, in payment of its debts, and indorse them for the purpose. This, by universal usage, is within the scope of the cashier's powers. *U. S. Circ. Ct. Ill.* 1847, *Lafayette Bank v. State Bank of Illinois*, 4 *McLean*, 208.

191. — to accept bills. That a cashier has no power to accept bills of exchange, on behalf of the bank, for accommodation, merely, of the drawers, and the holder, with notice of bills so accepted, cannot recover against the bank,—see *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 *Dougl. (Mich.)* 457.

192. — to transfer non-negotiables. A cashier of a bank cannot transfer non-negotiable paper without authority from the bank, evidenced by a resolution of the board of directors, usage in similar cases, or in some other way. *N. Y. Supreme Ct.* 1855, *Barrick v. Austin*, 21 *Barb.* 241.

193. Presumptively, the cashier of a bank has no authority to transfer judgments in its favor, or to dispose of its property. His authority extends only to negotiable instruments. The president and directors are the only persons who can legally make transfers of non-negotiables; and if the cashier acts as their agent in such matter, the fact ought to be shown in evidence. *Miss. Ct. of Errors*, 1853, *Holt v. Bacon*, 25 *Miss.* 567.

194. — to indorse for collection. A cashier has authority *ex officio* to indorse a note, the property of the bank, as a measure preliminary to a suit, and to authorize a demand upon the maker, and notice to the indorser. *Mass. Supreme Ct.* 1821, *Hartford Bank v. Barry*, 17 *Mass.* 94.

195. That a cashier has power, *prima facie*, to indorse for collection notes discounted, or notes deposited to be collected, or as collateral security,—see *Elliot v. Abbot*, 12 *N. H.* 549; *Corser v. Paul*, 41 *N. H.* 24.

196. A bank having received paper for collection, does not become liable as an in-

dorser, even to *bona fide* holders, by the act of its cashier, who is authorized to indorse for the purpose of transmitting to other banks for collection, but not especially authorized to indorse for the purpose of making the bank liable, in indorsing it in his own name, as cashier, for the purpose of collection merely, and without any intention of binding the bank. [Distinguishing 13 N. Y. (3 Kern.) 318; 16 N. Y. 125.] *N. Y. Supreme Ct.* 1862, Bank of State of N. Y. v. Farmers' Branch, &c. of Ohio, 36 *Barb.* 332.

197. That a cashier indorsing a bill of exchange, for the purpose of collection merely, is a party to the paper, within the New York act of 1833, 395, § 8, relating to notarial certificates as evidence,—see Bank of United States v. Davis, 2 *Hill*, 451.

198. — to transfer funds. A transfer of a deposit belonging to a bank, though made in bad faith, by the cashier, will be good against the bank in favor of a *bona fide* holder, for value and without notice. *Mo. Supreme Ct.* 1845, St. Louis Perpetual Ins. Co. v. Cohen, 9 *Mo.* 416.

199. — to borrow. That the cashier, in virtue of his general employment, may borrow on behalf of the bank,—see Barnes v. Ontario Bank, 19 *N. Y.* 152; Ballston Spa Bank v. Marine Bank, 16 *Wis.* 120.

200. — to collect debts. The cashier of a bank is its executive officer, and has authority to take such measures for the security and eventual collection of a debt as he deems proper, and to act in reference to the collection or compromise of the same according to the general usage, practice and course of business. *N. Y. Supreme Ct.* 1860, Bridenbecker v. Lowell, 32 *Barb.* 9. Compare Bank of State of N. Y. v. Farmers' Branch &c. of Ohio, 36 *Barb.* 332.

201. The cashier of a bank has a general authority to superintend the collection of notes under protest, and to make such arrangements as may facilitate that object, and to do anything in relation thereto that an attorney might lawfully do. His authority does not, however, extend so far as to justify him in altering the nature of the debt, or in changing the relation of the bank from that of a creditor to that of an agent of its debtor; although a subsequent acquiescence of the bank in such an exercise of power may ratify and confirm it. *Pa. Supreme Ct.* 1841, Bank of Pennsylvania v. Reed, 1 *Watts & S.* 101;

Miss. Ct. of Errors, 1846, Payne v. Commercial Bank of Manchester, 6 *Smed. & M.* 24.

202. Bank held bound by acts of its cashier, within the scope of his authority in discharging a mortgage and note, though without a sealed authority, as being acts within the general power of a cashier. *Ill. Supreme Ct.* 1855, Ryan v. Dunlap, 17 *Ill.* 40.

203. The power of a cashier, acting in consultation with two or more of the directors, to make an agreement, which, if carried out, would have the effect to discharge sureties on a note held by the bank, may be implied from the usual course of the bank in such particulars. *Miss. Ct. of Errors*, 1846, Payne v. Commercial Bank of Natchez, 6 *Smed. & M.* 24.

204. The cashier of a bank has no authority, by virtue of his position, to receive payment of the amount due upon a mortgage given to such bank, and transferred by it to the State comptroller as security for its notes. *N. Y. Supreme Ct.* 1859, Mitchell v. Cook, 29 *Barb.* 243.

205. — to receive a deposit. The receipt of the cashier is evidence of a deposit, to charge the bank. *Ill. Supreme Ct.* 1823, State Bank v. Kain, 1 *Breese*, 45.

206. When money has been received by the cashier of a bank as its agent, for and on account of a third party, it will form no ground of defence to an action in favor of such party against the bank, that after the reception of the money it was misapplied by the cashier. His acts are the acts of the bank, while acting as their agent and within the scope of his authority, and any misapplication by him is a misapplication by the bank itself. *N. H. Superior Ct.* 1844, Town of Concord v. Concord Bank, 16 *N. H.* 26.

207. Where the statute of a State, relative to banks, was construed not to authorize the receiving, as a special deposit, of a sealed package of small notes, issued contrary to law: Held, that the receipt of the package, on special deposit, by the cashier, without the knowledge of the directors, raised no implied promise on the part of the bank for the safe-keeping of it, and that, in the absence of gross negligence or fraud, the bank was not liable therefor. *Pa. Supreme Ct.* 1850, Lloyd v. West Branch Bank, 15 *Pa. St.* 172.

208. — to appear and defend. It is not within the scope of the powers ordinarily conferred upon a cashier, to appear and de-

fend suits against the bank. An answer, therefore, by the cashier, when the bank is garnisheed, will not support a judgment against the bank. *Ala. Supreme Ct.* 1840, *Branch Bank at Mobile v. Poe*, 1 *Ala. N. S.* 396.

209. — to give a bond of indemnity. A cashier's general powers do not include an authority to bind the bank to indemnify an officer for levying upon property on an execution in favor of the bank. If such power is claimed to exist, it must be shown by evidence. *N. Y. Supreme Ct.* 1851, *Watson v. Bennett*, 12 *Barb.* 196.

210. Thus where an indemnity, purporting to be the bond of the bank of S., was given to indemnify the sheriff for levying upon certain goods; but it was not sealed, and was signed "B., cashier of the bank of S.;" and B. was sued for trespass in directing the levy,—*Held*, that the court could not assume the paper to be the act of the bank, but that B., if he would exonerate himself, must show his authority to execute the paper for his bank. As cashier, B. was not to be presumed to have such authority. *Id.*

211. — to appeal. That a bank may take an appeal by its cashier—see *Moreland v. State Bank*, 1 *Breese*, 205.

212. — to bind the bank by declarations. And he has power to bind the corporation by his acts and statements in relation to the sale of bills of exchange held by them. *Ohio Supreme Ct.* 1860, *Sturges v. Bank of Circleville*, 11 *Ohio St.* 153. But compare *Pendleton v. Bank*, 1 *T. B. Monr.* 171; and cases under OFFICERS.

213. The cashier of a bank possesses no incidental power to make any declarations binding upon the bank, not within the scope of his ordinary duties. He has no authority, upon a note being offered for discount, to bind the bank by his declaration to a person about to become an indorser on it, that he will incur no risk or responsibility by his becoming an indorser upon such discount. *U. S. Supreme Ct.* 1834, *Bank of Metropolis v. Jones*, 8 *Pet.* 12; *Pa. Supreme Ct.* 1842, *Harrisburg Bank v. Tyler*, 3 *Watts & S.* 373; *Md. Ct. of Appeals*, 1845, *Merchants' Bank v. Marine Bank*, 3 *Gill*, 96. And see *infra*, 455.

214. That the promise of a cashier to pay a debt which the corporation does not owe, or his admission—that forged bills of the

bank are genuine, will not bind the bank, unless it has authorized or adopted his act—see *Salem Bank v. Gloucester Bank*, 17 *Mass.* 1; *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 *Dougl.* 457.

215. If the cashier of a bank should pay to a bona fide holder the amount of a forged check drawn on the bank, or of forged notes of the bank, the payment cannot be recalled; because he is intrusted by the bank with an implied authority to decide on the genuineness of the handwriting of the drawer of the check, and of the paper of the bank. The act of payment is to be distinguished, in this respect, from a mere admission. *U. S. Supreme Ct.* 1825, *Bank of United States v. Bank of Georgia*, 10 *Wheat.* 333; *Mass. Supreme Ct.* 1820, *Salem Bank v. Gloucester Bank*, 17 *Mass.* 1; *Md. Ct. of Appeals*, 1845, *Merchants' Bank v. Marine Bank*, 3 *Gill*, 96.

216. Violations of duty. No act or vote of the board of directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders of the bank, can amount to a justification of the cashier of the bank in acts on his part which are in violation of the stipulation in his official bond, "well and truly" to execute the duties of his office. Acts done by a cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trusts assumed by them, are on the responsibility of the cashier and his sureties. Every act of fraud, every known departure from duty by the board, in connivance with the cashier, for the plain purpose of sacrificing the interest of the stockholders, would be an excess of power, from its illegality,—and, as such, void, as an authority to protect the cashier in his wrongful compliance. *U. S. Supreme Ct.* 1828, *Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46, 71.

217. A cashier, who receives money for deposit, out of the bank, and not in banking hours, or receives its funds at places distant from the bank, and does not account for them, is liable on his official bond. *Ky. Ct. of Appeals*, 1824, *Pendleton v. Bank of Kentucky*, 1 *T. B. Monr.* 177.

218. Where a cashier applies the notes of the bank to his own use, he is liable for the full nominal amount, and cannot avail himself of their depreciation. *Ky. Ct. of Appeals*, 1824 *Pendleton v. Bank of Kentucky*, 1 *T. B. Monr.* 177.

219. By mistake, a credit was erroneously entered in the account of a cashier with the receiver of the bank, which had stopped payment, and after the books were balanced, the cashier disposed of bills of the bank belonging to him at the time of the settlement, at a large discount. *Held*, that on the discovery of the mistake, the cashier was entitled to set off, against the balance found due from him, bills of the bank purchased by him subsequent to the discovery of the mistake. *S. C. Ct. of Appeals*, 1880, *Beers v. Maynard*, 1 *Bailey (Ch.)*, 168.

220. A cashier of a bank is not entitled to the benefit of the statute of limitations as to his own note lying in the bank, unless he shows that he has exhibited it as due and unpaid to the board of directors. *Pa. Supreme Ct.* 1839, *Harrisburg Bank v. Forster*, 8 *Watts*, 12.

221. The payment of overdrafts, by a cashier appointed to keep money and pay it to the checks of persons entitled to draw, is, without some special excuse, a violation of duty. *S. C. Ct. of Appeals*, 1849, *Bank of St. Mary's v. Calder*, 3 *Strobh.* 408.

222. A provision in a statute enacted for the protection of incorporated banks, prescribing a penalty for the conversion by a cashier of any "money, bank bill, or note," does not extend to promissory notes (other than bank notes) or to other commercial paper. *N. J. Supreme Ct.* 1858, *State v. Stimson*, 4 *Zabr.* 9.

223. What will support an indictment against a cashier of a bank for a conversion of its funds, under the statute of New Jersey (*N. J. Rev. Sta.* 125),—see *Id.*; *State v. Stimson*, 4 *Zabr.* 478.

As to principles governing cashiers in common with other Officers of corporations, see **OFFICERS.**

5. Tellers.

224. His authority to receive money. Receiving a note of a foreign bank, in violation of a statute prohibiting circulation of such notes, is not an act within the general scope of a teller's employment, in the absence of an express authority to receive such bills. His employment and duty is to receive money. In the discharge of that duty he has no right to receive anything but money in the legal sense of the term. His receiving what the legislature has declared shall not pass as money, can-

not charge the bank with a penalty therefor, unless it was done in pursuance of express authority or was subsequently ratified. *N. Y. Superior Ct.* 1854, *Clark v. Metropolitan Bank*, 8 *Duer*, 241.

225. — to issue due bills. Where a teller of a bank, having authority to issue "due bills" for the corporation for special purposes, issued them to raise money for his own use;—*Held*, that the want of power in the bank to make such issues could not be set up either by the teller or his surety; nor could the fact that the due bills were not properly stamped. *Pa. Supreme Ct.* 1866, *Wayne v. Commercial National Bank*, 52 *Pa. St.* 848.

As to power and effect of Certifying checks, see *infra*, 398-400.

V. BUSINESS AND DEALINGS.

1: Generally.

226. Dealing by agents. A bank may appoint an agent to transact any business which it may lawfully do, and such appointment may be made by a mere corporate vote. *Ala. Supreme Ct.* 1841, *Bates v. State Bank*, 2 *Ala. N. S.* 451.

227. Whether a bank located by its charter in one county, may appoint an agency in another county,—see *People v. Oakland County Bank*, 1 *Dougl. (Mich.)* 282; *Attorney General v. Oakland County Bank*, 1 *Walk.* 90; *City Bank of Columbus v. Beach*, 1 *Blatchf. C. Ct.* 425.

See **AGENTS; POWERS.**

228. Charter restriction on place of business. The charter of a bank declared that their "operations of discount and deposit should be carried on in the village of I. and not elsewhere." *Held*, that the act of the cashier in discounting, at another place, a note, paying to H. the indorser of the note, its full amount, partly by giving up an acceptance held by the bank against him, and partly in cash, was not a violation of the charter, no other transaction of a similar character appearing to have taken place, and there being some evidence that the cashier's object in making the discount was to collect a debt due the bank from H. *N. Y. Ct. of Errors*, 1844, *Potter v. Bank of Ithaca*, 7 *Hill*, 530.

229. Acquiring property, generally. The debts contracted with a bank must sometimes, from necessity, be paid in prop-

erty, or in stock of the bank itself, or some other stock. In either case it constitutes a part of the capital stock, to which the stockholders have no immediate claim; and is a fund to which the creditors of the bank must look for payment of their claims; and for the unpaid instalments upon such stock the corporation, and not the stockholder, is responsible. *Ga. Supreme Ct. 1855, Robinson v. Bank of Darien, 18 Ga. 65.*

See CAPITAL; PROPERTY.

230. That a bank, by its charter declared "capable of buying, receiving, and holding property and estate of whatsoever nature, and the same to alien and dispose of at pleasure," may receive cotton as collateral security, and ship and sell the same,—see *Commercial Bank v. Nolan, 7 How. (Miss.) 508.*

231. Personal property. A bank existing under the laws of Wisconsin may purchase personal property at a sale on an execution in its own favor, or under a mortgage or pledge of the property taken by it as security for loans. *Wis. Supreme Ct. 1863, Farmers' & Millers' Bank of Milwaukee v. Detroit & Milwaukee R. R. Co. 17 Wis. 872.*

As to the power of banks to take and hold Real property, or Mortgages upon it, see *supra* 39; also MORTGAGES; PROPERTY.

232. Borrowing money. Banking associations formed under the New York general law of 1838, have implied power, as incident to their banking powers, to borrow money, when necessary, in the prosecution of their business. *N. Y. Ct. of Appeals, 1857, Curtis v. Leavitt, 15 N. Y. 9, 53; 1859, Barnes v. Ontario Bank, 19 Id. 152. And see Leavitt v. Blatchford, 5 Barb. 9; Leavitt v. Yates, 4 Edw. 134, 164.*

233. Issuing evidences of debt. Under an act which provides that no corporation created, or to be created, shall issue bills, notes, or other evidences of debts, upon loans, or for circulation as money,—*Held*, that corporations may borrow money and issue the ordinary evidences of debt. *Cal. Supreme Ct. 1855, Magee v. Mokelumne Hill Canal & Mining Co. 5 Cal. 258.*

234. Taking securities for debts. A corporation not invested with banking powers may take a note for a debt, and allow the debtor to pay interest and renew the note. This is not banking. *N. Y. Supreme Ct. 1824, N. Y. Firemen Ins. Co. v. Sturges, 2 Cow. 664.*

235. Where it was provided, in the charter of a corporation established for loaning money, that "nothing therein contained should be construed to authorize the company to discount notes, or exercise any banking privileges whatever," the taking of a note for the sum loaned, and receiving the interest in advance, was held to be thereby prohibited, and that there could be no recovery on the note thus discounted,—though the sum loaned might be recoverable under the money counts. *Conn. Supreme Ct. 1849, Philadelphia Loan Co. v. Towner, 13 Conn. 249.*

236. Dealing by way of trade. A provision in a charter of a bank of discount and deposit that it "shall not deal or trade in anything except bills of exchange, gold and silver," &c. is to be construed as not forbidding them to purchase by way of discount, or receive in payment of a debt, promissory notes of individuals. Its intent is to forbid buying and selling in trade for profit, as distinguished from a banking business. Banking operations are always carried on in this country by discounting notes; and such a charter of course contemplates authority to make loans and discounts. By the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances, or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank. *U. S. Supreme Ct. 1823, Fleckner v. Bank of the United States, 8 Wheat. 388.*

237. The discounting by a bank of bills of exchange, secured by a deposit of cotton to be shipped by the bank, and the proceeds credited to the borrower, is not a violation of a provision forbidding it to "deal in goods, wares and merchandise, in any manner whatever unless it be to secure a debt due the said bank incurred by the regular transactions of the same." The word "deal," in such a clause, means "to buy and sell for the purpose of gain," perhaps including receiving to sell on commission. The same rule of construction which is applied to a clause giving power to deal, &c., is not proper in the case of a clause forbidding dealing. *Ala. Supreme Ct. 1841, Bates v. State Bank, 2 Ala. N. S. 451.*

238. Although a clause in the charter of a

bank forbids it "to deal or trade, directly or indirectly, in anything except bills of exchange, promissory notes, gold or silver bullion, or in the sale of goods, the produce of its lands," it may nevertheless receive and hold bonds and mortgages as securities for its debts; and, in the absence of proof to the contrary, such bonds and mortgages will be presumed to have come into the hands of the bank lawfully and within the scope of its corporate powers; the clause being designed merely to restrain the bank to its proper business of banking. *N. J. Chancery*, 1838, *Trenton Banking Co. v. Woodruff*, 1 *Green's Ch.* 117.

239. A statute authorized any bank to take and discount paper having longer time than twelve months to run, from any debtor, when deemed advisable for the better security of any debt due to such bank. *Held*, 1. That a bank previously chartered, though forbidden by its charter to discount paper which had more than twelve months to run, was within the provision of the subsequent statute.

2. That such paper, when discounted, must be presumed to have been taken for an existing debt, and for the security of the bank. *Tenn. Supreme Ct.* 1849, *Dockery v. Miller*, 9 *Humph.* 731.

240. A debtor to a bank pledged to it, as collateral security for existing and future liabilities, certain stocks, which were afterward, by virtue of a power of attorney executed by the debtor, transferred to the bank. A credit was entered the next year in the books of the bank therefor, for a less amount than the debt at the time of the pledge, and the securities were sold and transferred by the bank to its own officers without notice or judicial sale. In an action by the bank against the accommodation indorser of the debtor, on two notes given subsequently to the pledge, on an affidavit of defence, alleging the wrongful conversion, and an increase in the value of the stocks pledged, exceeding the debt at the time of the pledge and the amount of the notes sued on:

Held, 1. That the bank held the stocks as a pledge, pawn, or collateral security for existing and future indebtedness, and that the notes in suit were such a future debt as was protected by the pledge after the payment of the prior debt.

2 That it was the duty of the bank, as the holder of the pledge for an indefinite time, to

have called upon the pledgor to redeem, and if he failed, upon due notice, to have sold the stocks and applied the proceeds to the debt.

3. That the bank, in instituting no proceedings for a judicial sale, nor calling on the debtor to redeem, nor giving notice of a sale, nor making public sale, had failed in its duties to the pledgor, and that the private sale to its own officers was an illegal mode of dealing with the collateral held in trust.

4. That the indorser could not avail himself of the equities which had arisen between the bank and the principal debtor, and that the entry of judgment for want of a sufficient affidavit, was error. *Pa. Supreme Ct.* 1865, *Sitgreaves v. Farmers' and Mechanics' Bank*, 49 *Pa. St.* 359.

241. Taking bills for collection. A clause in a bank charter authorizing the bank "to deal in bills of exchange" includes authority to the bank to take bills of exchange for collection merely. It does not restrict the bank to buying and selling bills. It ought to be construed to extend to all transactions with bills of the bank which are lawful and considered by the bank expedient to enable it to transact its business or increase its profits. *Ala. Supreme Ct.* 1840, *Bank at Montgomery v. Knox*, 1 *Ala. N. S.* 148. And see *Bates v. Bank of Alabama*, 2 *Ala. N. S.* 451.

242. Selling assets. A bank has, by implication, the same power that any other holder has to transfer by an indorsement, or by a delivery under a blank indorsement, a negotiable note. In discounting notes, and managing its property in legitimate banking business, it must be able to assign or sell those notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for its banking house, and for any goods and effects connected with banking which it may properly own. Indeed, its right to sell any of its property, when not restricted in the charter or any previous law, is perhaps as unlimited as that of an individual, if not carried into the transaction of another separate and unauthorized branch of the business. *U. S. Supreme Ct.* 1847, *Planters' Bank v. Sharp*, 6 *How.* 301.

As to the application of this rule to Corporations generally, see *CONTRACTS*; *POWERS*.

243. *So held*, also, in a case of a transfer after maturity. *N. Y. Ct. of Appeals*, *Marvine v. Hammers*, 12 *N. Y. (2 Kern.)* 223.

244. The City Bank of New Orleans, three days before the expiration of its charter, in good faith, sold and transferred all its banking assets, by assignment, to the Louisiana State Bank, in consideration of an undertaking by the latter bank to discharge all the liabilities of the former, which were warranted not to exceed a specified amount. *Held*, that this transaction was within the corporate powers of the contracting parties, and that the latter bank thereby became an assignee, within the meaning of the statutes of Ohio, competent to prosecute an action in the name of the former. *Ohio Supreme Ct.* 1861, *Stetson v. City Bank of New Orleans*, 12 *Ohio St.* 577.

See PROPERTY.

245. Exchange of securities. The liabilities held by the bank against the directors exceeded a limit prescribed by the law of the State, and the cashier, to reduce the amount, procured notes to be made and indorsed for his accommodation, and had them substituted and absolutely exchanged for notes which had been indorsed by a director and discounted by the bank for his accommodation. *Held*, that the transaction, having been in good faith, and not as a mere shift to present a temporary appearance of soundness, was legal, and the new notes were valid. *N. Y. Supreme Ct.* 1848, *Seneca Co. Bank v. Neass*, 5 *Den.* 329.

246. A bank held a note which it had discounted, made by the president and indorsed by the defendant. Before maturity, the president, wishing to reduce the amount of discounts appearing to be made to the directors, obtained a note to be made by the cashier, for the same amount, and payable at the same time, which he indorsed and substituted for the first note, and delivered the first note to the cashier as security, on the understanding that the cashier might make a re-exchange whenever he chose. On the discount books the second note was entered as discounted, and the first as paid. Before maturity, the cashier restored the first note, took back and destroyed the second, and canceled the entries in the books. *Held*, that the first note was not to be deemed, as a matter of law, as having been paid, but that the indorser was chargeable upon it. The transaction was an exchange of securities; and inasmuch as the amount due from directors, including that note, would have been less than the limit pre-

scribed by statute, the exchange was not void as an attempt to conceal an unlawful act. *N. Y. Supreme Ct.* 1848, *Highland Bank v. Du-bois*, 5 *Den.* 558.

247. Usury. Banking corporations are within the prohibition of the statute against usury, although chartered since that statute, and by their charters authorized to loan "on banking principles." Such an expression does not authorize them to exceed the legal rate of interest. *Mass. Supreme Ct.* 1812, *Maine Bank v. Butts*, 9 *Mass.* 49.

For cases upon the Corporate powers of banks, held in common with other corporations, see POWERS.

2. Circulation.*

248. Bank notes not bills of credit. By a fair construction of the terms "bills of credit," as used in the provision of the Constitution of the United States which prohibits States to issue such bills, they do not include ordinary bank notes, even where the State owns the whole of the stock in question. *U. S. Supreme Ct.* 1837, *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 *Pet.* 251, 317; 1851, *Darlington v. Bank of Alabama*, 13 *How.* 12. And see *Owen v. Branch Bank of Mobile*, 3 *Ala.* 258.

249. Form. That a promissory note made by a bank in the course of business, and not intended to circulate as money, may be valid, although not made in the manner required in the case of bank notes—see *Rockwell v. Elkhorn Bank*, 13 *Wis.* 658.

250. Issuing. That a bank is answerable for the acts of its agent; and it is immaterial how notes get into circulation, if they come into the hands of the owner *bona fide*—see *Whits v. How*, 3 *McLean*, 291.

251. *It seems*, that where bills of a bank are legally pledged for the security of a debt or a demand due to any other person or institution, so as to entitle the pledgee to hold and use such bills for his indemnity in case the debt is not paid, such bills must be con-

* The scope of this work only embraces bank notes so far as they are connected with *Corporations* issuing them. The power of banks to issue circulating notes, their obligations in respect to them, the mode of enforcing redemption, &c., rights and liabilities of private parties, as between themselves in respect to payments made in bank notes, and the like, belong more appropriately to the law of *Contracts*; and punishable offences, like issuing notes for circulation as money in violation of law, forging and counterfeiting notes, &c., to the law of *Crimes*.

sidered as issued and in circulation within the true intent and meaning of the statute limiting such issues; and such bills are no longer under the control of the bank. *N. Y. Chancery*, 1841, *Davenport v. City Bank of Buffalo*, 9 *Paige*, 12.

252. An attempt was made by the cashier to hypothecate bills of the bank by sealing them up in a package and depositing them in its vaults, with his indorsement that they were security for a loan to the bank; such bills were not entered upon the books of the bank as a part of its circulation. *Held*, that they were not legally hypothecated, and the creditor obtained no lien. *Id.*

253. The mere receipt by the officers of a new bank, of the bills of an old bank of the same name, and their paying out the same bills, does not make the new bank responsible to pay all the bills of the old bank. *Mass. Supreme Ct.* 1817, *Wyman v. Hollowell & Augusta Bank*, 14 *Mass.* 58; *U. S. Circ. Ct. Mass.* 1819, *Bellows v. Hollowell & Augusta Bank*, 3 *Mass.* 31. And see *Bank of United States v. Davis*, 2 *Hill*, 451.

254. Distinction between "paying out" notes, and "issuing" them as money. *United States v. Ray*, 2 *Cranch C. Ct.* 141; *People v. Wells*, 8 *Mich.* 104.

255. A note which a banking association could not lawfully issue for circulation as money, may nevertheless be deemed presumptive evidence of an indebtedness which it was competent for the bank to contract, for some purpose incidental to the banking business. Until shown not to have been issued for the benefit of the bank, it must be deemed obligatory on the association; and the holder of it is entitled to be regarded as a creditor of the bank, and may proceed as such against them under the statute. *N. Y. V. Chan. Ct.* 1840, *Parmy v. Tenth Ward Bank*, 3 *Edw.* 395.

256. That bank bills complete in form, but not issued by the bank, are its property, and may be so treated in an indictment for stealing them,—see *The People v. Wiley*, 3 *Hill*, 194.

257. Destroyed and lost notes. The owner of bank notes which have been destroyed, may recover the amount from the bank which issued them, on proof of their destruction. Thus, where notes, issued by a bank, were sent to it, through an express company, and while in transit a part were

stolen by an agent, who destroyed them after the amount had been paid to the bank by the company: *Held*, that the property in the notes was transferred by that payment to the company, who, on proving the destruction, were entitled to the amount from the bank. *Pa. Supreme Ct.* 1863, *Hagerstown Bank v. Adams Express Co.* 45 *Pa. St.* 419. And see *Bank of Louisville v. Summers*, 14 *B. Monr.* 306; and, as to lost bank notes, *Waters v. Bank of Georgia*, 2 *M. Charl.* 198.

258. Cutting a bank note into two parts, for the purpose of remitting them separately by mail, does not discharge the bank from the debt, but it may be recovered by the true and *bona fide* holder of one of the parts, upon sufficient proof that the other part has been lost or destroyed. *Va. Ct. of Appeals*, 1818, *Bank of Virginia v. Ward*, 6 *Munf.* 166; 1824, *Farmers' Bank v. Reynolds*, 4 *Rand.* 186; *N. C. Supreme Ct.* 1834, *Allen v. State Bank*, 1 *Dev. & B. Ch.* 3; *Ky. Ct. of Appeals*, 1857, *Commercial Bank v. Benedict*, 18 *B. Monr.* 307; *Northern Bank v. Farmers' Bank*, *Id.* 506; *Ill. Supreme Ct.* 1841, *State Bank v. Aersten*, 3 *Scamm.* 185.

259. To enforce bank notes, alleged to have been destroyed, against the bank, there must be such certainty of description as to enable the bank to see that it issued such notes, and such as will enable the court to extend an adequate indemnity to the bank. *Tenn. Supreme Ct.* 1839, *Irwin v. Planters' Bank*, 1 *Humph.* 145.

260. That the owner of bank bills which cannot be identified or distinguished from other similar bills, cannot maintain an action against the bank which issued them, upon circumstantial evidence that they have been destroyed, and a tender of a bond of indemnity,—see *Tower v. Appleton Bank*, 3 *Allen*, 387.

261. Whether a demand of bank notes is necessary. There is no ground for a distinction between the notes of banks and other corporations, and natural persons, in reference to the necessity of demand at a particular place before suit. Where the statute constituting the bank provides that the notes shall be made payable at the bank, a demand there is not necessary if the note be not in terms expressed to be payable there. *N. J. Supreme Ct.* 1817, *State Bank v. Van Horn*, 1 *South.* 382.

262. A bank bill, like any other note of

that a subsequent transferee of it was a *bona fide* holder, is opposed to the law of the case, and nugatory. *N. Y. Ct. of Appeals*, 1862, *Clafin v. Farmers' & Citizens' Bank*, 25 *N. Y.* 293; 24 *How Pr.* 1.

400. By a fraudulent conspiracy between the paying teller of the Merchants' Bank, the teller of the Atlantic Bank, and a broker, the broker drew a check on the Merchants' Bank, where he had no funds, which the paying teller marked "good," and the broker took it to the teller of the Atlantic Bank, who gave him the money for it in current bills, partly on the Atlantic Bank, and partly on other banks. The broker took these to the Merchants' Bank, and gave them to the paying teller, who, for the purpose of covering a deficit, unknown to any other of the bank officers, in his cash, which was to be counted that afternoon, placed them with it. The purpose for which the money was obtained was known to the two other parties, but no other officer of either bank knew anything of the transaction. The paying teller's cash was produced by the cashier to the directors, and counted by them that afternoon, approved, and returned to him. The next morning he committed suicide; the check was presented at the Merchants' Bank, and payment refused. *Held*, that the Merchants' Bank could not hold the money as against the Atlantic Bank, and was liable to the latter, after demand, in an action for money had and received. *Mass. Supreme Ct.* 1858, *Atlantic Bank v. Merchants' Bank*, 10 *Gray*, 582. Compare *Bank of the Republic v. Baxter*, 31 *Vt.* 101.

401. — or notes. The rule on which a bank is held liable on the teller's certificate of a check applies to the certification of a *promissory note* drawn payable at the bank, where the course of business between banks is, instead of actually paying the notes of customers when in funds, on presentment, to mark them as good, and settle in the exchanges of next day. *N. Y. Ct. of Appeals*, 1862, *Meads v. Merchants' Bank of Albany*, 25 *N. Y.* 143.

402. Paying forged checks. Bankers are presumed to know the signature of their customers, and they pay checks purporting to be drawn by them at their peril. *N. Y. Ct. of Appeals*, 1854, *Weisser v. Denison*, 10 *N. Y.* (6 *Seld.*) 68. And see *Morgan v. N. Y. State Bank*, 11 *N. Y.* (1 *Kern.*) 404.

403. Checks forged by the confidential

clerk of the depositor were paid by the bank, charged to the depositor in his pass-book, the book balanced, and, with the forged vouchers, among others, returned to the clerk, who examined the account at his principal's request, and reported it correct; and the principal did not discover the forgeries until several months afterwards, when he immediately made them known at the bank. *Held*, that it not appearing that the bank had taken any action, or lost any right by the depositor's assent to the account, he was not precluded from recovering from the bank the amount of the forged checks. *N. Y. Ct. of Appeals*, 1852, *Weisser v. Denison*, 10 *N. Y.* (6 *Seld.*) 68.

404. The fact that the forged check was written on one of the dealer's own blanks taken from his book, that the dealer had furnished his signature to the felon, and that he had grounds of suspicion,—*Held*, no reason for charging the dealer with a payment by the bank of the forged check. *Leavitt v. Stanton*, *Hill & D. Supp.* 413.

405. When a custom is proved among the banks of a city, requiring a bank buying a check drawn upon another bank, from a stranger, to be satisfied of his title to the check, and allowing the bank upon which it was drawn to rely, in paying it, upon the presumption that such previous caution had been exercised by the bank purchasing the check, and in such a case a forged check is bought by a bank without any such inquiry, and upon presentment to the bank named upon it as drawee, is paid, the money may be recovered back in an action for money had and received. *Ohio Supreme Ct.* 1855, *Ellis v. Ohio Life Ins. & Trust Co.* 4 *Ohio St.* 628.

406. *It seems*, that the drawee of a bill of exchange, paying its amount to a banking-house by whom it had been purchased, both being ignorant that it was forged, may entitle himself to a return of the money by notice given in time to allow the purchaser to charge the real parties upon it. *Id.*

407. If a bill of exchange, made payable to order, be accepted payable at the acceptor's bankers, and the indorsement of the bill be forged, and the bankers pay the bill to a party presenting it for payment, they are guilty of no breach of duty towards the acceptor in making the payment; but they are not at liberty to charge the amount of the bill in account against him, although

the payee be a stranger to them, and they have no immediate means of ascertaining the genuineness of his handwriting, and have dealt with the bill in the ordinary course of business. *Roberts v. Tucker*, 4 *Eng. L. & Eq.* 236; 20 *Law J. N. S. Q. B.* 270.

408. Making note payable at bank. A direction in a note, making it payable at a given bank, is equivalent to a request to the bank to pay it. *N. Y. Com. Pl.* 1856, *Griffin v. Rice*, 1 *Hill*, 184.

409. Where a bank pays a note made payable at a particular bank, and charges it to the maker in his account in the bank, when the account is not good for the amount, such bank becomes the holder of the note, and may sue for the amount of the note. *N. Y. Com. Pl.* 1846, *Union Bank v. Griffin*, 4 *N. Y. Leg. Obs.* 344.

410. A bank at which a promissory note was made payable received it from the holder for collection, and having an account with the maker, which was not, however, good for the amount, charged it to him and paid it to the holder, at the same time placing upon it a cancelling mark, which, by the practice of the bank, only denoted that it was charged. In a suit on the note by the bank, as indorsee, against the maker, it was *Held*, that it was a subsisting security in the hands of the plaintiff, and authorized a recovery; although the note was made for the accommodation of an indorser upon it, who was cashier of the bank at which it was payable, and had promised the maker to provide for it. *N. Y. Supreme Ct.* 1845, *Watervliet Bank v. White*, 1 *Den.* 608.

411. A note being made payable at the bank of A. it was presented there and paid by mistake, there not being funds of the maker in the bank. Within banking hours of the same day, the bank obtained the note, which had been stamped "paid," presented it to its own teller for payment, had it protested, and gave due notice to the indorsers, *Held*, that the note was not to be deemed paid as against the bank, that the protest and notice were properly made, and the maker and indorsers were liable to the bank. *N. Y. Supreme Ct.* 1861, *Irving Bank v. Wetherald*, 34 *Barb.* 328.

412. Where a party who has drawn his notes payable at a bank where he keeps no account, delivers money to pay such a note to the paying teller of the bank, who re-

ceives it, and promises to pay the note with it, he does not, thereby, become a depositor in the bank, nor is the bank liable to him for damages upon the teller's neglect to pay it, in the absence of proof of a general usage that the teller should receive funds in such way on behalf of the bank. *N. Y. Superior Ct.* 1851, *Thatcher v. Bank of the State of New York*, 5 *Sandf.* 121; *N. Y. Com. Pl.* 1854, *Newark India-rubber Co. v. Bishop*, 3 *E. D. Smith*, 48.

413. The receiving teller of a bank, where there is one, is the only proper officer to receive deposits; and if the paying teller receive the funds of a stranger, and promise to apply them to the payment of a bill or note, he acts as the agent of the stranger and not of the bank, which is not liable for any neglect or breach of his promise. *N. Y. Superior Ct.* 1851, *Thatcher v. Bank of the State of New York*, 5 *Sandf.* 121. Compare *supra*, 223, 224.

414. Overdrafts. Where by the course of dealing between a bank and a depositor, the depositor has been allowed habitually to overdraw his account, a value being given for the accommodation, the bank is bound to honor such drafts until the depositor has reasonable notice that such accommodation is discontinued. *Esch.* 1860, *Cumming v. Shand*, 5 *Hurl. & N.* 95.

415. That a mere permission to overdraw, revocable at pleasure, is not an "authority" to overdraw which binds the bank to honor checks, and so warrants the party drawing the check in stating that the check is good, —see *Ballard v. Fuller*, 32 *Barb.* (*N. Y.*) 68.

416. A usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank, is a usage and a practice to misapply the funds of the bank, and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is a manifest departure from the duty both of the directors and the cashier, and cannot receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal; and, therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. *U. S. Supreme Ct.* 1838, *Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46, 72. Compare *Lancaster Bank v. Woodward*, 18 *Pa. St.* 357.

417. — *how recoverable.* If a depositor fraudulently overdraws his account, and the identical money is placed by him to his credit in another bank, the former bank may reclaim the money from the latter bank. They may follow it into the hands of any person who has not taken it in the course of business, and allowed an equivalent therefor, without notice of fraud. They are not creditors at large, but have a specific lien upon the fund. *N. Y. Chancery*, 1829, *Tradesmen's Bank v. Merritt*, 1 *Paige*, 302; *S. P.* 1832, *Mechanics' Bank v. Levy*, 3 *Id.* 606.

418. The president of a bank became treasurer of a voluntary association, and as such treasurer opened an account with his bank, and deposited their funds there, which account he overdraw by a check drawn by him as treasurer,—*Held*, that the bank could recover the amount of the overdraft from the members of the association. He drew as their agent. The fact that he was at the time the president of the bank made no difference. *N. Y. Supreme Ct.* 1833, *Tradesmen's Bank v. Astor*, 11 *Wend.* 87.

419. A bank overpaying a check from a general deposit has a right of action to recover back the sum in its own name, and not in that of the depositors. *Ky. Ct. of Appeals*, 1858, *Keene v. Collier*, 1 *Metc.* 415.

420. Entry of deposit in bank book. An entry by a bank teller of the amount of deposit in the bank book of the depositor is not conclusive on the latter; but if mistake can be shown as to the amount, there is a remedy as in ordinary cases of mistake. *N. Y. Supreme Ct.* 1821, *Mechanics' & Farmers' Bank v. Smith*, 19 *Johns.* 115.

421. Though the dealer's account may be deemed balanced, and the lapse of time may be such that as a whole account it cannot be opened, yet particular items may be falsified. *N. Y. Supreme Ct.* 1809, *Manhattan Co. v. Lydig*, 4 *Johns.* 377.

422. When conclusive. A book-keeper in the bank, who was also a book-keeper for a dealer with the bank, received money from the latter, for the purpose of having the same deposited in the bank; and he entered the amount in the ledger, and afterwards in the dealer's bank book, but the money was not received by the teller, nor entered in his cash book, and was supposed to be embezzled, with other moneys, by the book-keeper, who absconded. *Held*, that the book-keeper, in

making the deposit, was the agent of the depositor, and not of the bank; and that the depositor must answer for the deficit in the deposit. *Id.*

423. *It seems*, that if a dealer send his bank book with money to be deposited, and the clerk enters the amount to his credit, in the bank book, at the time the deposit is made, it is conclusive on the bank; otherwise, if the deposit is first made, and the entry is afterwards copied from the ledger into the dealer's bank book. *Id.*

424. A by-law, or rule of a bank, that all payments made and received, must be examined at the time, does not preclude a party dealing with the bank from showing, afterwards, that there was a mistake in the entry of a deposit made by him. The power of a bank to make by-laws for the management of its property, and the duties of its officers, though incident to its corporate powers, and though declared in the charter, does not involve an authority whereby the interest of third parties can be affected, and their just claims defeated by a by-law. *N. Y. Supreme Ct.* 1821, *Mechanics' & Farmers' Bank v. Smith*, 19 *Johns.* 115. Compare *Gallatin v. Bradford*, 1 *Billb.* 209; *Godin v. Bank of Commonwealth*, 6 *Duer*, 76.

425. The entry of a deposit was made by the teller, the amount being erroneously stated to him by the depositor's clerk. *Held*, that the entry was not to be deemed the deliberate act of both parties, and conclusive; and the correctness of the amount so stated being questioned by the plaintiff on the same day, and as soon as he discovered a mistake, he was allowed to recover from the bank the difference between the entry and the true amount. *Id.*

426. That a bank is bound to exhibit its books to a depositor, on proper occasions,—see *Union Bank v. Knapp*, 8 *Pick.* 96.

427. *Certificates of deposit.* Certificates of deposit, as far as negotiability is concerned, must be placed on the same footing as promissory notes. *Cal. Supreme Ct.* 1854, *Welton v. Adams*, 4 *Cal.* 37. Compare *Bullard v. Central Bank*, 1 *Kelly*, 461.

428. A bank certificate of deposit—"A has deposited in this bank four hundred and forty dollars, subject to his order, payable only on the return of this certificate,"—is not negotiable. *Pa. Supreme Ct.* 1857, *Lebanon Bank v. Mangan*, 28 *Pa. St.* 452.

429. Their validity. Under a statute prohibiting the circulation of bills or notes not payable on demand, banks have no power to issue time certificates of deposit; and such certificates, if issued, are void. *Ill. Supreme Ct.* 1857, *Bank of Peru v. Farnsworth*, 18 *Ill.* 563. *S. P. N. Y. Supreme Ct.* 1842, *Bank of Orleans v. Merrill*, 2 *Hill*, 295; *N. Y. Ct. of Appeals*, 1840, *Leavitt v. Palmer*, 3 *N. Y.* (3 *Comst.*) 19.

430. A certificate issued by the New York Life Insurance & Trust Co. stating that a specified sum had been deposited with the company for the period of twenty years, and unredeemable within that time, and payable after that time, with interest; which certificate was issued by the company as a loan, secured to them by bond and mortgage—is a violation of the provision of 1 *N. Y. Rev. Stat.* 600, § 4 (*supra* 66), and a violation of section 21 of its charter (Laws of 1830, 80, ch. 75, § 21),—providing that the company should not, “in any case, or for any purpose, issue its own bills, notes, or other evidences of debt, upon loan, or for circulation as money.” *N. Y. Ct. of Appeals*, 1852, *New York Life Ins. & Trust Co. v. Beebe*, 7 *N. Y.* (3 *Seld.*) 364. Compare *Schermerhorn v. Talman*, 14 *N. Y.* (4 *Kern.*) 93.

431. Certificates of deposit, which on their face are not calculated to circulate as money, and could not well be used so, and which were not actually issued with an intent that they should be so used, are not, although they are drawn payable to an officer of the bank issuing them, and by him indorsed in blank, to be deemed as “in the nature of bank notes or certificates of deposit payable to bearer,” within a provision of the charter of the bank forbidding them to issue such. *N. Y. Ct. of Appeals*, 1851, *Mumford v. American Life Ins. & Trust Co.* 4 *N. Y.* (4 *Comst.*) 463. To the same effect is *American Life Ins. & Trust Co. v. Bayard*, 5 *N. Y. Leg. Obs.* 13.

432. Upon the deposit of money in a bank, the depositor received a book, containing the cashier's certificate thereof, in which it was stated that the money was to remain in deposit for a certain time.

Held, 1. That such agreement was illegal and void, under *Mass. Rev. Stat.* ch. 86, § 57, as being a contract by a bank for the payment of money at a future day certain.

2. That no action could be maintained by the depositor against the bank upon such ex-

press contract, but that he might, without a previous demand, recover back the money in an action commenced before the expiration of the time for which it was to remain. The parties were not in *pari delicto*. *Mass. Supreme Ct.* 1839, *White v. Franklin Bank*, 22 *Pick.* 181.

4. Loans and Discounts.

433. Loans. A power in the charter to loan on banking principles does not restrict the corporation from loaning their notes at a discount, with an agreement on the part of the borrower to redeem with specie the identical bank notes received by him on the loan, if they should be returned to the bank during the continuance of the loan, and also to purchase of the company, with specie during the loan, a certain amount of other bank notes not current at par. *Mass. Supreme Ct.* 1813, *Northampton Bank v. Allen*, 10 *Mass.* 284.

434. As a general rule, a bank, in making a loan, must confine itself to its capital, or to its own notes, which it is legally liable to redeem; and if it give out something else, it must show that the transaction is in substance the same. *Miss. Ct. of Errors*, 1854, *Maury v. Ingraham*, 28 *Miss.* 171.

435. What is discounting. That the buying exchange by a bank is, in effect, discounting paper,—see *People v. Oakland Co. Bank*, 1 *Doughl. (Mich.)* 282.

436. The purchase of uncurrent bank bills, payable at a distant place, and not, therefore, immediately available, is analogous to a purchase of a note not due, and if such a purchase is made at a legal rate of discount, the transaction is to be deemed “discounting,” within the New York “act to authorize the business of banking.” *N. Y. Supreme Ct. Chambers*, 1852, *People v. Metropolitan Bank*, 7 *How. Pr.* 144.

437. An advance upon a note of a sum of money equal to the face of it, without deducting any interest or receiving any payment of interest, is not a “discount” of a note, within the meaning of a statute restraining foreign corporations from discounting notes within the State. *N. Y. Com. Pl.* 1856, *Noble v. Cornell*, 1 *Hill.* 98.

438. The power to make discounts. That a bank has, presumptively, power to purchase bills of exchange,—see *Bank of Louisville v. Ellery*, 34 *Barb. (N. Y.)* 630; *State Bank v. Criswell*, 15 *Ark.* 230.

439. A purchase by a bank of bills issued by a railroad company in a peculiar case, held not void as against public policy. *Branch Bank at Montgomery v. Crochepon*, 5 *Ala. N. S.* 250.

440. Where the charter of a bank authorizes it, in general terms, to deal in bills of exchange, this gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another State. The power thus given, clothes the corporation with the right to make contracts out of the State, in so far as the State granting the charter can confer it. For whenever the bank purchases a foreign bill, and forwards it to an agent to present for acceptance, if it be honored by the drawee, the contract of acceptance is necessarily made in another State; and the power to purchase bills without any restrictions as to place, by its fair and natural import, authorizes the bank to make such purchases, wherever it is found most convenient and profitable; and also to employ suitable agents for that purpose. The purchase of such a bill is, therefore, the exercise of one of the powers which the bank possesses under its charter; and is sanctioned by the law of the State creating the corporation, so far as that State can authorize a corporation to exercise its powers beyond the limits of its own jurisdiction. *U. S. Supreme Ct.* 1839, *Bank of Augusta v. Earle*, 13 *Pet.* 519, 588.

441. The privilege given to a bank, in its charter, to discount upon moneys deposited for safe keeping, does not extend to special deposits. *Mass. Supreme Ct.* 1821, *Foster v. Essex Bank*, 17 *Mass.* 479.

442. The rate of discount allowable. Where a bank is prohibited by a statute—such as the New York safety-fund act of April 2, 1829—from taking more than six per cent. in advance, on discounting paper maturing in sixty-three days, any paper discounted by them in violation thereof, is void in their hands.* *N. Y. Supreme Ct.* 1858, *Seneca Co. Bank v. Lamb*, 26 *Barb.* 595.

* Banks in Vermont not allowed to receive more than six per cent. interest on loans, although the loans are made, and securities received in States where more than six per cent. is allowed by law. See *Farmers' Bank v. Burchard*, 38 *Vt.* 346. That where a bank takes a greater rate of interest on a discount than that allowed by its charter, the contract is not void for want of authority, inasmuch as a discount or a loan is an act within the scope of the powers of a bank,—see *Commercial Bank v. Nolan*, 7 *How. (Mo.)* 508.

443. That a special charter authorizing a bank to discount bills &c. and to make by-laws touching the time, manner and terms &c. of discounts, will not be construed to exonerate the bank from the operation of the general laws of the State restricting discounts by moneyed corporations,—see *Id.*

444. A provision in the charter of a bank which authorizes it to discount notes &c. "on banking principles," is intended to authorize it expressly to take interest in advance, and it does not make void a contract or note reserving more than lawful interest. *U. S. Circ. Ct. Ohio*, 1846, *McLean v. Lafayette Bank*, 3 *McLean*, 587.

445. In the case of a mercantile discount, and ordinary bills and notes are to be deemed such, the bank may deduct the whole interest for the time they have to run. This is only an anticipation of funds, and not usury. *Circ. Ct. D. C.* 1809, *Bank of Alexandria v. Mandeville*, 1 *Cranch C. Ct.* 552.

446. That any attempt by a bank to put upon a borrower bank bills not its own, and below par at the time and place, is usurious, unless the bank, by its contract of loan, engages to make the notes good as cash,—see *Bank of the State v. Ford*, 5 *Iredell*, 692.

447. A bank in discounting drafts at the highest rate allowed by law, may in addition charge the current rate of exchange as a compensation for collecting the drafts, provided this is not resorted to as a device to evade the statute against usury. *Wis. Supreme Ct.* 1863, *Central Bank of Wisconsin v. St. John*, 17 *Wis.* 157.

448. If a person who obtains discounts at a bank voluntarily allows a sum to remain on deposit with the expectation that this course will enable him to obtain discounts more readily, but without any agreement or understanding that he may not draw his money at any time, there is no usury in the practice. *Mass. Supreme Ct.* 1864, *Appleton Bank v. Fiske*, 8 *All.* 201.

449. Rights and liabilities upon discounts. Under a power in the charter to buy bills of exchange upon banking principles, a purchase of bills of exchange is not invalidated by the fact that the bank bought them from another bank, paying in the depreciated notes of the latter. To treat the depreciation of the notes with which the bills were bought from the bank which issued the notes as avoiding the transaction, would

be to afford inducements to banks to discredit their own bills. *U. S. Circ. Ct. Ill.* 1847, *Lafayette Bank v. State Bank of Illinois*, 4 *McLean*, 208.

450. One who is indebted upon a valid bill or note cannot resist an action upon it, on the ground that the plaintiff, being a banking corporation acquired the demand by purchase at a discount greater than such corporations are allowed, by statute, to take. Such restrictions are designed for the protection of those who deal with them. A debtor has nothing to do with the rate of discount at which the bank has purchased the demand against him. *N. Y. Ct. of Appeals*, 1860, *Oneida Bank v. Ontario Bank*, 21 *N. Y.* 490.

451. An agreement by the president and cashier of a bank, that the indorser of a promissory note shall not be liable on his indorsement, does not bind the bank. It is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money. *U. S. Supreme Ct.* 1832, *Bank of United States v. Dunn*, 6 *Pet.* 51. And see *supra*, 217.

452. A bank is bound to apply deposits of the maker in payment of his note, or the indorser is discharged. *Del. Ct. of Errors*, 1834, *M'Dowell v. Bank*, 1 *Harring*, 369.

453. If a bank discount a note, knowing it to be the intention of the party offering it that the proceeds should be applied to the discharge of a particular note held by the bank, those proceeds cannot be applied by the bank to the discharge of any other note. *Circ. Ct. D. C.* 1819, *Bank of Alexandria v. Saunders*, 2 *Cranch C. Ct.* 183.

454. Where a note was discounted by a bank, which, on failure of payment by the maker, was paid by the last indorser, who sued the prior indorsers thereon, and failed to recover for want of a sufficient demand on the maker,—*Held*, that the bank was liable for the amount of the note to the indorser who took it up, unless he was aware of the want of demand at the time of taking it up. *S. C. Ct. of Appeals*, 1832, *Halls v. Bank of the State*, 8 *Rich.* 366.

455. A bank held collateral securities indorsed by defendant, for a loan made by

them to a third person; and when the loan was due, the bank charged it to the borrower, in account, and gave up the securities; but subsequently, it being discovered that his credit was less than the loan, he returned the securities to the bank. *Held*, that the defendant was not discharged by the temporary surrender of the securities. *N. Y. Com. Pl.* 1858, *Williamson v. Mills*, 2 *Hill*, 84.

456. An accommodation note, made for benefit of a bank, was discounted for them by another bank, and the former bank received the proceeds.

Held, that it constituted a valid claim against the assets of the former bank, and that the receiver, after paying the amount due upon it, must deliver it up to the makers; or, if the makers should pay it, must allow the principal and interest as a debt in their favor. *N. Y. Chancery*, 1841, *Davenport v. City Bank of Buffalo*, 9 *Paige*, 12.

457. By making a note negotiable at bank, the maker authorizes the bank to advance, on his credit, to the holder, the sum expressed in the note; and it would be a fraud on the bank to set up offsets against the note, in consequence of any transactions between the parties. These offsets are waived, and cannot, after the note has been discounted, be again set up. *U. S. Supreme Ct.* 1815, *Mandeville v. Union Bank of Georgetown*, 9 *Cranch*, 9.

5. Collections.

458. The relation. That, when a note is deposited with a bank for collection, and no special agreement is made, the contract to be implied is one of agency, merely, and the duties and liabilities of the bank are those of an agent,—see *Bank of Mobile v. Huggins*, 3 *Ala.* 206; *Montgomery County Bank v. Albany City Bank*, 7 *N. Y.* (3 *Seld.*) 459.

459. A banker receiving paper for collection, can be held absolutely responsible for the amount, previous to collection, only upon the ground of a contract to be so responsible, either expressly proved, or inferable from an unequivocal course of dealing. The mere fact that the owner of the paper was a depositor, and remitted it for his credit, is not enough to transfer the title to the bank. *N. Y. Ct. of Appeals*, 1861, *Scott v. Ocean Bank*, 23 *N. Y.* 289.

460. A bank does not become a purchaser for value, of demands remitted to it for col-

lection, by reason of its having a balance against the remitting bank, for which it has refrained from drawing, and of its having discounted notes for the latter upon its indorsement, in reliance upon a course of dealing between the banks to collect notes for each other, each keeping an open account of said collections, treating all the paper sent for collection as the property of the other, and drawing for balances at pleasure. *N. Y. Ct. of Appeals*, 1863, *McBride v. Farmers' Bank*, 26 *N. Y.* 450.

461. Bank not agent of the maker. A bank receiving paper for collection is the agent of the owner of the paper; not in any sense agent of the maker who pays it. And a maker who pays his note at bank cannot recover back the payment from the bank, on the ground that it has failed to account to the owner. *N. Y. Supreme Ct.* 1856, *Smith v. Essex Co. Bank*, 22 *Barb.* 627. And see *Runyon v. Latham*, 5 *Ired.* 551.

462. Consideration. The fact that a bank, receiving paper for collection, may reasonably expect that, according to the usual course of business, the proceeds may lie in their hands a longer or shorter time, is a sufficient consideration for their undertaking to collect. *N. Y. Supreme Ct.* 1823, *Smedes v. Utica Bank*, 20 *Johns.* 372; *S. P. N. Y. Ct. of Errors*, 1833, *Bank of Utica v. McKinster*, 11 *Wend.* 478. And see *Curtis v. Leavitt*, 15 *N. Y.* 9, 167; *Thompson v. Bank of the State*, 3 *Hill* (*S. C.*), 77.

463. Duties of collecting bank. The general duty of a bank in respect to the collection of paper entrusted to it—stated. *Bank of Mobile v. Huggins*, 3 *Ala.* 206.

464. A bank receiving a bill for collection is bound to present it, at the proper time and place, for payment, and in case of neglect is liable for the loss sustained thereby. But a withdrawal of the bill from the bank after the neglect, is not a waiver of the holder's right of action against the bank; nor will the pursuit of other parties discharge its liability. *Ala. Supreme Ct.* 1840, *Bank at Montgomery v. Knox*, 1 *Ala. N. S.* 148.

465. A deposit of notes in a banking institution for collection, only imposes upon the bank the duty of receiving the money if paid, and if not paid, of making such demand of payment, and causing to be given such notices of demand and non-payment as are necessary to fix the liability of the differ-

ent parties to the notes. It is no part of the duty of a bank to employ counsel and bring suit upon notes left with it on deposit. *La. Supreme Ct.* 1856, *Crow v. Mechanics' & Traders' Bank*, 12 *La. Ann.* 692.

466. A bank receiving a bill for collection, is bound in the discharge of its obligations, if the bill has not been accepted, to present the same for acceptance without unreasonable delay, as well as to present the same for payment when it becomes payable; and if not accepted when presented for that purpose, or not paid when presented for payment, it must take such steps by protest and notice as are necessary to charge the drawer and indorser.* *N. Y. Ct. of Appeals*, 1852, *Montgomery Co. Bank v. Albany City Bank*, 7 *N. Y.* (3 *Seld.*) 459.

467. A bank received a bill for collection, presented it for acceptance, and gave no notice of non-acceptance. *Held*, that it was liable to the owner for the amount of the bill, in case the acceptance was defective. It is the duty of an agent who receives for collection a bill payable at a future time, to use diligence in presenting it, and in giving notice if there is a failure of due acceptance. *N. Y. Ct. of Appeals*, 1854, *Walker v. Bank of the State of New York*, 9 *N. Y.* (5 *Seld.*) 532.

468. A bank receiving a bill for collection, or as collateral security only, is bound to follow the usual course of business, and give notice of non-payment to the indorser; but if the indorser, have knowledge of the non-payment, or for other reasons the notice be unnecessary, the bank will not be liable for a neglect to notify. *Pa. Supreme Ct.* 1846, *West Branch Bank v. Fulmer*, 3 *Barr*, 899.

469. Where bankers at A received for collection a note payable at B, and were notified that there were two persons of the same name as the indorser, one residing at A and the other at B, and that the latter was the indorser; there being nothing on the face of the note to show this,—*Held*, that it was their duty to transmit these instructions to their correspondents at B, upon sending to them the note for collection, and that no custom could absolve them from this duty, which was of the very essence of their undertaking,

* See also *Fabens v. Mercantile Bank*, 23 *Pick.* 330; *Thompson v. Bank of the State*, *Riley*, 81; *Branch Bank v. Knox*, 1 *Ala.* 148; *Bank of Mobile v. Huggins*, 3 *Ala.* 206; *Thompson v. Bank of the State*, 3 *Hill* (*S. C.*) 77.

namely, the fixing of the indorser's liability. *Minn. Supreme Ct.* 1861, *Borup v. Nininger*, 5 *Minn.* 523.

470. What is payment to a collecting bank. A collecting bank received the payee's check drawn upon the bank for the amount of the paper they assumed to collect, and charged the payee with the check, and surrendered to him the paper. The payee's account was not at the time in funds to meet the check, but subsequent deposits were made, which exceeded the amount.

Held, that the bank were liable for the proceeds.

1. The note was paid by the check.
2. If otherwise, the subsequent deposits were by law applicable to this check.
3. If there was no payment, still the bank were liable for not having given notice to charge indorsers. *N. Y. Ct. of Appeals*, 1854, *Commercial Bank v. Union Bank*, 11 *N. Y.* (1 *Kern.*) 203.

471. Liability. By failing to demand a note or bill left with it for collection, the bank makes the note or bill its own, and becomes liable to the owner for the amount. *U. S. Supreme Ct.* 1828, *Bank of Washington v. Triplett*, 1 *Pet.* 25; *N. Y. Supreme Ct.* 1832, *McKinster v. Bank of Utica*, 9 *Wend.* 46; *Ind. Supreme Ct.* 1842, *Tyson v. State Bank*, 6 *Blackf.* 225.

472. A bank is responsible for mistaking the date of a note received for collection, whereby it was presented for payment before the proper time, and the indorser discharged. *Pa. Supreme Ct.* 1861, *Bank of Delaware County v. Broomhall*, 38 *Pa. St.* 135.

473. The holder of a post-note, which was issued by a bank that failed before the note fell due, sent it to another bank for collection, and this bank caused payment to be demanded, and notice of non-payment to be given to the indorsers, on the day the note was due, without grace, whereby the indorsers were discharged on the ground that by law the promisors were entitled to grace on the note, although they had, while solvent, paid such notes without grace. The holder thereupon brought an action against the collecting bank, to recover damages for negligence in not making such demand and giving such notice as would hold the indorsers. It appeared on the trial that, at the time when the note fell due, the question whether banks were entitled to grace on their

post-notes had never been decided, and that there was no uniform practice as to demanding payment of such notes, and giving notice to the indorsers after the promisors failed. *Held*, that the action could not be maintained. *Mass. Supreme Ct.* 1848, *Mechanics' Bank v. Merchants' Bank*, 6 *Meta.* 13.

474. A banker with whom a draft is lodged for collection is not liable for neglect to present it, where presentment was not necessary to charge the parties, and would have been useless if made.* *N. Y. Supreme Ct.* 1858, *Mobley v. Clark*, 38 *Barb.* 890.

475. Where a bank received for collection a note payable in another State, under an agreement to collect it for seven per cent. and they neglected to give information of non-payment, and to return the note to the depositor within a reasonable time,—*Held*, that they were liable. *Pa. Supreme Ct.* 1848, *Wingate v. Mechanics' Bank*, 10 *Barr.* 104.

476. And it further appearing that, at the time of trial, the note was barred by the statute of limitations, and that the bank had never until then returned it to the depositor, and there being no evidence of the insolvency of the maker,—*Held*, that the measure of damages was the amount due on the face of the note, with interest, less the seven per cent. to be paid for collection. *Id.*

477. Money collected by one bank for another, placed by the collecting bank with the bulk of its ordinary banking funds, and credited to the transmitting bank in account, becomes the money of the former as a general deposit. Hence, any depreciation in the specific bank bills received by the collecting bank, which may happen between the date of the collecting bank's receiving them and the other bank's drawing for the amount collected, falls upon the former. *U. S. Supreme Ct.* 1864, *Marine Bank v. Fulton Bank*, 2 *Wall.* 252.

478. Who may enforce it. The duty of a bank to collect paper left with it for collection, not being founded on express contract but on an implied agreement arising from the custom of banks, the duty is raised, or the assumpsit implied in behalf of such person as may be beneficially interested in having the

* A banker who, under peculiar circumstances, acted with the knowledge and concurrence of his employer in delaying to present paper for collection,—*Held*, not liable as negligent. *Jacobsohn v. Belmont*, 7 *Borw.* 14.

duty performed; so that if A. leaves a note for collection, and B. becomes the owner of it before the time for the performance of the duty arrives, the latter is the proper person to bring the suit for an injury arising from the neglect of that duty. *N. Y. Ct. of Errors*, 1838, *Bank of Utica v. McKinster*, 11 *Wend.* 478.

479. A bank receiving a draft for collection, is liable to the true owner, in an action for money had and received, provided notice of such ownership is given before the proceeds are paid over to the depositor of the draft. *Md. Ct. of Appeals*, 1837, *Union Bank v. Johnson*, 9 *Gill & J.* 297.

480. That the collecting bank is liable to the original owner, and cannot set off a claim against the transmitting bank from which the bill was received,—see *Lawrence v. Stonington Bank*, 6 *Conn.* 521.

As to Lien on proceeds of collection, see *infra*, 499—504.

481. Employment of notary. It is the duty of banks, receiving notes for collection, to place them in the hands of a notary, that they may be protested in due time when necessary. *Md. Ct. of Appeals*, 1855, *Citizen's Bank v. Howell*, 8 *Md.* 580.

482. Where a bank in which a note has been deposited for collection, in case of non-payment, places it, for protest, in the hands of the notary to whom its own business is uniformly intrusted, it will not be responsible for the failure of the notary to protest the note, or to notify the proper parties. *La. Supreme Ct.* 1846, *Baldwin v. Bank of Louisiana*, 1 *La. Ann.* 13; *Md. Ct. of Appeals*, 1855, *Citizen's Bank v. Howell*, 8 *Md.* 580; *Miss. Ct. of Errors*, 1857, *Bowling v. Arthur*, 34 *Miss.* 41. And see *Bellemire v. Bank of United States*, 4 *Whart.* 105; 1 *Miles*, 173; *Tiernan v. Commercial Bank*, 7 *How. (Miss.)* 648; *Bank of Owego v. Babcock*, 5 *Hill*, 152; *Frazier v. New Orleans Gas Light & Banking Co.* 2 *Rob. (La.)* 294.

483. In an action against a bank for negligence in not duly demanding of the maker payment of a note left by the plaintiff with them for collection, the defence was that the note was duly placed by the defendants in the hands of a competent notary public for demand and protest, and that the negligence, if any, was on his part. The defendants had been the collecting agent for the plaintiffs for more than ten years, and had invariably

placed their notes in the hands of a notary for demand and protest, with the knowledge of the plaintiffs.

Held, 1. That evidence was admissible on behalf of the defendants, that the usage was invariable among the banks of Boston, including the defendants, when notes are sent to them for collection, to keep the same for payment until the close of banking hours, and if not then paid, to put them in the hands of a notary for demand and protest, and that the defendants did this in the present case.

2. That if these facts were established, the defendants were not responsible for the negligence of the notary. *Mass. Supreme Ct.* *Warren Bank v. Suffolk Bank*, 10 *Cush.* 582.

484. In an action against a bank for negligence in not making necessary demand and protest of a note left with the bank for collection, the bank, by showing the delivery of the note to a notary public for demand and protest in due time, is, *prima facie*, exonerated from liability. It is not sufficient for the plaintiff to prove, in general terms, that the notary was a man of dissipated habits; to rebut such *prima facie* case, he must prove that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act. *Miss. Ct. of Errors*, 1846, *Agricultural Bank v. Commercial Bank*, 7 *Smed. & M.* 592.

485. Employment of a second bank. A bank in which bills of exchange are deposited for transmission only, fulfils its duty by sending them to the bank to which they are to be transmitted for collection, and is not responsible for any laches of that bank. *Pa. Supreme Ct.* 1834, *Mechanics' Bank v. Earp*, 4 *Rawls*, 884; 1848, *Wingate v. Mechanics' Bank*, 10 *Barr*, 104.

486. Bills of exchange payable at distant places, and left with a bank for collection, are presumed to be intended to be transmitted to and collected by suitable sub-agents at the places where payable; since it cannot be expected that a bank will employ one of its own officers to journey about and collect such bills. In such case, therefore, as in case of bills expressly left with a bank for transmission only, if the bank in good faith employ suitable sub-agents for collection, it is not liable for their neglect or default. *U. S. Supreme Ct.* 1828, *Bank of Washington v. Triplett*, 1 *Pet.* 25; *Mass. Supreme Ct.* 1839, *Fabens v. Mercantile*

Bank, 23 *Pick.* 330; 1848, *Dorchester & Milton Bank v. New England Bank*, 1 *Cush.* 177. And see *Ætna Ins. Co. v. Allen Bank*, 25 *Ill.* 243.

487. A bank receiving for collection a bill of exchange, drawn in New York upon a person residing in another State, is liable for any neglect of duty occurring in its collection, whether arising from the default of its officers here, its correspondents abroad, or the agents of such correspondents. This liability may, however, be varied by express contract, or by usage and custom. *N. Y. Ct. of Errors*, 1839, *Allen v. Merchants' Bank*, 22 *Wend.* 215.

488. Duty of the second bank. A bank receiving from another bank a bill or note for collection, is bound to present the same for payment, and if the same is not paid at maturity, to give due notice of the dishonor to the bank from which the note was received; but it is not required, unless by special agreement, to give notice to any other party to the note. *Mass. Supreme Ct.* 1844, *Phipps v. Millbury Bank*, 8 *Metc.* 79. And see *Colt v. Noble*, 5 *Mass.* 167; *Eagle Bank v. Chapin*, 3 *Pick.* 180; *Mead v. Engs*, 5 *Cow.* 303; *Howard v. Ives*, 1 *Hill*, 263; *Bank of United States v. Davis*, 2 *Hill*, 451; *Bank of United States v. Goddard*, 5 *Mass.* 366; *Haynes v. Birks*, 3 *Bos. & P.* 599; *contra*, *Smedes v. Bank of Utica*, 20 *Johns.* 372.

489. Who may enforce it;—the duty of the collecting bank. Where the holders of a bill payable in Washington indorsed it, and entrusted it to the M. Bank, to be transmitted to a bank in Washington, for collection. The cashier of the M. Bank indorsed it, and sent it to the Bank of Washington, together with other bills, and without any statement of the ownership. *Held*, that the Bank of Washington might be liable to the real owners of the bill for failure of duty in collecting. *U. S. Supreme Ct.* 1828, *Bank of Washington v. Triplett*, 1 *Pet.* 25.

490. The deposit of a bill in one bank, to be transmitted to another for collection, is a common usage, and well understood; and the duty of a bank receiving such bill for collection, is precisely the same, whoever may be the owner thereof. The custom to indorse a bill entrusted to a bank for collection, is also universal; and the indorsement by the original owners gives the collecting bank no legal reason for supposing that they have parted with their interest, or that the transmitting bank has acquired it. *Supreme Ct.*

1828, *Bank of Washington v. Triplett*, 1 *Pet.* 25. Compare *Camden v. Doremus*, 8 *How.* 515; *Patriotic Bank of Washington v. Farmers' Bank of Alexandria*, 2 *Cranch C. Ct.* 560.

491. Where a bill is delivered by the payee to a bank to be transmitted for collection, the bank to which it is accordingly transmitted becomes the agent of the payee, and answerable to him alone for any breach of its duty in relation to the bill. If, by the mistake of the latter bank, the first-mentioned bank pays over the value to the payee and the bill proves to be dishonored, the first-mentioned bank can recover back the money on the payee's indorsement; and any breach of duty upon the part of the other is no defence. *Circ. Ct. D. C.* 1838, *Farmers' Bank v. Owen*, 5 *Cranch C. Ct.* 504.

492. If it be necessary or convenient for a bank receiving a bill for collection, to employ some other bank or individual to collect the bill, either at the place of its location, or at a distant place where the bill is payable, and it does so, the latter, on receiving the bill and entering upon the discharge of their trust, becomes the agent of the former bank, and not of the owner, and in the absence of agreement to the contrary, is answerable to them for any neglect in the discharge of their duties as agent, whereby the former bank sustains any loss or damage. *N. Y. Ct. of Appeals*, 1852, *Montgomery Co. Bank v. Albany City Bank*, 7 *N. Y. (3 Seld.)* 459; 1854, *Commercial Bank v. Union Bank*, 11 *N. Y. (1 Kern.)* 203.

493. When a bank or broker, or other dealer, receives, upon good consideration, a note or bill for collection in the place where such bank, broker, or dealer carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent, either in the negotiation, collection, or paying over the money, by which the money is lost, or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied. [Citing 3 *Barn. & Cr.* 419; and distinguishing 1 *Pet.* 25.] *N. Y. Ct. of Errors*, 1839, *Allen v. Merchants' Bank*, 22 *Wend.* 215; *N. Y. Ct. of Appeals*, 1852, *Montgomery Co. Bank v. Albany City Bank*, 7 *N. Y. (3 Seld.)* 459; 1854, *Commercial Bank v. Union Bank*, 11

N. Y. (1 *Kern.*) 208; *S. P. N. Y. Superior Ct.* 1849, *Hoard v. Garner*, 3 *Sandf.* 179.

494. The Bank of P. by arrangement with the Bank of W. redeemed its circulation, and paid its drafts on the credit of its remittances for collection; and having received from them, under this arrangement, a draft indorsed in blank and payable at sight, indorsed it for collection to a third bank. *Held*, that the Bank of P. could maintain an action against such third bank for neglect to charge the parties to the draft, or for the money collected. Under such an arrangement, it was the legal owner of the draft. *N. Y. Ct. of Appeals*, 1854, *Commercial Bank v. Union Bank*, 11 *N. Y.* (1 *Kern.*) 203.

495. Where a bank in Ohio forwards a draft payable in New York, which has been placed in its hands for collection, to its correspondent in that place, such correspondent is the agent of the bank, and not the sub-agent of the owner of the draft, and the bank is responsible for the proceeds of the draft immediately on its collection by him; and, without some agreement to the contrary between the bank and the owner of the draft, payment to such correspondent is payment to the bank. *Ohio Supreme Ct.* 1858, *Reeves v. State Bank of Ohio*, 8 *Ohio St.* 465.

496. If, before such draft is collected, the bank becomes insolvent, the owner of the draft may, by proper notice, revoke its agency, and make such correspondent his agent for the collection, so as to make him directly liable to said owner for the proceeds of the draft when collected. But if the bank become insolvent after the draft is collected by such agent, and the proceeds are undistinguishably merged with other assets of the bankrupt, through the extent of the dealings between the bank and such agent, the latter having in his hands at the time many drafts and proceeds of drafts from said bank, and paying over to the assignees of the bank a general balance, the owner can only prove his claim like other creditors. *Id.*

497. Entry in dealer's book. Although the extension of bills of exchange, deposited for collection in the books of the bank, and in the bank book of the depositor, is equivalent to payment, or actual collection of the bills, yet, if made under mutual mistake, the bank is not bound by it, and frequent settlements of the depositor's bank book, previous to the discovery of the mistake in which the bills

were credited to him as paid, will not necessarily alter the rights of the parties. *Pa. Supreme Ct.* 1834, *Mechanics' Bank v. Earp*, 4 *Rand.* 384.

498. A bank by mistake carried a note deposited for collection, to the depositor's credit on his bank book, as paid, and afterwards erased the credit from his book, on discovering the mistake. The depositor gave notice to the bank that he held it responsible for the amount, and the bank sued the maker of the note in its own name, and also sued his bail, both of which suits were fruitless. *Held*, that the bank was liable to the holder for the amount. *Phil. District Ct.* 1838, *Wetherill v. Bank of Pennsylvania*, 1 *Miles*, 399.

6. Lien.

499. In general, whenever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands, for the amount of his general balance, unless such securities were delivered to him under a particular agreement. *U. S. Supreme Ct.* 1843, *Bank of the Metropolis v. New England Bank*, 1 *How.* 384; 17 *Pet.* 174.

500. On moneys collected. Where there have been for several years mutual and extensive dealings between two banks, and an account current kept between them, in which they have mutually credited each other with the proceeds of all paper remitted for collection, when received, and charged all costs of protest, postage, &c. and accounts have been regularly transmitted from one to the other, and settled upon these principles; and upon the face of the paper transmitted, such paper always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account; either bank has a lien, for a general balance of account, upon the paper thus transmitted, no matter who may be the real owner of such paper; the possession of the paper being *prima facie* evidence that it was the property of the bank remitting it. The other bank, without notice to the contrary, had a right so to treat it, and was under no obligation to inquire whether it was held as agent or as owner; and if an advance of money had been made upon the paper, the right to retain for that amount would hardly be disputed. No difference in principle appears between an advance of money and a balance suffered to remain upon

the faith of these mutual dealings. In the one case, as well as the other, credit is given upon the paper deposited, or expected to be transmitted, in the usual course of the transactions between the parties.* *Id.*

501. If the accounts show that it was the practice and understanding of the banks to allow these balances to stand and await the collection of the paper so remitted, the rights of the parties are the same as if there had been a positive and express agreement; and such mutual indulgence on these balances would be a valid consideration, and, like the actual advance of money, give the bank receiving such bill a right to retain the amount due after closing the account. *Id.*

502. In such a case, if it appeared as matter of fact that the bank claiming the lien had notice at the time of the mutual dealings between them, that the other bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as an agent, then the former bank would not be entitled, as against the true owner, to retain for the general balance against the remitting bank. And if the bank claiming the lien had not notice that the remitting bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the bank receiving would not be entitled to retain against the real owners, unless credit was given to the bank which remitted it, or balances were suffered to remain in its hands to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of dealing. But if the jury found that the bank receiving the bill in question regarded and treated the remitting bank as the owner of it, and had no notice to the contrary; and, upon the credit of such remittances, made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the remitting bank, to be met by the proceeds of such negotiable paper, then the bank receiving the paper is entitled to retain, against the true owners, for the balance of account due from the remitting bank. *Id.*

* See this case examined and distinguished in *Hoffman v. Miller*, 9 Boreo. 384, where it was held that the banker could not claim a lien, it appearing that the indorsement was expressed to be "for collection," and the paper had been entered in account accordingly, and there was no understanding that delay to draw for balances was dependent on such remittances.

503. A bank which receives from another bank promissory notes of third persons, for collection merely, which notes are subsequently paid by the makers,—but which does not part with value, give credit, relinquish any security, or assume any burden or responsibility on the faith of the notes, cannot retain the same, or their proceeds, as against the true owner, on account of a balance due to them from the bank from whom they received such notes.* *N. Y. Supreme Ct. 1857, McBride v. Farmers' Bank of Salem, 25 Barb. 657.* And see *Case v. Mechanics' Banking Association*, 4 *N. Y. (4 Comst.) 166.*

504. A bank was in the custom of receiving from another bank large amounts of paper for collection, under circumstances indicating knowledge that much of it was placed merely for collection. By their usual course of dealing, the receiving bank gave no credit until collection, and the bank sending the paper was at liberty to recall it at any time, and when a note was dishonored, it was to be immediately returned and expenses charged; and every week all balances between the two banks were paid up.

Held, that the bank receiving paper for collection from the other, under these circumstances, could not assert a lien upon it against the owner for a claim they held against the other bank. *N. Y. Supreme Ct. Sp. T. 1850, Van Amee v. Bank of Troy, 8 Barb. 312; S.*

* Where a banker, having mutual dealings with another banker, is in the habit of transmitting to him, in the usual course of business, negotiable paper for collection, the collection being in fact sometimes on account of the transmitting banker himself, and sometimes on account of his customers, and he falls while owing his corresponding banker a balance in general account;—the corresponding banker having received such paper, cannot retain, to answer that balance, any paper so transmitted for collection, and really belonging to third persons, if he knew it was sent for collection merely.

Neither can he retain it, if he did not know that it was so sent, unless he gave credit to the transmitting banker, or suffered a balance to remain in the hands of the transmitting banker, to be met by the paper transmitted, or expected to be transmitted, in the usual course of dealings between them.

But if the receiving banker have treated the transmitting banker as owner of the transmitted paper, and had no notice to the contrary, and upon the credit of such remittances, made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the transmitting and now insolvent banker, to be met by proceeds of such negotiable paper transmitted, then the receiving banker is entitled to retain the paper or its proceeds against the banker sending it, for the balance of account due him, the receiving banker. As respects the knowledge of or notice to the receiving banker, it is unimportant from what source he may have derived it. *Sweeney v. Easter, 1 Wall. 166.*

C. sub nom. Van Namee v. Bank of Troy, 5 *How. Pr.* 161.

VI. USAGES.

505. How usages of banks may be established. Usages of banks will not be judicially noticed, but must be proved, or must have been heretofore proved and established by courts of justice, before they will be recognized and applied. *Md. Ct. of Appeals*, 1837, *Planters' Bank v. Farmers' & Mechanics' Bank*, 8 *Gill & J.* 449.

506. A single case is not sufficient to establish a general usage of a bank. *Md. Ct. of Appeals*, *Duvall v. Farmers' Bank*, 9 *Gill & J.* 31.

507. A usage of a bank is not necessarily obligatory from the time of its adoption. To give it the force of law, requires an acquiescence and notoriety, from which an inference may be drawn that it is known to the public, and especially to those who do business at the bank. *U. S. Supreme Ct.* 1853, *Adams v. Otterback*, 15 *How.* 539.

508. It seems, that in the performance of acts within the legitimate authority of the board, the ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the board of directors, to whom the charter and by-laws submit the general management of the bank, and the control and direction of its officers. [13 *Wheat.* 64.] *Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46, 70.

509. The usage of issuing certificates of deposit, by a teller of a bank, is not evidence to prove a usage of certifying checks. *Mass. Supreme Ct.* 1845, *Mussey v. Eagle Bank*, 9 *Metc.* 306.

510. The usage of the bank's notary, not to be deemed the usage of the bank. *Bank of Alexandria v. Deneale*, 3 *Cranch C. Ct.* 488.

511. Their effect, generally. That the reasonable and established customs of banks enter into and make a part of contracts made with them, by persons having knowledge of such usages, and must have due weight in expounding such contracts,*—see *Jones v. Fales*, 4 *Mass.* 245; *Widgery v. Mun-*

roe, 6 *Mass.* 449; *Lincoln & Kennebec Bank v. Page*, 9 *Mass.* 155; *Lincoln & Kennebec Bank v. Hammatt*, 9 *Mass.* 159; *Blanchard v. Hilliard*, 11 *Mass.* 88; *Smith v. Whiting*, 12 *Mass.* 6; *Whitwell v. Johnson*, 17 *Mass.* 449; *City Bank v. Cutter*, 8 *Pick.* 414; *Brent v. Bank of the Metropolis*, 1 *Pet.* 89; *Bank of the Metropolis v. New England Bank*, 1 *How.* 234; 17 *Pet.* 174; *Bank of the Metropolis v. New England Bank*, 6 *How.* 212; *Hartford Bank v. Stedman*, 3 *Conn.* 489; *Renner v. Bank of Columbia*, 9 *Wheat.* 581.

512. That where the charter and by-laws of a bank are silent as to the manner and form in which its acts and contracts shall be evidenced, general usage, and the course of business of similar institutions will govern,—see *Neiffer v. Bank of Knoxville*, 1 *Head*, 162.

513. — effect, in respect to making payments. The special custom of bankers in a particular locality cannot change values as fixed by law; and, if some persons have been in the habit of receiving depreciated paper in payment of dues, the right to enforce payments in such paper does not exist. Such a right can only arise by contract. *Ill. Supreme Ct.* 1862, *Marine Bank of Chicago v. Chandler*, 27 *Ill.* 525; *Marine Bank of Chicago v. Birney*, 28 *Ill.* 90; *Marine Bank of Chicago v. Rushmore*, 28 *Ill.* 463.

514. A custom of a bank to pay only half of a half bank note,—*Held* to be bad, as unsupported by law. *N. C. Supreme Ct.* 1894, *Allen v. State Bank*, 1 *Dev. & B.* 3.

515. That a custom of a bank not to correct mistakes in the receipt or payment of money, unless discovered before the person leaves the room, is, illegal and void—see *Galatin v. Bradford*, 1 *Bibb*, 209.

516. — in respect to deposits. An usage, established by proof, that current deposits made in a bank, and the proceeds of notes and drafts placed for collection, are to be paid to the depositor upon demand, at the counter of the bank, would prevent the running of the act of limitations against such depositor, until payment of his claim had been refused, or some act done with his knowledge, dispensing with the necessity of a demand. What would dispense with such demand. *Md. Ct. of Appeals*, 1837, *Planters' Bank v. Farmers' & Mechanics' Bank*, 8 *Gill & J.* 449; 1838, *Union Bank of Georgetown v. Planters' Bank*, 9 *Gill & J.* 439, *Same v. Same*, 10 *Gill & J.* 422.

* That a local usage, not shown to extend to banks, may be not binding upon the banks of the locality,—see *Yeaton v. Bank of Alexandria*, 5 *Cranch*, 49.

517. Proof of usage by banks which are members of the clearing house in the city of New York, in regard to the return of checks drawn on banks in that city, is not applicable to checks drawn on banks at a distance. *N. J. Ct. of Errors*, 1864, *Overman v. Hoboken City Bank*, 81 *N. J. Law* (2 *Vroom*), 563.

518. — in respect to discounts. Where a note is made for the purpose of being negotiated at a bank, whose custom, known to the parties, it is to demand payment and give notice on the fourth day, that custom forms a part of the contract, at least so far as to bind the rights of those who are parties to it; and may be shown by parole. *U. S. Supreme Ct.* 1824, *Renner v. Bank of Columbia*, 9 *Wheat.* 581; 1828, *Bank of Washington v. Triplett*, 1 *Pet.* 25.

519. Where a note was in terms made payable at a bank, *Held*, that the parties were bound to know its usages, and had impliedly agreed that those usages should become a part of their contract.* *U. S. Supreme Ct.* 1826, *Mills v. Bank of United States*, 11 *Wheat.* 431; *Miss. Ct. of Errors*, 1844, *Cohen v. Hunt*, 2 *Smed. & M.* 227.

520. A party to a note discounted by a bank is not bound by the special and particular usage of such bank, unless upon his agreement express or implied. *Cira. Ct. D. C.* 1824, *Bank of Alexandria v. Deneale*, 2 *Cranch C. Ct.* 483; distinguishing *Renner v. Bank of Columbia*, 9 *Wheat.* 581.

521. The rule and practice of a bank to take notes signed by the promisors, without

any distinction indicating thereon who is principal and who surety, is not alone sufficient to enable it to hold a surety, known by it to be such, after it has extended the time of payment beyond that specified in such note, without the consent of the surety, even if the surety had knowledge of such usage and practice. *Mo. Supreme Ct.* 1856, *Lime Rock Bank v. Mallett*, 42 *Mo.* 349.

522. — in respect to collections. That the usage of banks to give notice to the makers of notes of the time of their maturity and place of deposit for collection, cannot, where such notice has been delivered, be substituted for a demand of payment, so as to affect the indorser,—see *Farmers' Bank v. Duvall*, 7 *Gill & J.* 78.

523. That where a bank is employed to collect according to its own usage, it is not liable for damages by a delay in presentment, which was in conformity with that usage,—see *Patriotic Bank of Washington v. Farmers' Bank of Alexandria*, 2 *Cranch C. Ct.* 560.

524. — in respect to accounts. When accounts were rendered by one banking institution to another, according to a proved usage between them, and where it was further proved that, in case either objected to the account of the other, it was the usage for the objecting bank to give notice thereof to the other—*Held*, that, from the absence of such objection, the jury might infer that the bank receiving the account acquiesced in its correctness. *Md. Ct. of Appeals*, 1838, *Union Bank v. Planters' Bank*, 9 *Gill & J.* 439.

525. — in respect to receiving packages. As between a consignee (a bank) and an express company in the habit of carrying their packages, it is competent for the carrier to prove that after banking hours the bank is closed only as to banking business, and not as to the reception of packages, but that the latter have habitually been received on the arrival of the trains after "banking hours" And that fact being proved, a tender of the package to the bank, an hour and a half after banking hours, at half-past five o'clock p. m. in summer—was *Held*, a good and reasonable tender. *Wis. Supreme Ct.* 1858, *Marshall v. Wells*, 7 *Wis.* 1.

* This rule applied where a note was made payable in the District of Columbia—it appearing that by the established custom of the banks in the District of Columbia, payment of a promissory note or bill is to be demanded on the fourth day after the time limited for the payment thereof, in order to charge the indorser, contrary to the general law merchant, which requires a demand on the third day. *Renner v. Bank of Columbia*, 9 *Wheat.* 581; *Mills v. Bank of United States*, 11 *Wheat.* 431; 1828, *Bank of Washington v. Triplett*, 1 *Pet.* 25. See also upon this usage, *Patriotic Bank v. Farmers' Bank*, 2 *Cranch C. Ct.* 560; *Brent v. Coyle*, *Id.* 337; *Bank of Alexandria v. Wilson*, 2 *Id.* 5; *Bank of Washington v. Reynolds*, *Id.* 239; *Bank of Columbia v. Lawrence*, *Id.* 510; *Bank of Columbia v. McRenny*, 3 *Id.* 361.

And where the invariable usage of a particular bank was, when the maker of an accommodation note resided out of the city, to require, as a condition of the loan, a stipulation that a demand of payment at the bank should be sufficient, and, in the particular case, the note in question had been renewed for years without any personal demand, the maker residing out of the city, and the indorser having been active in procuring the accommodation,—*Held*, that the jury might infer from these circumstances taken together, an agreement to dispense with a personal demand. *Brent v. Bank of the Metropolis*, 1 *Pet.* 39; *Bank of Washington v. Reynolds*, 2 *Cranch C. Ct.* 299.

BENEFIT SOCIETIES.

[Under various names, in various States, corporations exist to receive periodical payments from members, and hold them as a fund to be loaned or given to members needing pecuniary relief. Such are "Beneficial Societies" of Maryland; "Fund Associations" of Missouri; "Loan and Fund Associations" of Massachusetts; "Mechanics' Associations" of Michigan; "Protection Societies" of New Jersey. "Friendly Societies" in Great Britain are a still more extensive and important species belonging to this class. These all resemble each other in leading features and character; and such decisions of the courts as are applicable to them irrespective of distinctions in detail, are stated in this title; no more familiar name, generally applicable, being known.]

1. Nature of the organization. Friendly societies not *insurance companies* within a covenant to effect a policy with "some respectable insurance company." *Courtenay v. Courtenay*, 8 *Jones & La. T.* 519

2. The relation of membership. A mutual benefit society formed by several persons, being partners or shareholders, who subscribe money, and carry on business substantially for the benefit of the individual members among themselves, and not for the benefit of the society as such, is not a partnership or company established "for any purpose of profit" within the meaning of sect. 2 of stat. 7 & 8 Vict. ch. 110, so as to require registration. *Q. B.* 1852, *Bear v. Bromley*, 11 *Eng. Law & Eq.* 414; 16 *Jur.* 450.

3. That a member of a friendly society is not a partner with his associates, in such a sense as to prevent him from being sued in assumpsit for funds of the society which have been entrusted to his keeping,—see *Sharp v. Warren*, 6 *Price*, 131. Compare *infra*, 5.

*Friendly Societies, as the English term their most important class of these societies, are defined to be "associations supported by subscription for the mutual relief and maintenance of members or their wives, children, relatives or other nominees, against casualties; such as sickness, old age, widowhood. Friendly societies were first authorized by statute, in Great Britain, in 1793, by the act 83 Geo. 3, ch. 54. This, with several subsequent acts on the same subject, was repealed in 1839 by the act of 10 Geo. 4, ch. 56; by which a more favorable system was introduced. From 1839 to 1850 these societies became more and more numerous, and the interests involved in them more important; until the number of societies in England and Wales undoubtedly exceeded ten thousand, embracing an aggregate membership of nearly a million of persons, and controlling annual receipts amounting to half or three-quarters of a million of pounds.

In 1850 the whole law relating to these societies was consolidated by the act 13 & 14 Vict. 115; which act, and the subsequent statutes 18 & 19 Vict. ch. 68, and 31 & 32 Vict. ch. 101, give details of their organization and administration, as they have been conducted down to a recent date. See also the act 25 & 26 Vict. ch. 87, relative to Industrial and Provident Societies.

4. Validity of members' engagements.

A bond to the trustees of an unincorporated loan fund association, the articles of which provide that it shall terminate as soon as its funds shall be sufficient to pay \$500 to each member to whom no advance shall have been made, executed by a member who, having offered the highest premium, has obtained an advance of \$500, deducting that premium, to secure the payment of his dues, is not void for *uncertainty* because it provides for monthly payments to be continued *so long as the society shall exist*.

Nor is it void for *usury* because it binds the obligor to pay a stated monthly due in addition to legal interest, on the whole sum advanced. *Mass. Supreme Ct. Merrill v. McIntire*, 18 *Gray*, 157.

5. In an action on a note given to the treasurer of a mutual benefit society, it appeared that the purpose of the society was to accumulate a fund to be loaned to members at legal interest. The loans were put up at auction among the members. The note in suit was given for a loan made to defendant, a member, and included legal interest on the advance, and a bonus bid by him for the privilege of taking it. *Held*, that the contract was not *usurious*, for the reason that it was not a loan, but an advance of partnership funds. The rules of the society were, in effect, a mere agreement by partners that their joint contribution should be advanced for the use of one or the other, as occasion should require, and this was not *borrowing*. *C. P.* 1889, *Silver v. Barnes*, 6 *Bingh. N. C.* 180. To the same effect is *Chancery*, 1851, *Burbridge v. Cotton*, 15 *Jur.* 1070; 8 *Eng. L. & Eq.* 57. Compare *supra* 2, 8; **CONTRACTS**.

6. Right of members, in funds. Under articles of a voluntary association, providing that, if any member should be reduced in circumstances by fire, the society should grant him such relief from its funds as should appear just and reasonable, and extending the same privilege to the widows of deceased members; no member has any vested right in the funds of the society. *Mass. Supreme Ct.* 1861, *Torrey v. Baker*, 1 *Allen*, 120.

7. A subsequent provision, unanimously adopted, that no alteration should be made to the articles of association except at the annual meeting, or at that meeting unless two-thirds of the members present agree thereto, by necessary implication admits of the

adoption by the society of a rule for the disposition of its funds wholly different from that which before existed. But such change can only be made in the manner prescribed; and a vote to make a different disposition of the funds at such meeting, by a vote of less than two-thirds of the members present, is invalid, although after the meeting is over, enough other members to make up the requisite number request in writing to be allowed to record their votes in the affirmative. *Id.*

8. **Forfeiture of shares.** By one of the rules of a benefit building society it was provided that "any member not having executed a mortgage to the society as thereafter mentioned, continuing to neglect the payment of his or her monthly subscriptions for six consecutive monthly nights, shall thereupon cease to be a member of the society, and forfeit all his or her interest therein." By other rules, the general management was vested in twelve directors, a quorum of whom was to consist of five. The plaintiff, a member of the society (not having executed a mortgage), neglected for seven successive months to pay his monthly subscription, but afterwards tendered the amount, and the fines payable thereon, to two of the directors, who were in attendance for the purpose of receiving payments, and who accepted the same. At the first monthly meeting of the directors after the money was so paid, it was resolved that the plaintiff had on the sixth default ceased to be a member of the society, and forfeited all his interest therein; and it was ordered that his name should be erased, and the money received from him by the two directors be returned to him. *Held*, that the share was properly forfeited, and that the acceptance of the money by the directors, under the circumstances, did not amount to a waiver of the forfeiture. *C. P.* 1856, *Card v. Carr*, 1 *Com. B. N. S.* 197, 38 *Eng. L. & Eq.* 184.

9. **Reference of claims.** A claim by the administrator of a member of a benefit society for the amount of a policy of assurance on the life of such a member, is not within the rules of an association, enrolled under the friendly societies act, providing for the reference of matters of dispute between the institution and members thereof, to the decision of arbitrators. *Each.* 1856, *Kelsall v. Tyler*, 34 *Eng. L. & Eq.* 588.

10. **Assessment of losses.** In assessing the

losses of an association upon its members, the court will not include those who left the State before the corporation closed, and are without the reach of its process. *Vt. Supreme Ct.* 1865, *Henry v. Jackson*, 37 *Vt.* 431.

For many decisions upon benefit societies, deemed applicable to other classes of corporations also, see the general titles throughout the work; particularly **BOARD**; **BY-LAWS**; **MEMBERS**; **OFFICERS**.

BEQUESTS.

[Cases on gifts of personal property to corporations are here included. Cases on gifts of real property are presented under **DEVISES**. And the general doctrine of corporate power to hold property in trust, or for a charitable use, irrespective of how it is acquired, is under **TRUSTS**.]

1. **Power to take.** A religious corporation may accept a legacy, charged with the payment of its income to a third person for life, and may execute the trust. Wherever property is devised to a corporation, partly for its own use and partly for the use of others, the power of the corporation to hold the property for its own use carries with it the power to execute that part of the trust which relates to others. *N. Y. Chancery*, 1828, *Matter of Howe*, 1 *Paige*, 214. Compare *Ayres v. Methodist Episcopal Church*, 8 *Sandf.* 351; 8 *N. Y. Leg. Obs.* 17.

2. A bequest to a corporation not for its general purposes, but in trust for particular objects within the scope of its corporate duties, is good. Therefore a bequest to the mayor and corporation of Philadelphia for the purpose of buying land and building thereon a hospital for relief of the indigent, blind, and lame, is valid. *Pa. Supreme Ct.* 1831, *Mayor &c. of Philadelphia v. Elkhott*, 3 *Rawle*, 170.

As to the power of Religious corporations and of other particular corporations to take by bequest or devise, see **RELIGIOUS CORPORATIONS**, and other titles of classes of corporations.

As to bequests and devises to Unincorporated associations, see **ASSOCIATIONS**, 14, 15.

3. Payment allowed to be made to a corporation which could not take by bequest, as agent of the society intended to be benefited. See *Wright v. Trustees of Methodist Episcopal Church*, *Hoffm.* 202.

4. **Validity.** A bequest of money generally, and not for permanent purposes, to an unincorporated association capable of clear identification, is valid. *Mich. Supreme Ct.* 1864, *Estate of Ticknor*, 18 *Mich.* 44.

5. In Vermont, a bequest to the treasurer for the time being, of a charitable association, for the uses and purposes of said society, is valid, though the objects are vague and indefinite, and though the society is not incorporated. *Vt. Supreme Ct.* 1835, *Burr v. Smith*, 7 *Vt.* 276.

6. A bequest made to a certain religious society by name, which is organized and known by the name mentioned at the date of the will, and incorporated by the same name before the death of the testator, is good. *N. J. Chancery*, 1847, *Voorhees v. Voorhees*, 2 *Halt. Ch.* 511.

7. A bequest of \$30,000 to A, B and C, "and to the survivors &c. upon the special trust that they shall permit the persons who now constitute the American Board of Commissioners for Foreign Missions (so called) and their associates, to take the interest and income of the same for the purposes of said board, and to promote the pious objects thereof,"—sustained. *Bartlet v. King*, 12 *Mass.* 587.

8. A bequest of an annual sum, out of the income from real estate, for fifty years to trustees, to be invested by them and accumulated during that time and then applied to establish a charity, is a valid bequest, even if the accumulation cannot be allowed for so long a period. *Mass. Supreme Ct.* 1865, *Odell v. Odell*, 10 *Allen*, 1.

9. A bequest of money to a church, to be laid out in bread yearly, for ten years, for the poor of the congregation, is good. So is a bequest of money to trustees, with directions so to invest it that the interest may be, from time to time, applied towards the education of students in the ministry, of a specified congregation, under the direction of the vestrymen of specified churches. *Pa. Supreme Ct.* 1827, *Witman v. Lex*, 17 *Serg. & R.* 88.

10. A bequest to executors for the use of such of the poor and indigent of a certain town as should, from time to time, be selected by its trustees, is not avoided by the incapacity of the trustees of the town to take by devise. *N. Y. A. V. Chan. Ct.* 1844, *Shotwell v. Mott*, 2 *Sandf. Ch.* 46.

11. Bequest to the "New York yearly

meeting of Friends, called orthodox, for the use of its ministers in straightened circumstances,"—sustained. *Shotwell v. Mott*, 2 *Sandf. Ch.* 46.

12. A direction to accumulate funds for the erection of a church, not allowable, in New York,—see *Wilson v. Lynt*, 30 *Barb.* 124.

13. **Identification of beneficiary.** Where, in a bequest intended for a corporation, the beneficiary is defectively described, parol evidence is admissible, to point the language of the will, and show what society or corporation was intended by the testator. *N. Y. A. V. Chan. Ct.* 1844, *Hornbeck v. American Bible Society*, 2 *Sandf. Ch.* 183.

14. Bequests of a residue to the treasurers of societies named as "Am. Bible, Tract, Synods, Board of Missions, Domestic Missions, N. Y. Colonization, and Seamen's Friend," sustained, upon parol evidence in favor of the American Bible Society, the American Tract Society, the General Synod of the Reformed Protestant Church, the New York State Colonization Society, and the American Seamen's Friend Society. *Id.*

15. A legacy to "the ladies of the Ursuline Order, residing in Charleston," sustained, as a legacy to "the Ladies Ursuline Community of the city of Charleston." *Banks v. Phelan* 4 *Barb. (N. Y.)* 80.

16. A bequest of £500 to the Westminster Asylum for pregnant women,—*Held*, upon extrinsic evidence, and context of the will, without any inquiry, a gift to "The General Lying-in Hospital." *Chancery*, 1852, *General Lying-in Hospital v. Knight*, 11 *Eng. L. & Eq.* 191; 21 *Law J. N. S.* 587.

17. A testator having made a bequest to "The Marine Bible Society," and there being no society of that name in existence, it appeared, in answer to a bill in equity, brought to obtain the direction of the court as to the disposition of the bequest, that at, or shortly before the time of the making of the will, there was a voluntary association in being, known by the name of "The Boston Young Men's Marine Bible Society," the object of which was "to circulate bibles among destitute seamen," but which, at the time of the testator's death, had been dissolved or become extinct;—*Held*, that the latter was the society intended by the testator; and the court thereupon appointed a trustee to receive and dispose of the legacy, by appropriating the avails thereof to the purchase of bibles, to be distributed

among destitute seamen, and distributing the same, as near as may be, in conformity with the constitution and by-laws of the Boston Young Men's Marine Bible Society, as it formerly existed. *Mass. Supreme Ct.* 1849, Winslow v. Cummings, 8 *Cush.* 858.

18. A. bequeathed as follows: "I direct my executors to pay over the residue of my estate to the American Bible Society of New York, and to the American Missionary Society of New York, to whom I leave or bequeath it." The American Bible Society of New York was a body corporate; but no such society as the American Missionary Society was then in existence, or ever had an existence. *Held*, that the American Bible Society was not entitled to the whole of the residue; and that, as to the moiety intended to be bequeathed to the American Missionary Society, the testator had died intestate, and the same was distributable among her next of kin. *S. C. Ct. of Appeals*, 1851, Telfair v. Howe, 8 *Rich. Eq.* 235.

19. A bequest to the trustees of the Bethel Church, in Newark, is a good bequest to a church the corporate name of which is "The Bethel Church in Newark." *N. J. Chancery*, 1848, Baldwin v. Baldwin, 3 *Halst. Ch.* 211.

20. Construction. Under a bequest in these words:—"As a testimony of my gratitude to the Giver of every good and perfect gift, I further will and devise the sum of \$150, as a donation to the Associate Congregation of R. to be placed under the direction of the trustees of said society, and the interest thereof to be annually paid to their minister forever":

Held, 1. That as there was nothing in the terms employed to indicate that the testator had any regard to the connection of the congregation named with any religious body, or to any future divisions which might occur in it, the fact could have no effect upon their right to the legacy, that they had seceded from the "Associate Church" to which, at the time of the testator's death, they belonged.

2. The gift was, in effect, a gift to the society, and the only inquiries to be made, in determining their right to receive the legacy, were, whether the society still existed, and whether they had a minister, chosen and appointed by the majority, and regularly ordained over the society. *Vt. Supreme Ct.* 1846, Smith v. Nelson, 18 *Vt.* 511, 548.

21. A testator devised and bequeathed the

whole of his estate, both real and personal, to his wife for life, and "after her death to the Methodist church of which she may be a member at the time of her death, to be appropriated to the uses and purposes which the conference may deem most advantageous for said church more especially." *Held*, that the particular congregation of which the wife was a member at her death was exclusively entitled to the bounty, and not the Methodist church in its general connectional character. *S. C. Ct. of Errors*, 1847, Attorney General v. Jolly, 2 *Strobb. Eq.* 379.

22. A bequest to the "westerly part of Hopkinton, if the inhabitants will settle a Congregational minister within three years after my decease," gives no legal title to any party or corporation to receive it; but a court of equity would in such case order the executor to pay the legacy to a plaintiff who should establish an equitable title thereto. *N. H. Superior Ct.* 1848, Second Congregational Society v. First Congregational Society, 14 *N. H.* 815.

23. A bequest to "the Baptist Societies for Foreign and Domestic Missions, and the American and Foreign Bible Society," is valid and sufficiently specific; and if societies can be found which were organized and known by those names at the time of the testator's death, they will be considered the societies referred to in the will, and capable of taking the bequest, whether incorporated or not. *Ala. Supreme Ct.* 1851, Carter v. Balfour, 19 *Ala. N. S.* 814.

24. Lapse, through expiration of charter. The charter of a corporation for religious purposes, expired, before a legacy which had been bequeathed to them, vested; and before the expiration of the charter, the corporation assigned the legacy to trustees, in trust to transfer it to such association as might be organized for the same purposes; and it was assigned, accordingly, to a new corporation. *Held*, that the legacy lapsed on the expiration of the first charter. *N. Y. Superior Ct.* 1850, Andrew v. N. Y. Bible & Prayer-Book Society, 4 *Sandf.* 156; 8 *N. Y. Leg. Obs.* 361.

BILLS AND NOTES.

[This chapter embraces the peculiar rules governing the power of corporations in general to make, indorse, or take, bills of exchange and promissory notes. For rules

peculiar to these instruments, as made or received by particular corporations, reference should be made to the titles of those corporations. And cases upon negotiable instruments deemed illustrative of the general powers and liabilities of corporations in respect to Contracts, are under CONTRACTS.]

- I. THE POWER TO MAKE THEM.
- II. FORM AND EXECUTION.
- III. TRANSFERS AND INDORSEMENTS.
- IV. RECOVERY AND DEFENCES.

I. THE POWER TO MAKE THEM.

1. General powers of corporations. Even though a corporation is not, in express terms, empowered to make a note or draft, or accept a draft, yet it may do so as a mode of binding itself for any debt which it may lawfully contract. *Ind. Supreme Ct.* 1854, *Hamilton v. New Castle &c. R. R. Co.* 9 *Ind.* 359; *Me. Supreme Ct.* 1854, *Carne v. Brigham*, 39 *Me.* 35; *N. Y. Supreme Ct.* 1829, *Barker v. Mechanics' Fire Ins. Co.* 3 *Wend.* 94; 1842, *Moss v. Oakley*, 2 *Hill*, 265; 1843, *Kelley v. Mayor &c. of Brooklyn*, 4 *Hill*, 263; * *Pa. Supreme Ct.* 1854, *McMasters v. Reed*, 1 *Grant's Cas.* 36; *Ind. Supreme Ct.* 1860, *Hardy v. Merriweather*, 14 *Ind.* 203; *R. I. Supreme Ct.* *Clark v. School District No. 7*, 3 *R. I.* 199.

2. Although the power of a corporation to issue bills or notes, as a circulating medium, is expressly excluded by the general law; the right to issue negotiable paper for any of its lawful purposes, is incident to its expressed powers or objects. *Cal. Supreme Ct.* 1858; *Smith v. Eureka Flour Mills*, 6 *Cal.* 1; *S. P. N. Y. Supreme Ct.* 1857, *Partridge v. Badger*, 25 *Barb.* 146; *Mo. Supreme Ct.* 1860, *Buckley v. Briggs*, 30 *Mo.* 452.

3. Although the power to borrow money is not expressly conferred by a general incorporation act which authorizes corporations formed under the act to buy, purchase, hold, convey, &c. any real and personal property whatever, necessary to carry on their operations,—such a company have power to borrow money, when necessary in the transaction of that business, and to bind themselves by a

note of the company for payment. When a corporation conduct their business within the purposes and objects of their incorporation, on substantially the same principles and in the same manner as individuals conduct the like business, they should be deemed not as transcending their authority, but as exercising those implied powers which are necessary to the development of those expressly given. *N. Y. Supreme Ct.* 1857, *Mead v. Keeler*, 24 *Barb.* 20.

4. If a corporation have power to make a purchase, they may lawfully make promissory notes on time for the price. An ability to make a contract implies an ability to make a promissory note. No question is better settled upon authority, than that a corporation, not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day, or upon demand, when such note is given for any of the legitimate purposes for which the company was incorporated. *N. Y. Ct. of Appeals*, 1853, *Moss v. Averell*, 10 *N. Y.* (6 *Seld.*) 449; *S. P. N. Y. Supreme Ct.* 1836, *Clark v. Farmers' Woolen Manuf. Co.* 15 *Wend.* 256; *Ky. Ct. of Appeals*, 1840, *Commercial Bank v. Newport Manuf. Co.* 1 *B. Monr.* 13.

5. So, if a corporation be authorized to borrow money for a purpose connected with its business, it may do so by the mode of borrowing a bill or note, and indorsing and transferring it. *N. Y. Superior Ct.* 1847, *Furniss v. Gilchrist*, 1 *Sandf.* 53; 1859, *Holbrook v. Basset*, 5 *Bosw.* 147; *N. J. Supreme Ct.* 1858, *Lucas v. Pitney*, 3 *Dutch.* 221.

6. Under a power by charter to contract with connecting roads for their use &c. a railroad company is authorized to accept bills drawn by a connecting road as a consideration for a change of gauge of that road. *Ind. Supreme Ct.* 1858, *Smead v. Indianapolis &c. R. R. Co.* 11 *Ind.* 104.

7. Their limit. Where a company was incorporated, not for the purposes of trade, but merely for carrying on the business of supplying the inhabitants of a particular place with water,—*Held*, that they could not become the makers of promissory notes or the acceptors of bills of exchange without express authority, since the nature of the business in which they were engaged did not raise a necessary implication of such a power. *K. B.* 1819,

* See also, for recognitions of this rule in New York, *Barker v. Mechanics' Fire Ins. Co.* 3 *Wend.* 94; *Mott v. Hicks*, 1 *Cov.* 513; *Barry v. Merchants' Exchange Co.* 1 *Sandf.* 280; *McCullough v. Moss*, 5 *Den.* 567; *Attorney General v. Life and Fire Ins. Co.* 9 *Patge*, 470; *Halstead v. Mayor &c. of N. Y.* 5 *Barb.* 218.

The rule will (in New York) be assumed to be the law of another State, in the absence of evidence to the contrary. *Clark v. Titcomb*, 43 *Barb.* 122.

Broughton v. Manchester Water Works Co. 3 *Barn. & Ald.* 1.

8. An insurance company, empowered to make insurance &c. and to do all things for the well-being of the company not contrary to the provisions of the charter, but having no express power to make notes, has no implied power to make such contracts, for it cannot be deemed necessary to the purposes of the company. The means for carrying on its business are required to be raised by the stock, and if liabilities be incurred in their business, they have not power to borrow money or contract debts to pay them. If there be any circumstances which will render the making of a note by them valid, they must be shown by the party who would enforce the note. *Miss Ct. of Errors*, 1856, *Bacon v. Mississippi Ins. Co.* 31 *Miss.* 116.

See INSURANCE COMPANIES.

9. Accommodation paper given to a company, and by it transferred in payment of a debt due, is not void for want of power in the company to make such a transaction. Corporations carrying on business under no restraining acts may make promissory notes and draw bills of exchange, where these are the usual and proper means to accomplish the purposes of their organization. Such notes and bills are to be presumed valid and legal where they are not prohibited by law, and are received in good faith; although invalid when given in violation of law or when given for purposes wholly foreign to those for which the corporation was created. [15 *Johns.* 44; 1 *Cow.* 513; 4 *Hill*, 263; 2 *Id.* 265; 8 *Wend.* 96; 1 *Sandf.* 53; *Ang. & A. on C.* § 257; *Pierce on R. R.* 373; *Edw. on B.* 77.] *N. J. Supreme Ct.* 1858, *Lucas v. Pitney*, 3 *Dutch.* 221.

10. Presumption. Where a corporation has the general power to be a party to promissory notes, such notes will be presumed, until the contrary be shown, to have been given for the authorized purposes of the corporation. *Ga. Supreme Ct.* 1855, *Mitchell v. Rome R. R. Co.* 17 *Ga.* 574.

11. Where a corporation, expressly restrained from exercising any banking privileges, but having the right to receive notes in the way of business, offered a note as a set-off in a suit,—*Held*, that the note would be presumed to have been properly received by the corporation, till the contrary was proved by the plaintiff. *Mo. Supreme Ct.*

1855, *Hart v. Missouri State Mutual Fire and Marine Ins. Co.* 21 *Mo.* (6 *Benn.*) 91.

For cases on Corporate power to make notes, illustrative also of the general power to contract, see CONTRACTS.

12. Powers of officers. A by-law authorizing officers of a corporation "to accept bills of exchange in the prosecution of its business," does not empower them to make an accommodation acceptance. *N. Y. Superior Ct.* 1859, *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.* 5 *Bow.* 275; 10 *Abb. Pr.* 47.

13. Under a resolution of the board of directors, authorizing the president and cashier, as often as they find occasion, to borrow or obtain discounts; if both agree to a plan of borrowing, it may be executed by the use of paper signed by one of them. *Pa. Supreme Ct.* 1824, *Ridgway v. Farmers' Bank*, 12 *Serg. & R.* 256.

14. Where the directors of a corporation authorized the president to provide for a debt of the company by procuring the joint note of the stockholders, and giving them a bond of indemnity, and instead of this he gave the note of the corporation,—*Held*, that such note was unauthorized, and could not be enforced. *Miss. Ct. of Errors*, 1856, *Bacon v. Mississippi Ins. Co.* 31 *Miss.* 116.

15. A vote of the directors, authorizing its agent to raise money for its own use, on the credit of the corporation, and to give therefor "the company note," authorizes him to draw a bill of exchange in the name of the company, the dishonor of which will not subject them to damages. *Mass. Supreme Ct.* 1882, *Tripp v. Swanzey Paper Co.* 13 *Pick.* 291.

16. — or agents. That a promissory note, given by an agent of a corporation, will bind the corporation, provided he acted within the sphere of his powers, or the act was subsequently ratified,—see *Butts v. Cuthbertson*, 6 *Ga.* 166.

17. But if the power of making and indorsing promissory notes for and in the name of a corporation is not expressly conferred upon its agent and attorney by the instrument by which he is appointed, general words at the conclusion thereof authorizing him "to do all other acts and things for and in behalf of the said company that he may deem proper to further and protect its interests," cannot have that effect. *N. Y. Supreme Ct.* 1864, *Lawrence v. Gehhard*, 41 *Barb.* 575.

II. FORM AND EXECUTION.

18. **Form.** Under the provision of the Ohio bank act (Swan's Stat. 100, § 64), declaring that all notes and bills discounted by any banking company shall be made by the terms thereof, or by special indorsement, payable solely to said company,—a note by its terms payable to a bank or its order, is void in the hands of the bank or any one who is not a *bona fide* purchaser; but the money advanced on it may be recovered. The intent of the act is to prevent fraudulent transfers by banking corporations of discounted paper, and the requirement of the statute is to be deemed mandatory. *Ohio Supreme Ct.* 1858, *Vanatta v. State Bank*, 9 *Ohio St.* 27.

19. An order drawn by the president of a corporation upon its treasurer, directing the latter to pay to F. or order a certain sum, stating the amount to be due F. for work done for the corporation, is a promissory note. It cannot be deemed a bill of exchange, which supposes the existence of a party other than the drawer, to whom the bill is addressed, and who is therein requested to pay the amount to the holder on account of the drawer; and on such a bill an action may be maintained against the corporation without presentment to the treasurer. *N. Y. Ct. of Appeals*, 1857, *Fairchild v. Ogdensburgh, Clayton & Rome R. R. Co.* 15 *N. Y.* 387.

20. An order in the form, "Please pay L. and A. my wages from month to month, as they become due, and what may be now due," drawn on the clerk of a corporation, and accepted by him for the corporation,—*Held* to be, *prima facie*, a mere authority to pay, and not an assignment. *Carrique v. Sidebottom*, 3 *Metc. (Mass.)* 297.

21. An order or bill drawn by a corporation upon one of its officers may, at the holder's election, be treated as the promissory note of the corporation, payable at a particular place. *Ind. Supreme Ct.* 1863, *Indiana & C. R. R. Co. v. Davis*, 20 *Ind.* 6; *S. P. Marion & Mississinewa R. R. Co. v. Hodge*, 9 *Ind.* 168.

22. As to necessity of presentment in such cases,—see *Id.*

23. **Negotiability.** An acknowledgment by a secretary of the board of trustees of a university, who is unauthorized to make such acknowledgment, that there is due to A. B. a certain sum, is not a negotiable instrument. *Ill. Supreme Ct.* 1862, *Sears v. Trustees of Wesleyan University*, 28 *Ill.* 188.

24. An instrument by which a railroad corporation promises to pay to W. S. or order, "\$1,000, with interest semi-annually, as per interest warrants hereto attached, as the same shall become due; or, upon the surrender of this note, together with the interest warrants not due, to the treasurer at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in the said company in exchange therefor,"—is a negotiable promissory note; and one transferring it by indorsement may be charged as indorser. *N. Y. Ct. of Appeals*, 1860, *Hodges v. Shuler*, 23 *N. Y.* 114.

25. Such an instrument requires the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative to pay in money or railroad stock. It is not optional with the maker to pay in money or stock. The owner of the note may before maturity surrender it in exchange for stock, thus canceling it and its money promise, but that promise is nevertheless absolute and unconditional. It is only upon a surrender of the note that the holder is to receive stock; and the money payment does not mature until six months after the holder's right to exchange the note for stock has expired. The election given to the promisee, upon a surrender of the instrument six months before its maturity, to exchange it for stock, does not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay. *Id.*

26. That the fact that a note taken by trustees, after the surrender of a bank charter, was made "negotiable and payable at said bank," does not raise a legal presumption that it was discounted, instead of being taken in settlement of a debt due,—see *Savage v. Walshe*, 26 *Ala.* 619.

27. A post-dated check on a bank not absolutely void—see *Watson v. Poulson*, 7 *Eng. L. & Eq.* 585.

28. **Effect of seal.** A note under the corporate seal is not negotiable. The effect of fixing the corporate seal to a contract is the same as when an individual affixes his seal; it makes the instrument a specialty. *N. Y. Supreme Ct.* 1836, *Clark v. Farmers' Woolen Manufacturing Co.* 15 *Wend.* 256; *Steele v. Oswego Cotton Manufacturing Co.* *Id.* 265; *Pa. Supreme Ct.* 1839, *Trevall v. Fitch*, 5

Whart. 325; 1842, *Hopkins v. Railroad Co.* 3 *Watts & S.* 410.

29. Signature. Under the provision of the English statute 7 & 8 Vict. ch. 110, § 45,—which requires that directors who make or accept bills of exchange, intended to bind their companies, shall express them to be made or accepted on behalf of the company to be charged,—although the section contains no words nullifying the instrument for a non-compliance, a bill accepted without a compliance creates no obligation against the company. Where, however, a bill drawn upon a company, by their corporate name, and sealed with their seal, and having the name of the company circumscribed, was accepted by two persons, styling themselves directors of the company appointed to accept that bill, and the acceptance was countersigned by the company's secretary,—*Held*, that such acceptance was sufficiently expressed. *Q. B.* 1851, *Halford v. Cameron's Coalbrook &c. R. W. Co.* 3 *Eng. L. & Eq.* 309; 20 *Law J. N. S.* 160; 15 *Jur.* 335; 16 *Q. B.* 442; *S. P.* *Edwards v. Cameron's Coalbrook &c. R. W. Co.* 6 *Each.* 269.

30. An instrument signed by two directors of a joint stock company, and directed to their cashier, in the following form:—"Thirty days after date, credit Mrs. A. A. or order, with the sum of £311 claims per Susan King, in cash, on account of this corporation,"—*Held*, to be a promissory note; to be binding on the company, and to be sufficiently signed under the 7 & 8 Vict. ch. 110. *C. P.* 1850, *Allen v. Sea, Fire & Life Assurance Co.* 14 *Jur.* 870, n.; 19 *Law J. N. S.* 805.

31. A person who accepts a bill for a company, without authority to do so, becomes alone personally liable, although he stated at the time that he would not be personally bound. *Each.* 1853, *Nicholls v. Diamond*, 24 *Eng. L. & Eq.* 403; 3 *Com. Law*, 305; 23 *Law J. N. S.* 1.

As to the manner in which Agents and officers should sign notes &c. in common with other contracts, in order to bind the corporation, and not themselves,—see AGENTS, 115-124; CONTRACTS.

III. TRANSFERS AND INDORSEMENTS.

32. In general, a corporation may assign such notes as it has a right to take. *Ind.*

Supreme Ct. 1860, *Hardy v. Merriweather*, 14 *Ind.* 203.

33. An authority given by law to a bank upon the surrender of its charter "to sell and convey" its property, empowers it to transfer negotiable paper by indorsement. *Mc. Supreme Ct.* 1849, *Cooper v. Curtis*, 30 *Mc.* 488.

34. That a corporation which has the power to take a note, and to hold and convey personal estate, has necessarily the power to negotiate such note in the transaction of its ordinary business; and in a suit upon such note by an assignee thereof, it will be inferred that it was taken and transferred in the ordinary course of business, until the contrary is shown,—see *McIntyre v. Preston*, 5 *Gilm.* 48.

35. That a power conferred by statute upon trustees of a corporation, to "sell" negotiable securities, carries with it, by implication, the right to transfer them, so as to pass the legal title to a purchaser, by an assignment of them, and to enable him to sue in his own name,—see *Savage v. Walshe*, 26 *Ala. N. S.* 619.

36. A corporation, authorized to negotiate notes belonging to it, for the purpose of paying its debts or otherwise, may transfer such notes as security for a loan made to it in due course of business. *N. Y. Superior Ct.* 1859, *Scott v. Johnson*, 5 *Boru.* 213.

37. The transfer of a note or bill to a corporation by indorsement, is *prima facie* within its corporate powers, and therefore valid; it is, however, competent to show that such note was taken by them for an unauthorized purpose, and when this is shown, the contract is void and the instrument a nullity. Their right to recover cannot be sustained on the ground that the indorsement is an executed contract, which may stand independent of the agreement on which it was made. *Ohio Supreme Ct.* 1855, *Strauss v. Eagle Ins. Co.* 5 *Ohio St.* 59. And see *White's Bank v. Toledo Ins. Co.* 12 *Ohio St.* 60.

38. Seal not necessary. The corporate seal is not necessary to pass from a corporation its interest in a promissory note, especially when the assignment is made by a duly authorized agent. Even if it be conceded that a seal is essential to an assignment or transfer made by a corporation, the necessity arises from the ideal nature of the corporation, and when such transfer is made by an agent in their name, with his name annexed, if it be

admitted by the pleadings that the agent was duly authorized to make it, it is not necessary that he should affix any seal. *Ky. Ct. of Appeals*, 1881, *Garrison v. Combs*, 7 *J. J. Marsh.* 84.

39. **Powers of officers.** Under a charter providing that the powers of the company are to be exercised by a board of trustees and such other agents as they may appoint, and a by-law empowering the president, vice-president, or either of them to make contracts for the company, and to transact all its ordinary business,—*Held*, that the indorsement of a note, in the usual course of business, was within the powers of the president. *N. Y. Ct. of Appeals*, 1850, *Howland v. Myer*, 8 *N. Y. (8 Comst.)* 290.

40. In the absence of any restriction in the charter or by-laws of a corporation, promissory notes may be transferred in accordance with the custom of the company, by the mere indorsement of the president, if authorized by a resolution of the directors. *N. Y. Supreme Ct.* 1864, *Clark v. Titcomb*, 42 *Barb.* 122; *U. S. Circ. Ct. N. Y.* 1856, *State Bank of Ohio v. Fox*, 8 *Blatchf. C. Ct.* 431; *Ill. Supreme Ct.* 1863, *Goodrich v. Reynolds*, 81 *Ill.* 490; *Me. Supreme Ct.* 1861, *Patten v. Moses*, 49 *Me.* 255.

41. In an action by a bank as indorsee of a note given to an insurance company, the bank, to show its title to the note, may give evidence of a uniform practice by the insurance company, for a period of several months prior to the transfer of the note in suit, of raising money upon its notes, upon the indorsement of its president for the purpose of passing title; and such evidence will warrant the jury in finding that the indorsement of the note in suit was upon sufficient authority to make it binding in favor of plaintiffs. *N. Y. Ct. of Appeals*, 1865, *Marine Bank of N. Y. v. Clements*, 31 *N. Y.* 33.

S. P. as to an indorsement by a secretary. *Mass. Supreme Ct.* 1855, *Williams v. Cheney*, 8 *Gray*, 215.

42. **Rights of bona fide holder.** A usage of a corporation to negotiate notes payable to its order, by the indorsement of its president merely, gives a *bona fide* holder, for value, a good title to such a note, so indorsed, notwithstanding the original transfer to an intermediate holder was illegal. *N. Y. Superior Ct.* 1860, *Marine Bank v. Clements*, 6 *Bow.* 166.

43. A *bona fide* holder not chargeable with notice that the president of a corporation was

not authorized by its by-laws to indorse its notes, may recover on a note drawn payable to the corporation, and indorsed to the plaintiff for value, notwithstanding there was no resolution authorizing the transfer. *N. Y. Superior Ct.* 1860, *Merchants' Bank v. McColl*, 6 *Bow.* 473.

As to the power of presidents or cashiers of Banks to transfer negotiable assets, see *BANKS*, 164; 186–195.

44. **Mode of indorsement.** Where a note, in terms payable to a corporation, is transferred by their officer, duly authorized to do so, he indorsing it with his own name merely, with his addition, as such officer, this is sufficient to pass the legal interest of the corporation in the note. *Ill. Supreme Ct.* 1848, *McIntyre v. Preston*, 5 *Gilm.* 48; *N. H. Superior Ct.* 1858, *Nicholas v. Oliver*, 36 *N. H.* 218.

45. It makes no difference that he prefixed to his indorsement the words “without recourse.” *Ill. Supreme Ct.* 1848, *McIntyre v. Preston*, 5 *Gilm.* 48.

See *CONTRACTS*.

46. A draft of a manufacturing corporation payable to “G. S. treasurer,” may be indorsed by him, as treasurer, either in person or by attorney. See *Shaw v. Stone*, 1 *Cush.* 228.

47. **Delivery by the president and secretary, of a note transferable by delivery,—***Held*, a valid transfer. *N. Y. Superior Ct.* 1847, *Furniss v. Gilchrist*, 1 *Sandf.* 53.

48. **Accommodation indorsement.** No corporation is authorized to make an accommodation indorsement; and it is only when a note, so indorsed, has been discounted in good faith by the party suing thereon, in consequence of representations made by the corporation, that the indorsement is binding. *N. Y. Supreme Ct.* 1858, *Morford v. Farmers' Bank of Saratoga Co.* 26 *Barb.* 568; 1859, *Bridgeport City Bank v. Empire Stone Dressing Co.* 30 *Barb.* 421; 19 *How. Pr.* 51.

49. A coal company which was indebted to a railroad corporation for freight, gave its notes for an aggregate amount less than the indebtedness to the railroad company, and the latter indorsed them and procured them to be discounted. In an action against the railroad company upon its indorsement, it was objected that the indorsement appeared to be for the accommodation of the coal company, and was, therefore, not binding on the defendants. *Held*, that as there was no evidence that the

coal company received the avails of the notes, the objection was untenable. It was immaterial whether the notes were regarded as given to apply on the indebtedness of the coal company for freights or not. If the notes were given to apply on the indebtedness, they became the property of the defendants, and in transferring them they occupied the position of ordinary indorsers transferring business paper. If they were not to apply on the indebtedness, then they would appear to have been made for the accommodation of the defendants, and, after their discount, the defendants were the principal debtors, and the coal company their sureties. Neither view could aid the defendants, and no other view was admissible in the absence of evidence that the coal company received the avails of the notes. *N. Y. Ct. of Appeals*, 1863, *Olcott v. Tioga R. R. Co.* 27 *N. Y.* 546.

50. Although officers of a bank have no power to bind it as indorser for accommodation, yet where the plaintiff has in good faith, and for value, received a bill or note upon such indorsement, under reason to believe that it is business paper, and indorsed in the usual course of business, the bank will not be permitted afterwards to set up that the indorsement was for accommodation. *N. Y. Ct. of Appeals*, 1859, *Bank of Genesee v. Patchin Bank*, 19 *N. Y.* 312.

51. Effect of transfers. If a note executed for the purpose of raising money and made payable to a bank, be discounted by the cashier of that bank, on his private account, and afterwards be transferred before maturity by him, with his indorsement in the name of the bank as cashier thereon, this constitutes a sufficient recognition of the note by the bank to render it binding upon all the parties to it, whether principals or sureties. This is not such a diversion as will exonerate a surety, according to the rule settled in Vermont and New York.* *Vt. Supreme Ct.* 1858, *Keith v. Goodwin*, 31 *Vt.* 268.

52. In a suit against the trustees of bank which had suspended payment, and assigned its effects,—*Held*, that any right to recover interest or damages, which became attached to the notes of the bank, in consequence of

the suspension and refusal to pay them, was transferable with the notes, and passed by delivery to a holder. *Ark. Supreme Ct.* 1853, *Ringo v. Real Estate Bank*, 8 *Eng.* 563.

IV. RECOVERY AND DEFENCES.

53. Setting off bill. A bill of exchange drawn by A. was accepted, payable at a bank. A. who was a customer of the bank, discounted the bill with them, and the bank re-discounted it, and indorsed it to a third party. On the day when the bill became due, it was presented at the bank for payment by the holder, and, there being no funds of the acceptor then in their hands, the bank, having paid it, instead of debiting the acceptor's account with the amount, carried it to a separate account as an unpaid bill. The acceptor not having provided funds in the course of the day, the bank sent notice of its dishonor to the drawer on the next morning, and debited his account with it. In an action by A. against the bank for money lent, in which the defendants set off the amount of the bill, the jury found that the bank paid the bill as indorsers of it, and not as agents of the acceptor. *Held*, that the jury were justified in so finding, and that the bank were entitled to set it off. *Q. B.* 1853, *Polard v. Ogden*, 22 *Eng. L. & Eq.* 152; 2 *Ell. & B.* 459; 22 *Law J. N. S.* 439; 18 *Jur.* 39.

54. Recovery. An indorsee of negotiable paper, issued by a corporation in violation of public laws of the State, forbidding corporations to issue paper of the description of that in question, cannot recover on the paper against the indorser. The contract being void, its contents cannot be received in evidence to support an action on it. *U. S. Circ. Ct. Mich.* 1845, *Root v. Wallace*, 4 *McLean*, 8; *S. P.* 1842, *Root v. Godard*, 3 *Id.* 102. And see *Davis v. Bank of River Raisin*, 4 *Id.* 387.

55. Where a corporation has power to loan money and power to discount non-negotiable securities, money loaned by it, by way of discounting a negotiable security, the defect being in the form of the contract and not in the essence of the transaction, may be recovered on the money counts. *Ohio Supreme Ct.* 1858, *Vanatta v. State Bank*, 9 *Ohio St.* 27.

56. What is a defence. In an action by a bank against the maker of a negotiable note, evidence is admissible to prove, that

* As to the contrary rule elsewhere adopted, see *Manufacturers' Bank v. Cole*, 39 *Ma.* 133; *Clinton Bank v. Ayers*, 16 *Ohio*, 232; 6 *Ohio*, 246; *Riley v. Johnson*, 8 *Ohio*, 528; 16 *Pick.* 574; *Allen v. Ayer*, 3 *Pick.* 298; *Prescott v. Brinsley*, 6 *Cush.* 334.

the note was given by him with an express understanding with the officers of the bank, that it should be used only for exhibition to the bank commissioners to increase the apparent assets of the bank, and was to be used for no other purpose. And this may be shown by the maker himself in a suit by the bank, he being a competent witness to prove the facts. *Ms. Supreme Ct.* 1861, *Lime Rock Bank v. Hewett*, 50 *Ms.* 267.

57. Under the statute of Massachusetts of 1809, ch. 38, which prohibited banking corporations within the State from receiving or negotiating the bills or notes of foreign incorporated banks, except the bills of the United States Bank,—*Held* that a promissory note payable in such bills to a banking corporation, was void; and that no action could be maintained upon it by the promisees, after the statute was repealed. *Mass. Supreme Ct.* 1817, *Springfield Bank v. Merrick*, 14 *Mass.* 322.

58. A note given at the request of the director of a bank, for money which he owed the bank, exceeding the amount of one half his stock and which he is prohibited by statute from owing, is not void, although the directors, when they received the note, had knowledge of all the facts. *N. H. Superior Ct.* 1846, *Pemigewassett Bank v. Rogers*, 18 *N. H.* 255.

59. The maker of a note, given to a corporation and transferred by their officers contrary to law, can avail himself of the illegality of the transfer as a defence to the note if he is a creditor of the company, so that he may have an opportunity to set off the equities he has against the company. *Ms. Supreme Ct.* 1858, *Litchfield v. Dyer*, 46 *Ms.* 81.

60. If a corporation is authorized to raise money on promissory notes for a particular purpose, it seems that evidence may be received to impeach the notes, by showing they were issued for another purpose. *C. P.* 1814, *Slark v. Highgate Archway Co.* 5 *Taunt.* 792.

61. What is not. The indorser of negotiable paper made by a corporation cannot set up in defence to his liability thereon, that the instrument was not made in the form prescribed by the statute. Though it may be otherwise where the objection is that the instrument was prohibited by law. *Conn. Supreme Ct.* 1841, *Kilgore v. Bulkley*, 14 *Conn.* 362.

62. A charter of a bank stipulated that a certain amount of stock should be paid in before the bank could go into operation, and the public statutes required the capital of banking corporations to be paid in in cash. A subscriber for stock was allowed by the directors to give a note for his stock instead of paying cash, and the bank went into operation, the note being reckoned as a cash payment for stock. *Held*, in an action on the note, that the illegality of the transaction was no defence. *N. H. Supreme Ct.* 1865, *Pine River Bank v. Hodsdon*, 46 *N. H.* 114.

63. The liability of a party to a promissory note, made to a corporation, is not affected by any alterations in the charter of such corporation, made after such party has ceased to be a stockholder. *Ga. Supreme Ct.* 1855, *Mitchell v. Rome R. R. Co.* 17 *Ga.* 574.

64. An indorser is not allowed to exonerate himself from liability on his indorsement, by proving that he was led to indorse by representations made by the president and cashier of a bank in which the note was to be discounted, that the indorsement was a mere matter of form, and he would not be held liable.

1. Such evidence contradicts the written agreement.

2. The president and cashier are not clothed with power to bind the bank by such a special agreement. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money. *U. S. Supreme Ct.* 1832, *Bank of the United States v. Dunn*, 6 *Pet.* 51. Followed, 1834, *Bank of Metropolis v. Jones*, 8 *Pet.* 12.

65. A corporation which is charged as indorser of a promissory note is bound to pay the amount legally due thereon, although the agent of the corporation agreed to pay an illegal rate of interest to procure delay in the payment of the note. *Ms. Supreme Ct.* 1855, *Whitney v. South Paris Manuf. Co.* 39 *Ms.* 816.

66. A discount of a bill of exchange in notes of a railroad company which were depreciated, and some of which were of smaller denomination than the law allowed, *held* not to avoid the bill discounted. *Ala. Supreme Ct.* 1846, *Branch Bank at Montgomery v. Crocheron*, 5 *Ala. N. S.* 250.

67. One of several notes on demand, with

interest, given by a corporation before it had issued stock certificates to its stockholders, in evidence of their proportionate interest in certain of its own stock held by it in trust for them, and upon which no money was to be paid, was negotiated for value by a stockholder, thirteen months after its date;—*Held*, that such note was overdue at the time it was taken by the holder, so as to entitle the corporation to enjoin a suit at law commenced by him to recover the amount of the note from them, upon the ground of the equities subsisting between them and the payee of the note. *R. I. Supreme Ct.* 1858, *Atlantic De Laine Co. v. Frederick*, 5 *R. I.* 171.

Rules peculiar to particular kinds of Negotiable Instruments considered as made or received by corporations of a particular class, are treated under the title of the kind of corporation; thus checks and certificates of deposit, are treated under BANKS; premium notes for insurance, under INSURANCE COMPANIES.

BOARD.

[Embraces matters relative to the board of directors, managers, or trustees of a corporation, regarded in their collective capacity; and not dependent on distinctions between the kind of corporations.]

I. CONSTITUTION AND POWERS.

II. MODE OF ACTION.

I. CONSTITUTION AND POWERS.

1. Functions of the board of direction. That the management of private corporations is usually vested in certain officers and boards; the body of the members having no voice except in their election,—see *Bank of United States v. Dandridge*, 12 *Wheat.* 113; *Commonwealth v. Trustees of St. Mary's Church*, 6 *Serg. & R.* 508; *Ridgway v. Farmers' Bank*, 13 *Serg. & R.* 256.

For the modes of Choosing the board, see ELECTIONS; OFFICERS.

For rules relative to the members of the board, in their individual capacity, whether they are known as directors, trustees, managers, or by other name, see DIRECTORS.

2. That the board of directors practically constitutes the corporation, and in general may act as the corporation, and, unless speci-

ally restricted, exercise the corporate powers,—see *Burrill v. Nahant Bank*, 2 *Mass. (Mass.)* 168; *Whitwell v. Warner*, 20 *Vt.* 425; *Union Turnpike Co. v. Jenkins*, 1 *Cal.* 381.

3. That the board of directors are but agents of the corporation, and can only act for or bind it within such limits and in such ways, as the charter or by-laws, or some acts of the members authorize,—see *Salem Bank v. Gloucester Bank*, 17 *Mass.* 29; *Bank of Kentucky v. Schuylkill Bank*, 1 *Pars. Sel. Cas.* 180; *Ridley v. Plymouth Grinding & Baking Co.* 2 *Esch.* 711.

4. The corporation, however, and not the trustees, own the real estate; hence the alienage of the trustees cannot affect the title of the corporation. *N. Y. A. V. Chan. Ct.* 1844, *Cammeyer v. United German Lutheran Churches*, 2 *Sandf. Ch.* 186.

5. Existence presumed. That on an application of a member of a corporation to a court of equity, to enforce his rights in the administration of the company affairs, the court will presume, unless facts to the contrary are shown, that a board of direction exists, and that it is not impracticable to convene a general meeting of proprietors capable of controlling the action of such board,—see *Foss v. Harbottle*, 2 *Hare*, 461.

6. Power to fill vacancies. That the board have not an implied power to fill vacancies in the board,—see *Kearney v. Andrews*, 2 *Stockt.* 70.

7. — to borrow money. A board of directors, authorized to conduct the affairs of the company, may empower the president, or the president and cashier, to borrow money, indorse its notes, or to obtain a discount for the use of the bank. *U. S. Supreme Ct.* 1823, *Fleckner v. United States Bank*, 8 *Wheat.* 338; *Pa. Supreme Ct.* 1824, *Ridgway v. Farmers' Bank of Bucks County*, 12 *Serg. & R.* 256; *Md. Ct. of Appeals*, 1849, *Merrick v. Bank of Metropolis*, 8 *Gill*, 59.

8. The directors of a company have no implied authority to borrow money on the credit of the company, for any purpose, however useful or necessary to the objects for which the company is formed. *Esch.* 1851, *Burmester v. Norris*, 8 *Eng. L. & Eq.* 487; 6 *Esch.* 796.

9. By the deed of settlement under which a company was carried on, a capital was provided, and there were powers to alter the provisions of the deed by the vote of a special

general meeting. There was also a clause "that the affairs and business of the company shall be under the sole and entire control of the directors." *Held*, that under this deed the directors had no express authority to borrow money for the necessary purposes of the company; the instrument contemplating that the company business should be carried on by means of the large capital provided in it for that purpose. *Id.*

10. The directors of a manufacturing corporation, formed under a general statute giving them authority to manage its concerns, have power to make an advance or payment of wages to the agent; and for this purpose they may empower him to use the company's credit. *Mass. Supreme Ct. 1882, Tripp v. Swanzey Paper Co. 13 Pick. 291.*

11. — to make negotiable paper. The directors of a cemetery company were, by their act of incorporation, empowered to make contracts and bargains touching the undertaking, and to do and transact all other matters and things requisite to be done and transacted for the direction and management of the affairs of the company. *Held*, that they had no power, under their act, to accept or indorse bills of exchange for the purposes of the undertaking. *Each. 1849, Harmer v. Steele, 4 Each. 1; 19 Law J. N. S. 34.*

12. Where directors are empowered, for a certain purpose, to issue a note, or accept a bill of exchange, to a certain amount, they are deemed authorized to give in lieu for the same several notes or bills, equal to that sum, with their legal accretions. *O. P. 1849, Thompson v. Wesleyan Newspaper Association, 8 O. B. 849; 19 Law J. N. S. 114.*

As to the corporate power to Contract, generally, see CONTRACTS.

13. — to assume a debt. Under what circumstances directors of a corporation may assume a debt of an individual,—see *Stark Bank v. United States Pottery Co. 34 Vt. 144.*

14. — to dispose of the corporate property. The board of directors have no power to alienate corporate property, essentially necessary for the transaction of the business of the corporation. *Ma. Supreme Ct. 1851, Rollins v. Clay, 33 Ma. 132; N. Y. Supreme Ct. 1861, Abbot v. American Hard Rubber Co. 33 Barb. 578; 21 How Pr. 198.*

15. The directors of a corporation have no power to make a donation from or misap-

propriate its funds, in violation of the laws and rules regulating its mode of action. *Ma. Supreme Ct. 1844, Frankfort Bank v. Johnson, 24 Me. 490.*

16. — to make assignments. In the absence of authority conferred by its charter, the president and directory of a banking corporation cannot use its cash or credits for the purpose of effecting a settlement of the demands of its creditors; and an assignment by them of property of the bank to a third person for that purpose will not be valid, though the seal of the corporation be affixed. *Ala. Supreme Ct. 1845, Gibson v. Goldthwaite, 7 Ala. 281.*

17. The directors of an insolvent corporation have authority to convey all the property of the corporation to one of its creditors, upon condition that he shall apply the property to the payment of his claim, and pay over the surplus, if any, to the treasurer of the corporation. And such conveyance is not fraudulent, as against other creditors, by reason of its tendency to give a preference. *Mass. Supreme Ct. 1847, Sargent v. Webster, 13 Metc. 497.*

As to Assignments by corporations, generally, see ASSIGNMENTS.

18. The president and directors of a bank, may assign the property of the bank, for the payment of its debts, without the assent of the stockholders. *Md. Ct. of Appeals, 1849, Merrick v. Bank of Metropolis, 8 Gill, 59.* To the contrary, *Gibson v. Goldthwaite, 7 Ala. 281; Bank Commissioners v. Bank of Brest, Harring. Ch. 106.*

19. Or may authorize the president, or one of their own number, to assign securities belonging to the bank. *Mass. Supreme Ct. 1814, Spear v. Ladd, 11 Mass. 94; Northampton Bank v. Pepoon, Id. 288; Ma. Supreme Ct. 1848, Stevens v. Hill, 29 Ma. 133.* And see *Bank Commissioners v. Brest, Harring. Ch. 106.*

As to powers of Bank directors, see BANKS.

20. — to discharge debts. That the board may authorize stockholders to pay debts due from them to the corporation, by transferring stock in the corporation; and a transfer of stock accordingly will discharge the debt,—see *Taylor v. Miami Exporting Co. 6 Ohio, 176, 218.*

As to Dealings in stock, in general, see STOCK.

21. — to release witness. The directors of a bank may, on behalf of the corporation,

release the interest of a person whom the corporation propose to call as a witness. *Ma. Supreme Ct.* 1850, *Lewis v. Eastern Bank*, 82 *Me.* 90.

II. MODE OF ACTION.

22. Must meet as a board. A majority of a board of trustees cannot undertake to act in their individual names for the board itself; nor can any act be done affecting the ownership of property, except by a resolution of the board when regularly constituted and sitting in consultation. *La. Supreme Ct.* 1859, *Ross v. Crockett*, 14 *La. Ann.* 811.

23. A religious corporation can be bound only by the acts of its trustees acting as such. A resolution passed at a general meeting of corporators, though a majority of the trustees are present and concur, is not a corporate act. *N. Y. A. V. Chan. Ct.* 1844, *Cammeyer v. United German Lutheran Churches*, 2 *Sandf. Ch.* 186.

24. The consent of several members of a board of directors, acting separately, and not shown to constitute a quorum, will not constitute a valid acceptance of a proposal made to the company, so as to render it a complete contract and binding upon the party making the offer. *Ind. Supreme Ct.* 1860, *Junction R. R. Co. v. Reeve*, 15 *Ind.* 386.

25. Where a quorum of the directors of a public company are empowered to contract by affixing the seal of the company, it is essential to the validity of the act that the assent for affixing the seal should be given by the quorum, at the same time acting together. *Kach.* 1866, *D'Arcy v. The Tamar &c. Railway Co.* 14 *Weekly Rep.* 968.

26. May meet in another State. Where the charter of such corporation does not restrict the directors as to the place of their meeting, they may meet in another State, and may there appoint a secretary. *Conn. Supreme Ct.* 1827, *McCall v. Byram Manuf. Co.* 6 *Conn.* 428.

27. Powers of majority. Unless the by-laws of a manufacturing corporation, or a statute, expressly provide otherwise, a majority of the directors constitute a quorum, and a majority of the quorum have authority to decide any question upon which they can act. *Mass. Supreme Ct.* 1847, *Sargent v. Webster*, 18 *Metc.* 497.

28. Where there is a special body of a defi-

nite number appointed to perform corporate acts, such acts cannot be performed except by a majority of that body. *K. B.* 1775, *Rex v. Varlo*, *Cowp.* 248.

29. Where the matter is of public concern, and of an executive or ministerial character, the act of the majority of the board will suffice, although the others are not consulted. But where the function is judicial, involving a determination of some definite question, the whole body must be assembled and act together. *K. B.* 1802, *King v. Great Marlow*, 2 *East*, 244; 1807, *Battye v. Gresley*, 8 *East*, 319; 1800, *King v. Winwick*, 8 *Durnf. & E.* 454. And see *Green v. Miller*, 6 *Johns.* 38; and COMMITTEES; POWERS.

30. Effect of vacancies. Where the charter fixes the number of directors, and vacancies occur, the act of the board is not thereby invalidated, provided a quorum still remains. *C. P.* 1842, *Thames Haven Dock & Railway Co. v. Rose*, 3 *Eng. Railw. Cas.* 177; 4 *Mann. & G.* 552.

31. Effect of absences. A charter of a corporation in Massachusetts which confers the power of management upon "the president and directors," must be construed as a mere mode of designating the board of directors in its aggregate capacity, and not as rendering the presence of the president necessary to the transaction of business by the board, unless otherwise required by the charter or by-laws. *Mass. Supreme Ct.* 1847, *Sargent v. Webster*, 18 *Metc.* 497.

32. By a resolution of the directors of a company, four directors were necessary for the doing of any act. Three of the directors were called trustees, and those three gave a power of attorney to the agent of the company to draw bills. *Held*, that the other directors were not liable on those bills, as the power of attorney was not executed by four directors. *K. B.* 1880, *Ducarry v. Gill*, 4 *Carr. & P.* 121.

33. Three societies were authorized by statute to choose each three trustees, to take and hold real estate, and erect a hall thereon for the use of the three; and the statute also provided for two *ex officio* trustees, making eleven in all; and declared that it should be lawful for the board of trustees, or a majority of them, to mortgage the land. *Held*, that a mortgage executed by five of the nine chosen trustees might be presumed to have been executed with the concurrence of a majority of

the board. *N. Y. V. Chan. Ct.* 1840, *Miller v. Chance*, 3 *Edw.* 899.

How Meetings of a board are to be convened and held; what constitutes a Quorum and a Majority; how Resolutions are to be passed, and their effect; and what Records are to be kept, are treated under those titles respectively.

For rules depending on the Nature of the corporation with which the board of directors, managers, or trustees is connected, see the titles of the various kinds of corporations, particularly BANKS; INSURANCE COMPANIES; MANUFACTURING COMPANIES; RAILROAD COMPANIES.

BONDS.

I. FORM AND EFFECT.

II. TRANSFER AND REMEDIES.

I. FORM AND EFFECT.

1. **Power to issue bonds.** A corporation may give its bond for a lawful and authorized debt, under its general corporate powers. The power to execute and issue bonds &c. belongs to all corporations, and is inseparable from their existence; and it is for this they hold a common seal. *Pa. Supreme Ct.* 1861, *Commonwealth v. Council of Pittsburgh*, 41 *Pa. St.* 278.

2. **Filling blanks.** Where, in corporate bonds, the name of the payee is left blank, with the intention that such instrument may be transferred by delivery, any lawful holder may fill the blank with his own name as payee. *Mass. Supreme Ct.* 1858, *Chapin v. Vermont & Massachusetts R. R. Co.* 20 *Law Rep.* (10 *N. S.*) 650; *N. Y. Supreme Ct.* 1862, *Hubbard v. N. Y. & Harlem R. R. Co.* 14 *Abb. Pr.* 275; 36 *Barb.* 286.

3. After an issue of corporate bonds has been duly directed, the filling up and dating the bonds is a ministerial act, and a mistake in the date does not fatally vitiate them. *Wis. Supreme Ct.* 1859, *State v. Common Council of Madison*, 7 *Wis.* 688.

4. A debenture, or bond, issued as collateral security by a private incorporated company under their common seal and signed by their secretary, in which is left a blank for the name of the payee, though void because of such blank, and because it is improperly stamped, is admissible in evidence, in an ac-

tion for money lent, to show the worthlessness of the security. *C. P.* 1852, *Enthoven v. Hoyle*, 9 *Eng. L. & Eq.* 484; 21 *Law J. N. S.* 100; 16 *Jur.* 272.

5. **Not property until sold.** That the bonds of a corporation which it has executed and placed in the hands of an agent for sale, do not constitute, while yet in the hands of such agent for sale, *property* subject to seizure under an attachment against such corporation,—see *Coddington v. Gilbert*, 17 *N. Y.* 489.

6. **Validity.** A corporation, in order to borrow money for purposes within their corporate powers, issued bonds under seal, payable to the obligee or his assigns, for \$1,000 each, payable ten years from date, with interest coupons payable to bearer. *Held*, that, there being no evidence of an intent to circulate them as money, neither the bonds nor the coupons were within the provisions of the general statutes of the State restrictive of banking. *N. Y. A. V. Chan. Ct.* 1844, *Barry v. Merchants' Exchange Co.* 1 *Sandf. Ch.* 280.

7. **Collateral provisions.** When an act is passed authorizing corporate bonds to be issued upon certain terms, among which is a provision for payment or security, these terms go with the bonds, and may be enforced at the suit of a bondholder. *Cal. Supreme Ct.* 1861, *English v. Supervisors of Sacramento*, 19 *Cal.* 173.

8. — **or securities.** The bonds of a corporation are not rendered void by the company's giving to secure them a mortgage, which they had no authority to execute. *Pa. Supreme Ct.* 1859, *Philadelphia &c. R. R. Co. v. Lewis*, 33 *Pa. St.* 83.

9. By a clause empowering a company to raise money by bonds, it was enacted that every holder of them should be equally entitled to a claim or lien on the rates and sums of money to be taken by virtue of the act, in proportion to the amount advanced by such holders, as if the same had been advanced upon mortgages or annuities also grantable by the act, "without any preference by reason of priority of date of any such securities, or on any other account whatsoever." *Held*, that an individual bondholder might sue the company upon his own bond, though there were other bonds, mortgages &c. unsatisfied; the lien given by the act being only an additional security. *K. B.* 1881, *Hill v. The*

Manchester & Salford Waterworks Co. 2 *Barn. & Ad.* 544.

10. **Conversion.** Where by the terms of a railroad bond, a period was fixed within which it was convertible into stock, at the option of the holder,—*Held*, that an agreement for the extension of the time of payment before maturity of the bond, did not extend the right of conversion after the time limited. *Pa. Supreme Ct.* 1864, *Muhlenburgh v. Philadelphia & Reading R. R. Co.* 47 *Pa. St.* 16.

II. TRANSFER AND REMEDIES.

11. **Negotiability.*** In general, coupon-bonds, issued by corporations, drawn payable to bearer,† and apparently intended to pass from hand to hand, are to be regarded and treated as negotiable instruments. *U. S. Supreme Ct.* 1858, *White v. Vermont & Massachusetts R. R. Co.* 21 *How.* 575; 1863, *Mercer County v. Hackett*, 1 *Wall.* 83; *Gelpcke v. City of Dubuque*, *Id.* 176, 206; 1865, *Thompson v. Lee County*, 3 *Wall.* 327; *Conn. Supreme Ct.* 1860, *Society for Savings v. City of New London*, 29 *Conn.* 174; *Iowa Supreme Ct.* 1857, *Clapp v. County of Cedar*, 5 *Clarke*, 15; *N. Y. Supreme Ct.* 1863, *Connecticut Mut. Life Ins. Co. v. Cleveland &c. R. R. Co.* 41 *Barb.* 9; 26 *How. Pr.* 225.

12. Although not in form or character negotiable instruments according to the law merchant, these bonds must be regarded as transferable in the same manner and with like effect. *Mass. Supreme Ct.* 1858, *Chapin v. Vermont & Massachusetts R. R. Co.* 20 *Law Rep.* (10 *N. S.*) 650; *Ky. Ct. of Appeals*, 1859, *Maddox v. Graham*, 2 *Metc.* 56; *Wis. Supreme Ct.* 1859, *Clarke v. City of Janesville*, 10 *Wis.* 136.

13. — as respects transfer of title. The coupon bonds of an incorporated company are transferable by delivery, so that a *bona fide* holder has a good title of them. *N. J. Ct. of Errors*, 1858, *Morris Canal & Banking Co. v. Lewis*, 1 *Boasl.* 323.

14. Coupon bonds, of the ordinary kind, payable to bearer, pass by delivery. And a

purchaser of them, in good faith, is unaffected by want of title in the vendor. The burden of proof on a question of such faith, lies on the party who assails the possession. *U. S. Supreme Ct.* 1864, *Murray v. Lardner*, 2 *Wall.* 110. To similar effect, 1865, *Thompson v. Lee County*, 3 *Wall.* 327.

15. Bonds of corporations payable to "A. or his assigns," and assigned by A. in blank, are transferable by delivery. A purchaser of such a bond suing the obligors thereon need not, in the first instance, give evidence to connect his purchase with the payee's blank assignment. *N. Y. Superior Ct.* 1863, *Brainerd v. N. Y. & Harlem R. R. Co.* 10 *Boas.* 333.

16. Thus, where the plaintiff in such an action produced the bond with an assignment in blank indorsed thereon, and proved that she purchased it in the market some time after the date of such assignment, and had owned it ever since,—*Held*, that in the absence of any evidence to the contrary, she was to be presumed to be the rightful owner, and might recover without any proof connecting the purchase with the assignment by the payee. *Id.*

17. A broker in New York, to whom railroad bonds had been intrusted by their owner for the purpose of raising money thereon for him, delivered them, one in Connecticut and the others in Massachusetts, pursuant to an agreement made in New York, as security for a pre-existing debt of his own. *Held*, that his creditor, if he took them in good faith, could not be compelled in equity to give them up to the owner, although by the laws of New York a transfer made under such circumstances is subject to the rights of the real owner. *Mass. Supreme Ct.* 1859, *Culver v. Benedict*, 13 *Gray*, 7.

18. T. fraudulently representing himself to be the solicitor for a vendor, agreed for the sale of an estate, and according to the agreement the purchaser transferred a railway bond into T.'s name by way of deposit. T. assigned the bond to a purchaser, the defendant, without notice. Injunction to restrain defendant from parting with the bond &c. refused. *Chancery*, 1863, *Ashwin v. Burton*, 9 *Jur. N. S.* 319.

19. Certain State warrants, indorsed by the payees in blank, were paid and delivered to the State treasurer. They were afterwards stolen, and came into the hands of the defendants *bona fide*; the defendants presented

* Many of the cases cited under this head, in the text, arose upon bonds of counties, or other public corporations, issued under statutory authority for the purpose of raising money for public improvements.

† The making such bonds, on their face payable to "bearer," is said to amount to a direction that they shall be transferable by delivery, like a bank note &c. *Commonwealth v. Commissioners of Alleghany County*, 37 *Pa. St.* 287.

them and received negotiable State bonds, which they parted with in the regular course of business. *Held*, that upon these facts alone an action by the State for the bonds or their value would not lie. The mere reception of the bonds, though issued by mistake, does not render defendants liable. *Cal. Supreme Ct.* 1860, *State v. Wells*, 15 *Cal.* 336.

20. — as respects equities. Bonds with interest warrants or coupons annexed, issued by a county or other municipality, payable to bearer, and containing recitals showing that they were regularly issued under authority of law, estop the county from contesting their legality; and although not in the form of promissory notes or bills of exchange, are to be regarded as commercial securities; and the holder of them has a full title; and against one who has taken them in good faith, the county cannot set up the equities which might have been available against the original payee.* *U. S. Supreme Ct.* 1862, *Moran v. Commissioners of Miami County*, 2 *Black*, 722. To nearly same effect, *Wis. Supreme Ct.* 1859, *Clark v. City of Janesville*, 10 *Wis.* 136; *Ky. Ct. of Appeals*, 1859, *Maddox v. Graham*, 2 *Metc.* 56.

21. Bonds of a railroad corporation payable to bearer, issued for the purpose of raising money, with interest coupons annexed also payable to bearer, pass from hand to hand like bank notes, and a *bona fide* purchaser for value, without notice of any prior defect in the title, may enforce them independent of all equities existing between the company and the first holder. *N. J. Ct. of Errors*, 1855, *Morris Canal & Banking Co. v. Fisher*, 1 *Stockt.* 667; 3 *Am. Law Reg.* 423; *N. Y. Supreme Ct. Sp. T.* 1859, *Finnegan v. Lee*, 18 *How. Pr.* 186.

22. Bonds of a municipal corporation, which, though under seal, are payable to bearer, are negotiable instruments in such a sense as to exempt them in the hands of a *bona fide* holder from a defence which might be available against the original payee. *N.*

* In Pennsylvania it is *held* that county bonds issued in payment of subscription for railroad stock have not the quality of commercial paper; they are but bonds, and even in the hands of innocent and remote purchasers, they are subject to the equities existing against them in the hands of the first purchasers from the company. The interest coupons are subject to the same equities, and all purchasers of such bonds are bound to take notice of the law under which they are issued. *Diamond v. Lawrence County*, 87 *Pa. St.* 353.

Y. Ct. of Appeals, 1859, *Bank of Rome v. Village of Rome*, 19 *N. Y.* 20.

23. — as respects rights of *bona fide* holders. Where a county issues its bonds payable to bearer, and which, upon their face, pledge the faith, credit, and property of the county for payment, under the authority of acts of assembly referred to, in pursuance of which the bonds state that they are for their payment, and those bonds pass, *bona fide*, into the hands of holders for value, the county is bound to pay them. It is no defence to the claim of such a holder that authority given by the act referred to in the bonds, was subject to certain restrictions, limitations and conditions, which have not been formally complied with. *U. S. Supreme Ct.* 1863, *Mercer County v. Hackett*, 1 *Wall.* 83.

24. Nor is it any defence that the bonds sued on were originally sold by the corporation at less than par, when the act authorizing their issue, and referred to by date on the face of the instrument, declared that they should "in no case," nor "under any pretence," be so sold. *Id.*

25. It is no defence to an action on the bonds of a company which are negotiable by delivery, that the company's books do not show that any value had been paid for them. A purchaser is not bound to see to the application of the money. *Pa. Supreme Ct.* 1859, *Philadelphia & C. R. R. Co. v. Lewis*, 33 *Pa. St.* 83. *S. P. K. B.* 1831, *Hill v. Manchester & Salford Waterworks Co.* 2 *Barn. & Ald.* 544.

26. But the company may prove under the plea of *non est factum*, that requisitions of the act necessary to the validity of the execution have not been complied with. *K. B.* 1833, *Hill v. Manchester Waterworks Co.* 5 *Barn. & Ad.* 866; 2 *Nov. & M.* 573.

27. If the bonds were issued in violation of the constitution of the State, they are without authority, and must be held void, even in the hands of *bona fide* holders. *U. S. Supreme Ct.* 1859, *Aspinwall v. Commissioners of the County of Davies*, 22 *How.* 364.

28. One who buys such bonds irregularly issued with notice of the irregularities, takes them subject to any defence which the obligors may have. *N. Y. Ct. of Appeals*, 1861, *Stavin v. Town of Genoa*, 23 *N. Y.* 439; *Gould v. Town of Sterling*, *Id.* 456.

29. Certain appearances of alterations in a railroad bond considered, with reference to their effect to charge the purchaser of the

bond with notice that they were fraudulently acquired by the seller. *Birdsall v. Russell*, 29 *N. Y.* 220.

30. Where the directors of a joint-stock corporation issue debentures (which are, in form, the bonds of the company), without complying with the requirements of the deed of settlement, in regard to borrowing money; and such securities come into the possession of a *bona fide* holder, for value, without notice of any infirmity affecting them, such holder can not recover for them, as against the great body of the shareholders. Persons, dealing in the market, for the debentures of a company of this sort, are bound to use reasonable precaution in seeing to the authenticity of the documents they are purchasing. *Eng. V. Ch. Ct.* 1858, *Athenæum Assurance Co. v. Pooley*, 31 *Law Times*, 70.

31. — as respects action. The holder of bonds issued by a corporation, payable to bearer, may maintain an action on them in his own name.* Such bonds are not strictly negotiable under the law merchant, as are promissory notes and bills of exchange. They are, however, instruments of a peculiar character, and being expressly designed to be passed from hand to hand, and by common usage actually so transferred, are capable of passing by delivery so as to enable the holder to maintain an action on them in his own name. Possession is *prima facie* evidence of ownership. *Pa. Supreme Ct.* 1856, *Carr v. Le Fevre*, 27 *Pa. St.* 413.

32. Coupons. If coupons annexed to bonds are drawn so that they can be separated from the bonds, and, like the bonds, are negotiable, the owner of them can sue on the coupons without producing the bonds to which they were attached, and without being interested in them. *U. S. Supreme Ct.* 1865, *Thompson v. Lee County*, 3 *Wall.* 327; *S. P. Wis. Supreme Ct.* 1859, *Clark v. City of Janesville*, 10 *Wis.* 186.

33. Coupons of bonds issued by corporations, are transferable by delivery, and the holder thereof may sue in his own name. *Ill. Supreme Ct.* 1860, *Johnson v. County of Stark*, 24 *Ill.* 75.

* That the holder of corporate bonds drawn payable to bearer, may sue thereon in his own name,—see also *Society for Savings v. City of New London*, 29 *Conn.* 174; *Chapin v. Vermont & Massachusetts R. R. Co.* 20 *Law Rep.* (10 *N. E.*) 650; *McCoy v. Washington County*, 8 *Phil.* 290; *Vertue v. East Anglian Railway Co.* 5 *Exch.* 290; 20 *Law J. N. S.* 252; 1 *Pr. R.* 302; 19 *Law J. Exch.* 285.

34. Where a suit is brought for the collection of the interest due on railroad bonds, evidenced by coupons, the court will not allow the payee of the bond to take judgment for the interest due, until the coupons are produced. *U. S. Circ. Ct.* 1857, *Williamson v. New Albany & Salem Railway*, 9 *Am. Railw. Times*, No. 37; 2 *Redf. on Railw.* 605.

35. A coupon, disconnected from the bond with which it was issued, will not be held negotiable (no intention to that effect on the part of the party issuing it appearing on the face of the instrument), without a legislative enactment to that effect. *Ma. Supreme Ct.* 1857, *Myers v. York & Cumberland R. R. Co.* 43 *Me.* 232.

36. A bond issued by a railroad company for the payment of \$1,000 at a future day, acknowledged an indebtedness in that amount for money borrowed, to certain trustees named, payable to bearer, with semi-annual interest thereon, payable at the office of the company on delivery of certain interest warrants annexed. An interest warrant annexed was as follows: "Interest warrant, for \$30, being half-yearly interest on bond No. 80, of the N. L. W. & P. R. R. Co. payable on the 1st day of February, 1856. J. D., Treasurer." A holder of the bond and warrant having presented the letter, when due, at the time and place of payment, brought an action of debt on a general *indebitatus* count for the recovery of the interest represented by the warrant.

Held, 1. That the warrant did not import a promise, but was a mere acknowledgment of indebtedness for interest on the bond itself, and therefore could not be made the ground of an action.

2. That if the plaintiff relied upon the bond itself, on which alone his right to the interest was founded, he should have declared specially upon it.

3. That his omission to do so was not a mere defect of form, of which advantage could be taken only by special demurrer, but was a fatal variance, inasmuch as the declaration as it stood, imported only a parol promise. *Conn. Supreme Ct.* 1857, *Crosby v. New London & C. R. R. Co.* 26 *Conn.* 121.

37. Recovery. Where a company created for certain purposes, with the usual powers of a corporation, is allowed to borrow money for the completion of those purposes, and to

secure the payment of the same by an instrument which upon the face of it imports a covenant for payment, an action of covenant for the repayment of the money will lie against the company, although there are no specific statutory provisions enabling them to bind themselves by such a covenant. *Exch. Chamber, 1852, Eastern Union R. W. Co. v. Hart, 14 Eng. L. & Eq. 535.* See, also, *Bolckon v. Herne Bay Pier Co. 18 Eng. L. & Eq. 159; Perkins v. Pritchard, 8 Eng. Railw. Cas. 95; Hill v. Manchester Water Works, 2 Barn. & Ad. 544.*

38. Defences. Bonds given in payment for the capital stock of an insurance company, on which the company embarked in business and the complainant received his certificate of stock, will not be relieved against in equity, if there was no fraud upon the obligor, and the funds are necessary to meet the liabilities of the company, although the capital stock was not in good faith paid in, and the company embarked in business in violation of the express provision of its charter. If the proceeding was illegal, he was a party to that illegality, and cannot invoke the powers of a court of equity to aid him in defending himself from the consequences of his own voluntary acts. *N. J. Ct. of Errors, 1856, Yard v. Pacific Mut. Ins. Co. 2 Stockt. 480.*

39. Amount recoverable. Where a railroad company, by authority of the legislature, issued bonds payable at a future time, with interest payable semi-annually at the rate of seven per cent., and the bonds becoming due remained unpaid,—*Held*, that the damages to which the holders were entitled for the detention of the principal after it became due, were to be estimated at the contract rate of seven per cent. and not at the legal rate, which was six per cent. *Conn. Supreme Ct. 1860, Beckwith v. Trustees of Hartford &c. Railroad, 29 Conn. 268.*

40. Interest. Where a railway company issued bonds and debentures bearing interest, in which it was stipulated that the principal should be payable at a specified day, but the company did not then pay, nor did the obligee require the principal,—*Held*, that the debentures continued to carry interest until payment. *Exch. 1847, Price v. Great Western R. W. Co. 4 Eng. Railw. Cas. 707; 16 Mees. & W. 244.*

41. Priority. Rights of holders of second and third mortgage bonds, issued subject to

prior mortgage bonds,—see *Bronson v. La Crosse & Milwaukee R. R. Co. 2 Wall. 283.*

42. Where bonds are issued by a corporation, and a mortgage given to secure the payment of the class of creditors constituted by the bondholders, one of such bondholders cannot by getting judgment at law, be permitted to sell a portion of the property devoted to the common security, as this would disturb the *pro rata* distribution among the bondholders, to which they are equitably entitled. *U. S. Supreme Ct. 1859, Pennock v. Coe, 23 How. 117.*

43. Where funds are deposited by a corporation to the credit of a person declared its trustee, for the purpose of enabling him to pay its coupons due on a certain day, with instructions to such trustee and to the depository that the funds are to be applied to that purpose, the amount must be distributed *pro rata* among the coupon-holders entitled to participate. No one holder can obtain more than his share by a common-law action upon his coupons. *N. Y. Supreme Ct. Sp. T. 1860, Coe v. Beckwith, 31 Barb. 339; 10 Abb. Pr. 296; 19 How. Pr. 398.*

44. Suit by corporation. Where a corporation has the power in any case to take a bond, an objection to its right to sue upon a bond must be raised by proper plea. *Ark. Supreme Ct. 1842, Neely v. State Bank, 4 Ark. 522.*

45. That one who, for valuable consideration, has contracted to redeem corporate bonds, cannot avoid his contract on the ground that said corporation, without authority, made the interest payable semi-annually, instead of annually, as required by law,—see *Town Council of Newark v. Elliott, 5 Ohio St. 118.*

For matters common to bonds and other contracts, see **CONTRACTS**, and titles there referred to.

For rules applicable to **Negotiable Instruments**, see **BILLS AND NOTES**.

BRIDGE COMPANIES.

1. Incorporation. The legislature of one State cannot so authorize a corporation created by it to build a bridge extending into the limits of another State, as to empower such corporation to collect toll of one who

passes only upon that part of the bridge which is within the limits of the other State, without an express promise on the part of such passenger. *Ma. Supreme Ct.* 1846, *Middle Bridge Corporation v. Marks*, 26 *Ma.* 326. Compare *South Carolina R. R. Co. v. Jones*, 4 *Rich. Eq.* 459.

2. **Right to tolls.** Where one corporation was empowered to build a bridge, and take toll of persons passing over it, and another corporation was empowered to build a dam near the bridge, to be used as a road, without power of demanding toll, and the two corporations agreed that the bridge and dam should be connected, so that a part of the bridge should become a part of the dam,—*Held*, that the bridge corporation was not entitled to exact toll of persons passing over the dam, for passing on that part of the bridge which constituted a part of the dam. *Mass. Supreme Ct.* 1823, *Proprietors of Canal Bridge v. Gordon*, 1 *Pick.* 297.

3. **Posting the rates.** Where a charter granting the right to erect a toll-bridge requires that the rates of toll shall constantly be kept exposed to the view of passengers at the place where the tolls are collected, no action can be maintained for the recovery of the penalty, for forcibly passing the bridge without paying toll, unless the corporation have complied with this requirement. A non-compliance with this provision is not excused by the fact that the sign-board has been wantonly destroyed, or that the letters thereon have become obliterated by time, accident or design. In either case, the board must be replaced in a reasonable time. *Ma. Supreme Ct.* 1886, *Middle Bridge v. Brooks*, 18 *Ma.* 391. See also, *Worcester v. Essex Merrimac Bridge*, 7 *Gray*, 457; *Bonham v. Taylor*, 10 *Ohio*, 108.

4. **Exemption from tolls.** A statute exempting from toll, "persons drawing firewood for their own family use," extends to persons assisting one who is drawing wood for his own family use. *N. Y. Supreme Ct.* 1813, *Wooster v. Van Vechten*, 10 *Johns.* 467.

5. In Massachusetts a bridge company may bind themselves by a contract to permit certain persons to pass their bridge free of toll. See *Central Bridge Co. v. Bailey*, 8 *Cush.* 319; *Central Bridge Co. v. Sleeper*, *Id.* 324.

6. **Infringements of the franchise.** A court of equity will grant a perpetual injunction to restrain the owner of a private bridge from permitting travellers &c. subject to the

payment of toll at an established bridge, to pass over his bridge, in violation of the rights of the proprietor of the established bridge, and decrees to the latter a pecuniary recompense for the losses thereby sustained. *Ala. Supreme Ct.* 1850, *Harrell v. Ellsworth*, 17 *Ala.* 576.

7. — **by a rival bridge.** Under a proviso of a statute, declaring that any person may keep a private ferry &c. at which no toll is charged, a bridge as well as a ferry is intended to be included, although not expressly mentioned. But whether a bridge or a ferry, it must be limited to the private use of the person so keeping it, and to this extent he may draw away the business and property of an established bridge, but no further. *Id.*

8. Where a bill in equity prayed that a railroad corporation might be enjoined from erecting a bridge across the Connecticut River, upon the ground that it would injure the plaintiffs' toll-bridge, by infringing the vested rights conferred by his charter,—*Held*, that the statement of the respondents' answer, that railway communication was not in use, at the date of the plaintiffs' grant, and that it could not therefore have been in the contemplation of the legislature to exclude it, and that a railway bridge did not subserve the same purpose for which the toll-bridge was erected, was not impertinent. *N. H. Superior Ct.* 1850, *Tucker v. Cheshire R. R. Co.* 1 *Am. Railw. Cas.* 196; 1 *West.* 29.

9. Under a statute prohibiting any person from building any bridge &c. "within five miles either above or below the — bridge, on the same stream," the distance is to be measured on the course of the river. *Ga. Supreme Ct.* 1851, *McLeod v. Burroughs*, 9 *Ga.* 213.

10. **Location.** A charter was granted for a bridge across the Cayuga Lake or its outlet, leaving the location to the company, and declaring it unlawful to establish any bridge or ferry within three miles of the place where it should be erected. The company erected a bridge over the lake; and, it having been carried away, they did not rebuild on the same site, but over the outlet, at a distance of two miles. *Held*, that the prohibition of the charter must still be applied in reference to the space of three miles from the original site. The charter contemplated only one bridge, and by fixing their location the exclusive privilege was fixed. *N. Y. Ct. of*

Errors, 1830, Cayuga Bridge Co. v. Magee, 6 Wend. 85.

11. — by crossing on the ice. Under a charter of a bridge company providing that no person should cross the lake over which the bridge was built within three miles of the bridge without paying toll,—one who goes upon the ice on the lake more than three miles from the bridge, though he leaves the ice on the other side within three miles of the bridge, does not cross within that distance. To constitute a crossing within the act, the place of entering upon as well as of leaving the lake on the ice, must be within the distance. *N. Y. Supreme Ct.* 1823, Sprague v. Birdsall, 2 Cow. 419; 1827, Cayuga Bridge Co. v. Stout, 7 Id. 83.

12. Under a charter providing that any person might pass and repass in his own boat without paying toll, persons are not at liberty to cross upon the ice without paying toll. To allow this would make the passage free to travelers generally, instead of merely to the inhabitants of the vicinity. *N. Y. Supreme Ct.* 1827, Cayuga Bridge Co. v. Stout, 7 Cow. 83.

13. Interference with navigation. The charter of a company authorized to erect a bridge over a navigable river provided that the structure should not be erected "in such a manner as to injure, stop, or interrupt the navigation of the river by boats, rafts, or other vessels." *Held*, that the proviso was a limitation of the franchise only, and not a rule of liability to injured navigators. *Pa. Supreme Ct.* 1863, Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112.

14. Under a charter of a corporation authorizing them to construct a bridge over navigable waters "with a draw of sufficient width for vessels to pass through, the whole to be kept in good and safe repair," the corporation are bound to provide requisite tackle for raising the draw; and to raise the same when parties wish their vessels to go through. *Ms. Supreme Ct.* 1855, Patterson v. Proprietors of East Bridge, 40 Ms. 404. S. P. under a general statute of North Carolina, *N. C. Supreme Ct.* 1858, Davis v. Jerkins, 5 Jones' Law, 290.

15. A condition in a charter, authorizing a company to build a bridge over a navigable stream, so that it shall not "injure, stop, or interrupt the navigation," is not performed by building the bridge in such a

manner as to do as little injury as possible to the navigation, as it existed at the time the bridge was built. If at any future time the navigation is so interrupted, the corporation is liable to the injured party for the damages thereby sustained. *Pa. Supreme Ct.* 1856, Dugan v. Bridge Company, 27 Pa. St. 303.

16. In such a case if the bridge, when built, is no obstruction, a change in the channel from artificial causes created by third parties, can not affect the rights of the company; otherwise if such change is the result of natural causes, influenced in their operation by the piers of the bridge. *Id.*

17. Repairs. The obligation of bridge companies to keep their bridges in repair,—see Orcutt v. Kittery Point Bridge Co. 58 Ms. 500; State ex rel Commissioners of Ross County v. Zanesville & Maysville Turnpike Co. 16 Ohio St. 308; Chase v. Cabot & Co. Bridge Co. 6 Allen, 512.

18. Toll bridge corporations are not bound to erect and maintain railings upon their bridges for travellers to lean against or rest upon, while they stop to recover from fatigue; and a person using them for such purpose, does so at his own risk. Their liability is not that of common carriers. *Ms. Supreme Ct.* 1866, Orcutt v. Kittery Point Bridge Co. 58 Ms. 500.

BUBBLE COMPANIES.

1. Statute prohibiting "bubble companies." *Stat.* 6 Geo. I. ch. 18. Repealed, *Stat.* 6 Geo. IV.*

* This act was passed to prevent the organization of companies founded without real capital or business, and for the purpose of deceiving the public into a purchase of shares, by high colored statements of the condition and prospects of an imaginary concern. The reign of Queen Anne, and early years of Geo. I. were very prolific in combinations of this description; so much so, that in 1720 it was found necessary to formally abolish, by an order in council, a large number of companies, organized for a great variety of fanciful purposes:—e. g. for building and re-building houses throughout all England;—for effectually settling the islands of Blanco, and San Tortugas;—for carrying on "an undertaking of great advantage, nobody to know what it is";—for improving the art of making soap;—for a settlement on the island of Santa Cruz;—for a wheel for perpetual motion, capital one million;—for insuring and increasing children's fortunes;—for carrying on a trade in the River Oronooka;—for insuring to all masters and mistresses the losses they may sustain by servants;—for extracting silver from lead;—for the transmutation of quicksilver into a malleable fine metal. Several subse-

2. **Recovery of assessments.** A bill in equity lies to recover deposits paid by a shareholder in a joint-stock company, where the project is a bubble. *Chancery*, 1826, *Green v. Barrett*, 1 *Sim.* 45.

3. — **of loans.** In an action for money lent, the plea set up was, that the plaintiff, with the defendant and others, illegally associated in a certain undertaking tending to the common grievance and nuisance of the Queen's subjects, that is, that they acted as a corporate body, and pretended to be a trading corporation, and under a certain name to raise and transfer stock in the company, and to assign shares &c. without legal authority; and that the money was lent for furthering that purpose.

Held, 1. That the plea was bad, as disclosing no offence (the Bubble Act having been repealed) indictable at common law.

2. That the plea was bad, because it did not show any specific facts by which the company in question had acted as a corporate body; nor did it say that they had so acted within the Queen's dominions. *C. P.* 1843, *Garrard v. Hardey*, 7 *Jur.* 200; 13 *Law J. N. S.* 205.

4. **Liability of promoters.** Parties who project and promulgate the scheme of a joint-stock company, cause the usual books to be opened, allow or cause the inscription of a person as owner of an interest to a definite amount and value therein, and issue certificates of stock therefor, when the capital has not been paid in, fully and in good faith, and annex to the certificate a written power authorizing the transfer at large by the party to whom the certificate is issued, who publish false statements, tending to produce the belief that the stock is at least of par value, and that the business has warranted successive dividends from profits,—are liable directly in damages in an action for deceit brought by any innocent party who, on the faith of the public representations and of the statements of the certificate, has purchased from third parties, and paid for, shares of the stock. *N. Y. Superior Ct.* 1858, *Cross v. Sackett*, 6 *Abb.*

quent periods have witnessed the birth of schemes less numerous, and more plausibly disguised, but perhaps not less mischievous.

The "bubble act" (6 Geo. I. ch. 18) gave rise to much litigation while it continued in force; so far as decisions under it are of practical service in the United States, we have placed them under appropriate titles relative to the formation of companies and liability of officers and promoters; particularly, **DIRECTORS; INCORPORATION; INDIVIDUAL LIABILITY; ORGANIZATION; MEMBERS, &c.**

Pr. 247; 2 *Bosw.* 617; 16 *How. Pr.* 62. And see *Mead v. Mali*, 15 *How. Pr.* 847.

5. Where certain persons enter into a contract, claiming to be directors of a corporation, if no such corporation really exists, such persons are individually liable on the contract. *Ind. Supreme Ct.* 1861, *Herod v. Rodman*, 16 *Ind.* 241.

BUILDING SOCIETIES.

[Treats of corporations organized for the mutual assistance of members in erecting buildings for themselves.*]

1. **Their general object.** A building society (organized under the N. Y. act of April 5, 1853, authorizing the formation of corporations for the erection of buildings) must have for its leading object to carry on the business of erecting buildings for itself or others, and not to confine itself, as the primary and sole purpose of its organization, to the erection or improvement of a single building upon a single property of its own, for its more convenient and lucrative development and use. *N. Y. Supreme Ct.* 1865, *People v. Troy House Co.* 44 *Barb.* 625.

2. A corporation so formed had never erected any buildings, but at most only a single building, and had not erected, but only altered and improved, that one; had never devoted itself to the business of erecting buildings, but only to the object of making improvements upon a single building, and holding, managing, and leasing the same as its property. *Held*, that on the complaint of the people, it must be dissolved. *Id.*

3. **Not unlawful.** A building association was organized under articles of agreement which provided that the whole number of shares should be raised by small monthly subscriptions, every holder paying interest on his shares until paid up; that the members should be restricted in the selection of workmen to certain tradesmen; and that each member might dispose of his shares and transfer them on the society's books, if the purchaser should be approved at a meeting of the society, and should, on his admission, become a party to the original articles. *Held*, that the association was not illegal under the

* These corporations are created, and their mode of organization and operations prescribed by local statutes, so fully, that but few adjudications are found which possess general interest.

statute of 6 Geo. I. ch. 18, §§ 18, 19, as in restraint of trade, and against the general policy of the law. *K. B.* 1812, *Pratt v. Hutchinson*, 15 *East*, 511.

4. **Validity of mortgages to building societies, by members,—sustained.** *Citizens' Mutual Loan Assoc. v. Webster*, 25 *Barb.* 263; *Franklin Building Assoc. v. Mather*, 4 *Abb. Pr.* 274; *Morrison v. Glover*, 4 *Exch.* 480; 19 *Law J. N. S.* 20; *Cutbill v. Kingdom*, 1 *Exch.* 494; 17 *Law J. N. S.* 117; *Copland v. Bartlett*, 6 *Com. B.* 18; 18 *Law J.* 50. Compare *Melville v. American Benefit Building Assoc.* 83 *Barb.* 103; *Hamilton Building Assoc. v. Reynolds*, 5 *Duer*, 671.

5. That the member making the mortgage is estopped to deny its validity,—see *Howard v. Mutual Loan & Fund Assoc. v. McIntyre*, 8 *Allen*, 571.

6. **Usury.** An association organized under the New Jersey statute (*Nix. Dig.* 75) establishing mutual loan and building associations, may, by the sale of loans at a premium, or the purchase of shares at a discount, contract with its shareholders for extra interest. *N. J. Supreme Ct.* 1861, *Franklin Building Association v. Marsh*, 5 *Dutch.* 225.

7. By the rules of an English association it was provided that the funds of the society should from time to time be put up for sale, the highest bidder to be the purchaser, and to receive shares at the rate of his bidding. Shares were to be paid for by monthly subscription. The nominal value of the shares was £120. When the actual value reached that amount, by the payments made, all arrears of subscriptions &c. to be called in, the £120 per share to be paid, and the society dissolved. In the meantime, any member desirous of receiving the actual value of his share or shares by way of loan, might obtain it on mortgage of buildings, paying them 4s. per share monthly beyond his subscription for redemption money or interest. The directors were empowered to borrow money for the purpose of making advances on shares. By the practice of the society, members who did not wish to take loans might allow their monthly payments to accumulate at compound interest till the society dissolved. *Held*, that the rules and practice of the association did not contravene the Building Societies act (*Stat.* 6 & 7 *Will.* 4, c. 82), or deprive the society of the protection

against the usury laws given by it, and thereby render it an illegal association if the loan produced more than 5 per cent. annually. *Q. B.* 1850, *Morrison v. Glover*, 15 *Q. B.* 103.

8. Whether the regulations of such a society are a mere color for usury is a question for a jury, looking to the regulations themselves, and the other evidence. *Id.*

9. Building associations can recover on their mortgage loans only the sum actually loaned, with legal interest thereon. *Pa. Supreme Ct.* 1862, *Houser v. Hermann Building Association*, 41 *Pa. St.* 478.

10. The Pennsylvania Act of May 8, 1855,—which enacts that in investments by building associations in loans to members, the premium given shall not be deemed usurious,—does not authorize building associations to enforce usurious contracts of loan. *Id.*

11. A joint-stock corporation, organized for the purpose of doing a general insurance agency, commission and brokerage business, in order to effect a loan of the plaintiffs, who were a savings bank and building association, subscribed for fifty shares of the stock of said association, who paid such corporation one-half of the amount of such loan, after reserving therefrom one month's interest and one month's bonus of three-fourths of one per cent. on the amount of the loan, and one instalment on the stock. The plaintiffs afterward advanced said corporation \$5,000, the remainder of the loan, and said corporation paid the plaintiffs another month's interest and \$125 bonus, and executed their promissory note for \$10,000, payable on demand, with interest and with a bonus of three-fourths of one per cent. per month, in addition to the interest, both interest and bonus payable monthly, in advance, and to secure the payment of such note, mortgaged certain real estate to the plaintiffs. On a bill brought to foreclose said mortgage:

Held, 1. That such subscription for stock was void, and that so much of said note as embraced the money retained for the instalment paid on said stock, was without consideration.

2. That, as said loan was made to a party, who was not a member of said association, at a rate of interest exceeding six per cent. per annum, the contract was usurious.

3. That the amount of all the payments, made as aforesaid by the defendants to the

plaintiffs, should be deducted from the principal sum specified in said note, and a decree of foreclosure be passed, in favor of the plaintiffs, for the remainder. *Conn. Supreme Ct.* 1855, *Mechanics &c. Savings Bank v. Meriden Agency Co.* 24 *Conn.* 159.

12. In New York, before the enactment of the statute authorizing building associations (Laws of 1851, 234, ch. 122) a building association was formed, the articles of which provided for the "redemption" of its own shares from the members who were willing to accept the lowest prices. The plaintiff became a member, and immediately "redeemed" his shares to the association, in accordance with the articles, agreeing to pay the association, for the loan of \$3,500, \$84 per month, until the shares of the association should be worth \$600 each. This payment was secured by bond and mortgage. It appeared, by calculation, that the shares could not possibly attain to the specified value in less than five to eight years, and would very probably be still longer in reaching it. *Held*, that the transaction was substantially a loan on usury, and that the securities given must be cancelled. *N. Y. Supreme Ct.* 1860, *Melville v. American Building Assoc.* 33 *Barb.* 103.

As to Usury in similar cases, see *BENEFIT SOCIETIES*, 4, 5.

13. Settlements with members. A *feme sole* held stock in a building association, in the name of a trustee, paying the monthly dues by an agent, who meanwhile borrowed money from the association to the full value of the shares, gave a mortgage therefor, and at length, had his mortgage satisfied by giving up the stock, though it still stood in the name of her trustee, untransferred. On a bill in equity filed by her, to secure the value of the stock,—*Held*, that the association were liable therefor. *Pa. Supreme Ct.* 1861, *Larkins' Appeal*, 38 *Pa. St.* 457.

14. Where a stockholder in a building association, under resolution of the society, permitting borrowers to withdraw on the payment of a stipulated amount, the stock to be then "withdrawn and cancelled," withdrew, and his loans and stock which was then marked on the books as "cancelled," and "withdrawn" were paid off,—*Held*, that the association could not subsequently recover for back dues which had accrued on such stock. The position of the parties was that of debtor and creditor, and the payment by

the debtor of the sum found to be due, in accordance with the terms of the resolution, and the acceptance of the same, constituted an accord and satisfaction. *Pa. Supreme Ct.* 1865, *Miller v. Second Jefferson Building Association*, 50 *Pa. St.* 32.

15. Members of a building and investment society, which contemplated equal advantage to all, cannot borrow from the fund of the investing members without returning the benefits held out to them by the rules. Thus where the period fixed for the termination of a building society expired by effluxion of time, but the funds were insufficient to pay the investing members the sum it was by the rules calculated they ought to receive upon their shares,—*Held*, that the borrowing members were, by their rules, entitled to have the deeds relating to property purchased by them with the borrowed money, delivered up at the end of the time fixed for the termination of the society, and also to have a receipt indorsed on the deed mortgaging the property to the society, acknowledging the payment of all moneys intended to be secured thereby; but, as the object of the society was not complete, that all the members still continued liable to pay monthly subscriptions to the funds until they were sufficient to pay to each investing member the sum he was to receive per share if the calculations had realized the proposed objects of the society. *Master of Rolls*, 1859, *Sparrow v. Farmer*, 26 *Beav.* 511; 28 *Law J. N. S.* 537; 33 *Law Times*, 216; 5 *Jur. N. S.* 530.

16. If a mortgage be given to a building society to secure the payment of future contributions, the mortgagor cannot redeem by paying the advances made to him *minus* the amount of subscriptions paid. *Chancery*, 1852, *Seagrave v. Pope*, 15 *Eng. L. & Eq.* 477; 22 *Law J. N. S.* 258; 16 *Jur.* 1099; 1 *De Gez, M. & G.* 783.

17. The complainants, a building association, received from the defendant his bond and mortgage, reciting that he was a shareholder in said building association and had agreed to accept and had received from it \$400 at the date of the bond, "upon and for the redemption of No. 69, being the sum lent or offered to be received by him therefor." The condition of the bond was as follows:—"Now, if the said A. W. M. &c. shall pay to the said H. B. Association No. 1, upon said house, the sum of \$7, on the third Monday of

each month thereafter, for the period of ten years from the date hereof, or until the surplus assets of said corporation shall be sufficient, over and above its debts and liabilities, to pay on each unredeemed share to the holder thereof, the sum of \$8," &c.

Held, 1. That a failure of other shareholders to pay their dues afforded no defence to a suit for the foreclosure of said mortgage.

2. That the contract was in accordance with the charter of the corporation, and was not usurious.

8. That an agreement made by all the parties in interest, that the affairs of the company should be wound up and the owners of the unredeemed shares should receive the sums they had advanced, with interest, and that the owners of the redeemed shares, who had given mortgages for the price of redemption, should be discharged upon paying the amount of their mortgages, with interest, was valid, and should be enforced. *N. J. Chancery*, 1861, *Hoboken Building Association v. Martin*, 2 *Beasl.* 427.

18. Payments of a member of a building society, who has obtained a loan and given a mortgage to secure its payment, made on account of installments upon his shares of stock, do not *ipso facto* extinguish the mortgage to such extent. The debtor may so apply them, but they are not themselves an application of the money to the reduction of the mortgage; and therefore a recovery upon the mortgage is not conclusive evidence of the extinguishment of the shares. *Pa. Supreme Ct.* 1860, *North America Building Association v. Sutton*, 85 *Pa. St.* 468.

BY-LAWS.

[In the earlier cases the term "by-law" is used indifferently with reference to the regulations adopted by private corporations, and to the enactments made by public and municipal corporations in the exercise of the quasi legislative powers usually possessed by them. In the more recent adjudications the word "ordinance" is more frequently used for the laws of municipal corporations, and the term "by-law" employed with more especial reference to private companies. In this work, this distinction is adopted. This chapter embraces only decisions upon by-laws of private corporations, and some decisions which, although rendered upon ordinances of public corporations, establish or illustrate principles applicable to by-laws in the narrow sense of the term.

The chapter is intended to embrace matters relative to the power of private corporations to enact by-laws;—including the definition and limits of the power,—the interpretation and effect of provisions of the charter or articles

conferring it,—how by-laws are to be enacted, promulgated, modified, or repealed,—the general rules for interpreting by-laws,—what is a violation of them, and the penalties therefor,—how they may be enforced by the corporation itself,—and the fact that there is a legal remedy, and what it is, either against an individual or against the corporation itself, for a violation. But the interpretation and effect of particular by-laws governing particular subjects, are under those subjects:—*a. g.* of by-laws regulating elections, under *ELECTIONS*; of by-laws prescribing the keeping of records, under *RECORDS*. And by-laws which are in their nature peculiar to a single class of corporations, are under the title of that corporation.]

I. THE POWER TO MAKE THEM.

II. VALIDITY AND EFFECT.

III. ENFORCEMENT.

I. THE POWER TO MAKE THEM.

1. **The implied power.** That a corporation has power, as an incident to corporate existence, and without express provision conferring it, to make by-laws,—see *Case of Sutton's Hospital*, 10 *Co.* 28, 31; *Norris v. Staps*, *Hob.* 210; *City of London v. Vanacker*, 1 *Ld. Raym.* 496; 5 *Mod.* 438; 12 *Mod.* 270; 1 *Salk.* 142; *City of London v. Wood*, 12 *Mod.* 669; *Child v. Hudson's Bay Co* 2 *P. Wms.* 207; *Newling v. Francis*, 3 *Durnf. & E.* 189; *Kearney v. Andrews*, 2 *Stockt.* 70; *Martin v. Nashville Building Assoc.* 2 *Colo.* 418.

For cases enumerating this Among other corporate powers, see *POWERS*.

That *Eleemosynary corporations* are an exception, see that title.

2. **In whom it is vested.** The power of making by-laws, in all corporations to which it is incident by common law, is to be exercised by the entire body of corporators, as distinguished from select bodies, unless the constitution of the corporation has vested the whole power of making by-laws in some particular part or body of the corporation; but, in such case, a special power, given by the charter to a select body, to make by-laws touching certain objects therein specified, does not by implication deprive the body at large of the power to make by-laws, which previously existed in them. *House of Lords*, 1830, *Rex v. Westwood*, 7 *Bing.* 1, 90; 2 *Dow & C.* 21.

8. Where the power of making by-laws is by charter given to a select body, they do not represent the whole community; and therefore cannot assume to themselves what belongs to the body at large; but where the power of making by-laws is in the body at large, they may delegate their rights to a se-

lect body, which then becomes the representative of the whole community. *K. B.* 1766, *Rex v. Spencer*, 3 *Burr.* 1827.

4. That the power of making by-laws may be reposed in the directors,—see *Eap. Willcocks*, 7 *Cow.* 402; *Hartscot's case*, *Comb.* 203, 816.

5. Where the charter of a corporation empowers the president and directors to make by-laws, the power may be exercised by the president and a majority only of the directors. *Mich. Supreme Ct.* 1845, *Cahill v. Kalamazoo Mut. Ins. Co.* 2 *Doughl.* 124.

6. There is no variance between an allegation that the president and directors (naming all of them) of a corporation made certain by-laws, and proof that they were adopted by the president and a majority only of the directors. The majority, when assembled at a legal meeting, constitute the board. The allegation that the by-laws were adopted by the board is in legal effect true, notwithstanding some members of the board were not present at the meeting, provided a majority were in attendance. *Id.*

7. Need not be exercised in writing. The adoption of a code of by-laws by a corporation need not necessarily be by writing, but may be proved as well by the acts and uniform course of proceedings of such corporations as by an entry or memorandum in writing. *Md. Ct. of Appeals*, 1827, *Union Bank v. Ridgley*, 1 *Harr. & G.* 824, 410.

8. Nor under seal. Where a power is given by the charter to make by-laws according to a certain form, and in a particular manner, the power must be strictly pursued, and no by-law made otherwise than according to the power will be binding. Thus, where a gas-light company was empowered to make by-laws under seal for its government, and for regulating the proceedings of the directors, officers, and servants, and at a meeting of the company a resolution was passed, not under seal, allowing each director for his attendance on courts, committees &c. a certain compensation for each time of attendance,—*Held*, that the resolution was not a by-law within the statute. *K. B.* 1832, *Dunston v. Imperial Gas Co.* 3 *Barn. & Ad.* 125.

9. Preamble. That it is not necessary that the reasons for making a by-law should be stated in the preamble—see *Rex v. Harrison*, 3 *Burr.* 1822.

10. Extent of the power. That the cor-

porate power to prescribe by-laws extends only to its own members and officers; but over them its by-laws, duly and lawfully passed, are binding and obligatory—see *Vintner's Co. v. Passey*, 1 *Burr.* 235; 1 *Ld. Keny.* 500; *Company of Horners v. Barlow*, 3 *Mod.* 159; *Dodwell v. University of Oxford*, 2 *Vent.* 33; *Masters &c. of Trinity House v. Crispin*, *T. Jones*, 144; *Mayor of Oxford v. Wildgoose*, 3 *Leo.* 298; *Mechanics' Bank v. Smith*, 19 *Johns.* 115; *Susquehanna Ins. Co. v. Perrine*, 7 *Watts & S.* 848; *Palmyra v. Morton*, 25 *Mo.* 598; *Worcester v. Essex &c. Bridge Co.* 7 *Gray*, 457; *Bank of Wilmington & Brandywine v. Wollaston*, 3 *Harring.* 90; *Anacosta Tribe v. Murbach*, 13 *Md.* 91; *State v. Overton*, 4 *Zabr.* 435; *Came v. Brigham*, 39 *Me.* 85; *Cummings v. Webster*, 43 *Me.* 192; *German Evangelical Congregation of Lafayette v. Pressler*, 17 *La. Ann.* 127.

11. A by-law, enacted under express authority of a statute and in conformity to the power conferred, has the same force as though it were enacted by the legislature. *N. Y. Supreme Ct.* 1826, *Brick Presbyterian Church v. Mayor &c. of N. Y.* 5 *Cow.* 538; *Sp. T.* 1857, *McDermott v. Board of Police*, 5 *Abb. Pr.* 422.

12. The by-laws of a corporation are evidence against its officers, though they be not corporators. *Del. Superior Ct.* 1840, *Bank of Wilmington & Brandywine v. Wollaston*, 3 *Harring.* 90.

13. Repeal. That the same body in a corporation which has a power to make, has also the power to repeal by-laws,—see *King v. Ashwell*, 13 *East*, 22; *Rex v. Westwood*, 4 *Barn. & C.* 781; 7 *Dowl. & R.* 267.

14. Although voluntary associations frequently make constitutions and pass by-laws, which they declare are not to be altered, except in a certain manner, yet their constitution and laws may at any time be altered or abrogated, by the same power which created them; and the vote of any subsequent meeting, abrogating or altering such constitution, though passed only by a majority, has as much efficacy as a previous vote establishing them. *Vt. Supreme Ct.* 1846, *Smith v. Nelson*, 18 *Vt.* 511, 550.

15. That from the total non-observance of the statutes of a private foundation, a repeal of them may be presumed,—see *Attorney General v. Middleton*, 2 *Ves. sr.* 827.

II. VALIDITY AND EFFECT.

16. By-laws cannot contravene the Constitution. That a corporation cannot make a by-law contravening the Constitution:—*e. g.* an *ex post facto* law,—since no legislature can grant powers exceeding those which itself possesses,—see *Howard v. Savannah, T. Oharit.* 173; *People v. Crockett*, 9 *Cal.* 112.

17. — nor the fundamental rules of common law. That the legislative power of a corporation is restricted by the general principles and policy of the common law,—see *Norris v. Staps, Hob.* 210; *Lee v. Wallis*, 1 *Ld. Keny.* 292; *Sayer*, 262; *People v. Kip*, 4 *Cow.* 882, n.; *Kennebec & Portland Railroad Co. v. Kendall*, 31 *Me.* 470.

18. That by-laws in violation of common rights are void,—see *Clarke's case*, 5 *Co.* 64; *Hayden v. Noyes*, 5 *Conn.* 891; *Adley v. The Whitstable Co.* 17 *Ves.* 315; *Rex v. Cooper's Company of New Castle*, 7 *Durnf. & E.* 543; *Rex v. Tappenden*, 3 *East*, 186.

19. Whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights or endangering the security of individuals or the public, a statute or other special authority, emanating from the creating power, must be shown to legalize it, either expressly or by implication. *N. J. Supreme Ct.* 1834, *Taylor v. Griswold*, 2 *Green*, 323; *S. P. Philips v. Wickham*, 1 *Paige*, 590; but see *State v. Tudor*, 5 *Day*, 329.

20. The power of a corporation to make by-laws is limited by the nature of the corporation and the laws of the country. It can make no rule contrary to law, good morals, or public policy. *Ky. Ct. of Appeals*, 1863, *Sayre v. Louisville Union Benevolent Association*, 1 *Duv.* 143.

21. — nor the general statute law. A by-law contrary to a statute is void.* *Me. Supreme Ct.* 1850, *Kennebec & Portland R. R. Co. v. Kendall*, 31 *Me.* 470. And see *Leathley v. Webster, Sayer*, 251; *Norris v. Staps, Hob.* 310.

22. A provision in a bank charter conferring upon the directors power to make and prescribe such by-laws, rules, and regulations as should be needful, touching "the time,

manner, and terms upon which discounts and deposits shall be made," gives generally an authority to make by-laws &c. to operate upon and control the internal conduct of the business of the bank, and to restrain and direct its own officers and servants in the management of its affairs, and not to affect the public at large, or the rights and interests of third persons. Such an authority will not be allowed to have operation conflicting with the general statutes of the State. *N. Y. Supreme Ct.* 1858, *Seneca Co. Bank v. Lamb*, 26 *Barb.* 595.

23. Where directors of a joint stock company are authorized by its deed of settlement to draw or accept bills of exchange, a proviso in the deed that such bills shall be so made or accepted &c. as to be binding on the company and on the shareholders to the extent of the respective shares held by them in the capital stock of the company, and no further, is repugnant and void; and the bills drawn or accepted by the directors in conformity with the provisions of the joint stock companies act, bind the company. *Exch.* 1857, *Gordon v. Sea, Fire, and Life Assurance Society*, 26 *Law J. N. S.* 202; *Chancery*, 1863, *Re State Fire Ins. Co.* 11 *Week. Rep.* 416.

24. A provision in the charter of a corporation which requires that "all rules and restrictions made by the board of directors, concerning the transfer of stock, shall be subject to the general law of the State," only requires that such rules and restrictions shall not contravene the general law of the State, other than that relative to the subject about which they are prescribed, and that they shall be reasonable. *Mo. Supreme Ct.* 1845, *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 *Mo.* 149.

25. That a by-law may be valid, though it further regulate a subject already regulated by general statute,—see *Rogers v. Jones*, 1 *Wend.* 237.

26. Where a statute extending the powers &c. of a chartered corporation, prescribes certain regulations with regard to its dealings with the public on certain specified occasions and for certain purposes, whether the corporation can enforce against the public any further regulations, with regard to those occasions and purposes, by making by-laws cumulative to the regulations imposed by parliament—*query?* *Eagleton v. East India Co.* 3 *Bos. & P.* 55.

* In Pennsylvania, the charter of a beneficial society granting the power to enact by-laws must contain a restriction that they be consistent with the constitution and laws of the State and of the Union. *Butchers' Beneficial Association*, 35 *Pa. St.* 151.

27. — nor the charter. A corporation cannot make a by-law which contravenes the provisions of their charter. *N. J. Chancery*, 1854, *Kearney v. Andrews*, 2 *Stockt.* 70; *S. C. Chancery*, 1815, *Vestry of St. Luke's Church v. Matthews*, 4 *Des.* 578; *K. B.* 1768, *Rex v. Cutbush*, 4 *Burr.* 2204; *Rex v. Breton*, *Id.* 2260; 1789, *Newling v. Francis*, 8 *Durnf. & B.* 189. And see *Child v. Hudson's Bay Co.* 2 *P. Wms.* 207; *Harcot's Case*, *Comb.* 208; *Tucker v. Rex*, 2 *Bro. Cas.* 804; *Hoblyn v. Rex*, *Id.* 329; *Martin v. Nashville Building Assoc.* 2 *Coldw.* 418.

28. Must not be unreasonable. That a by-law if unreasonable, will be held bad, although it has been duly passed, and published and notified to the proper authorities, and not disallowed by them,—see *Elwood v. Bullock*, 6 *Q. B.* 383.

29. The power to make by-laws does not authorize the majority to make a by-law excluding one of the directors from all knowledge of their business transactions. *N. Y. Supreme Ct.* 1834, *People v. Throop*, 12 *Wend.* 183.

30. A medical society established a tariff of fees for medical services to be performed by its members, and fixed a minimum salary to be received by any member who should be appointed to any public office, in a professional capacity, and adopted a resolution declaring that it should be dishonorable for any member of the society to accept any appointment, or perform any services contained in such tariff of prices, at a less sum than was therein specified. Subsequently, in pursuance of a by-law to that effect, a member was expelled for a violation of this regulation. *Held*, that the regulation was void, as being unreasonable, and against public policy, and contrary to law; and that the expulsion of the member was unauthorized and illegal. *N. Y. Supreme Ct.* 1857, *People v. Medical Society of Erie*, 24 *Barb.* 570.

31. A by-law to compel the giving of a dinner must show that it is for a beneficial public purpose, or that an interest of the corporation is in some way promoted by it. Therefore, a by-law which compelled a freeman of a scrivener's company to provide a dinner for the master, warden, assistants, and other freemen, on the day of an election of a new master and wardens, was—*Held* to be bad; it appearing that the freemen had no connection in the election; were not obliged to attend it; and that no other business of

the company was done on the election day. *Q. B.* 1842, *Scrivener's Company v. Brooking*, 8 *Ad. & B.* 95; 8 *Q. B.* 95; 2 *Gale & D.* 419; 6 *Jur.* 835. And see *Carter v. Sanderson*, 5 *Bingh.* 79; 2 *Moore & P.* 164.

32. But in case of an old corporation, existing by prescription, an ancient custom or by-law, compelling the stewards of the corporation to give a customary feast, has been *Held* good. See *Gee v. Wilden*, 2 *Lutw.* 1820; *Wallis's Case*, *Cro. Jac.* 555; *Framework Knitters' Co. v. Green*, 1 *Ld. Raym.* 118.

33. Under a power, conferred by a local act upon a public navigation company, to make by-laws for the good government of the company, and for the good and orderly using of the canal, and of warehouses &c. and also for the well governing of the bargemen, the company have no authority to make a by-law prohibiting the use of the canal on Sundays. *Exch.* 1845, *Calder v. Hebble Navigation Co. v. Pilling*, 9 *Jur.* 377; 14 *Law J. N. S.* 228; 14 *Mos. & W.* 76.

34. That a by-law prescribing a reasonable initiation fee, suitable to defray the proper expenses of maintaining the corporation reputably, is good,—see *Taverner's Case*, *T. Raym.* 446.

35. That a by-law assessing on the members of the corporation a burden cast by law on the body politic is valid,—see *Jeffrey's Case*, 5 *Co.* 66, a.

36. Long continuance of a by-law, though length of time will not legalize it, if it were intrinsically illegal, is fair evidence to show that it has no intrinsic inconvenience. See *Rex v. Ashwell*, 13 *East*, 22.

37. Whether a by-law is reasonable or not, is a question for the court solely; and evidence to the jury on the subject, showing the effects of the law, is inadmissible. *Mass. Supreme Ct.* 1826, *Commonwealth v. Worcester*, 3 *Pick.* 462.

38. That a by-law in restraint of trade must not only be reasonable but beneficial to the public,—see *Bosworth v. Herne*, *Cas. Temp. Hardw.* 405; *Fremautte v. Thronster's Company*, 1 *Lev.* 229; *Dodwell v. Oxford*, 2 *Ventr.* 83; *Gunmaker's Company v. Fell*, *Willes*, 884.

39. By-laws in restraint of trade, disallowed. *Gunmaker's Company v. Fell*, *Willes*, 884; *Sayre v. Louisville Union Benevolent Assoc.* 1 *Duv.* 143. But compare *Adley v. Whitstable Co.* 17 *Ves.* 316.

40. By-law may be good in part. That a by-law may be sustained in part, notwithstanding other parts are bad, if the good and bad clauses are capable of separation—see *Amesbury v. Bowditch Mut. Fire Ins. Co.* 6 *Gray*, 596; *Rogers v. Jones*, 1 *Wend.* 287; *Rex v. Faversham Fisherman's Co.* 8 *Durnf. & E.* 352; *Gunmaker's Co. v. Fell, Willes*, 384; *Fazaherly v. Wiltshire*, 1 *Strange*, 462; 11 *Mod.* 353; *Harris v. Wakeman, Say*, 254; *Lee v. Wallis*, 1 *Ld. Keny.* 295. But compare *Clarke v. Tucket*, 2 *Ventr.* 182.

41. That if a by-law be *entire*, so that the part which is void influences the whole, the entire by-law is void,—see *Dodwell v. Oxford*, 2 *Ford.* 34; *Guilford v. Clarke*, *Id.* 248; *Oxford v. Wildgoose*, 2 *Lev.* 293.

III. ENFORCEMENT.

42. Right of corporations. A by-law of an incorporated company may be enforced, if definite and certain, at the pleasure and discretion of the company. *Each.* 1845, *Piper v. Chappell*, 9 *Jur.* 601; 14 *Mees. & W.* 624.

43. That corporations seeking to enforce by-laws, must show their power to pass their by-laws, and bring themselves by proof within that power,—see *Dunham v. Trustees of Rochester*, 5 *Cow.* 462; *Taylor v. Griswold*, 2 *Green*, 223.

44. In whose name to proceed. Where the penalty is given to the master and wardens of a company, to the use of the master, wardens, and company, the action cannot be maintained in the name of the master, wardens, and company, but must be brought in the name of the master and wardens alone. *O. P.* 1797, *Feltmakers' Company v. Davis*, 1 *Bos. & P.* 98; *S. P. Wood v. Mayor &c. of London*, 1 *Salk.* 397; *Graves v. Colby*, 9 *Adol. & E.* 356; *Piper v. Chappell*, 14 *Mees. & W.* 624.

45. Where, in a corporation incorporated by the name of the "Masters, Wardens and Commonalty of the Mystery or Art of the Turners of London," a by-law was duly made, imposing a penalty for refusal to accept the office of steward, but reserving it to the masters and wardens "for the time being," for the use &c. of the company,—*Held*, that an action of debt for the penalty would not lie at the suit of the persons who were master and wardens at the time of the refusal (not being so at the commencement of the

suit, but, for anything that appeared, being strangers to the corporation at the time of the commencement of the action). *It seems*, that, in order to enable the master and wardens, or other officers of the corporation, to whom, in their official character, the penalty might be reserved on the by-law, to sue on it as officers of the corporation, such officers must have a perpetual succession in the nature of a corporation. *Q. B.* 1838, *Graves v. Colby*, 9 *Adol. & E.* 356; 1 *Perry & D.* 235; 1 *Will. W. & H.* 705.

46. The penalty of a by-law cannot be given to a mere stranger, as "to any who shall sue for the same," but the corporation itself must bring the action. *Bodwic v. Fennel*, 1 *Wils.* 283; *Totterdell v. Glazby*, 2 *Wils.* 266.

47. A by-law made by a corporation cannot direct the payment of its penalty to be made to a stranger to the corporation, with the exception that it may be made payable to the chamberlain, who is considered as the treasurer of the corporation, and which, therefore, is in effect making it payable to the corporate body itself, because he is the officer whose duty it is to receive the money, and take care of it when received. *Q. B.* 1838, *Graves v. Colby*, 9 *Ad. & E.* 356. See also *Pierce v. Bartrum*, 1 *Cowp.* 269.

48. Proof. A member of a corporation is presumed to know its by-laws. *Mo. Supreme Ct.* 1857, *Inhabitants of Palmyra v. Morton*, 25 *Mo.* 593.

49. Parol testimony as to what are the by-laws of a corporation, though offered by an officer of the corporation, is incompetent. *N. H. Superior Ct.* 1835, *Lumbard v. Aldrich*, 8 *N. H.* 31. And see *Sells v. Brown*, 9 *Carr. & P.* 601.

50. Evidence of the custom of doing business in a union store association, is admissible to show consent to or acquiescence in an actual change or modification of their by-laws. See *Henry v. Jackson*, 37 *Vt.* 431.

See also RECORDS.

51. Construction. Courts, in construing by-laws, will interpret them *reasonably*; not scrutinizing their terms for the purpose of making them void, nor holding them invalid if every particular reason for them does not appear. See *Vintners' Company v. Passy*, 1 *Burr.* 235; 1 *Ld. Keny.* 500; *Poulter's Company v. Phillips*, 6 *Bingh. N. C.* 314.

52. That a condition must be so construed as to be consistent with the subject-

matter of the by-law,—see *Poulter's Company v. Phillips*, 6 *Bing. N. C.* 314.

53. The words "shall be lawful," when found in the by-law of a corporation, are not to be construed as obligatory. Therefore, where a by-law of a corporation ordained that under certain circumstances "it should be lawful" for the bailiffs to admit to the freedom of the town certain persons,—*Held*, that this by-law was only optional, and that the admission of such persons to the freedom of the borough could not be enforced by *mandamus*. *K. B.* 1821, *Rex v. Bailiffs of Eye*, 4 *Barn. & Ald.* 271; 1 *Barn. & C.* 85; 2 *Dowl. & R.* 172.

54. Where a by-law of a beneficial society provided for the relief of diseased members on application to the stewards of the society,—*Held*, that a member was entitled to relief only from the date of his application, and not from that of his disability or sickness. *Pa. Supreme Ct.* 1842, *Breneman v. Franklin Beneficial Association*, 8 *Watts & S.* 218.

55. The penalty. A corporation cannot impose a forfeiture of goods, as a punishment for violation of a by-law, without an express power so to do. *K. B.* 1786, *Kirk v. Nowill*, 1 *Durnf. & E.* 118; and see *Nightingale v. Bridges*, 1 *Show.* 185.

As to forfeiting a member's Stock, see *Stock*.

56. That a by-law cannot be enforced by avoiding any bond or covenant made in contravention of it,—see *Harscot's case*, *Comb.* 203; *Doggerell v. Pokes*, *F. Moore*, 411.

57. A by-law which compels the payment of a penalty, by excluding the offender from all participation in the profits of the company until payment, is bad. *K. B.* 1813, *Adley v. Reeves*, 2 *Maule & S.* 53.

58. A by-law, made by the freemen of a company of oyster fishermen, prohibiting any freeman from being engaged in the trade of sending oysters to market from any other ground on the Kentish shore than the oyster ground of the company, under a penalty, and, in case of refusal to pay the same, excluding, until paid, from all share of profits to be made thereafter by the joint trade of the company, is void; there being no usage stated to that extent, but only an usage for the freemen to make orders for regulating the company and fishery, with fines and penalties for the breach of such orders, and for prohibiting freemen from being engaged on

other oyster grounds, under penalties to be stopped out of the money arising by the sale of the stint of oysters of such freemen. *Id.*

59. That the penalty must be a sum certain, and not left to the arbitrary assessment of the governing part of the company upon the circumstances of the particular case, even though a maximum limit be fixed,—see *Wood v. Searl*, *J. Bridg.* 141; 8 *Leon.* 8; *Rex v. Newdigate*, *Comb.* 10; *Mayor & Aldermen of Mobile v. Yuille*, 8 *Ala.* 137.

60. That a penalty fixed by by-law cannot be altered so long as the by-law remains unrepealed—see *Scarning v. Cryers*, 8 *Leon.* 7; *Moore*, 75.

CALLS.

ASSESSMENTS.

CANAL COMPANIES.

1. Route. A canal company whose charter authorized the construction of a canal along the line of a river from tide-water,—*Held*, not restricted to commencing the route at the highest point of tide-water, but that the provision must mean nothing more than the highest point of safe and convenient navigable tide-water. *Circ. Ct. D. C.* 1829, *Chesapeake & Ohio Canal Co. v. Key*, 8 *Oranch C. Ct.* 599.

2. The words "from" and "at" in the provisions of such a charter, employed in describing the route, are not necessarily exclusive of the place to which they refer. *Id.*

3. Enlargement. *It seems*, that under a charter, allowing the company to construct and maintain, without qualification, a canal of suitable width, they have power to enlarge it after its construction, if such enlargement is beneficial to the public. But though they possess this power, and, upon making compensation therefor, to take private property for that purpose, they are liable to remunerate individuals in damages for any injuries they may sustain as the consequence of such improvement. *N. Y. Supreme Ct.* 1853, *Bruce v. Delaware & Hudson Canal Co.* 19 *Barb.* 371; *Selden v. The same*, 24 *Id.* 362.

4. Tolls. "Toll" is a Saxon word, originally signifying a payment in towns, markets, or fairs, for goods and cattle bought and sold

there. It is now also popularly applied to the charges which canal and railroad companies require for the transportation of goods. But it does not necessarily import an immediate payment. It means nothing more than a compensation for the privilege or service granted; the period of payment depends, as in other cases, on the understanding of the parties. *N. Y. Supreme Ct.* 1859, *Penn. Coal Co. v. Del. & Hudson Canal Co.* 29 *Barb.* 589.

5. **Right to demand them.** A corporation formed for public transportation,—*e. g.* a canal company,—cannot sustain a right to demand toll irrespective of authority given by the charter, upon the ground that it is the absolute owner of the works and of the land it occupies, and may, therefore, like any other owner, demand compensation from any person passing over its property. The corporation has no rights of property, except those derived from the provisions of the charter, nor can it exercise any powers over the property it holds, except those with which the charter has clothed it. It holds the property only for the purposes for which it was permitted to acquire it,—that is, to effectuate the objects for which the legislature created it. And, whether it may lawfully demand compensation from a person whom it permits to pass over its property, must depend upon the language of the charter, and not upon the rules of the common law. *U. S. Supreme Ct.* 1850, *Perrine v. Chesapeake & Delaware Canal Co.* 9 *How.* 172.

6. Hence a canal corporation, empowered by its charter to take toll upon articles specified, without mentioning passengers, cannot lawfully demand tolls on passengers, or on vessels by reason of their passengers. *Id.*

7. The charter of a canal company having provided for the payment of a certain toll by vessels not having merchandise on board, such vessels can not be excluded from the canal because they carry passengers. *Id.*

8. A canal company whose charter forbids their taking a higher rate of tolls than is specified in it, and gives a summary remedy for the collection of tolls, may, nevertheless, agree with one using the canal, on a less rate of toll, and an action will lie against him on such agreement. *Pa. Supreme Ct.* 1853, *Delaware & Hudson Canal Co. v. The Pennsylvania Coal Co.* 31 *Pa. St.* 181.

9. As to right to elect between different rates of toll authorized by the charter,—

see *Staffordshire & Worcestershire Canal Co. v. Trent & Mersey Canal Co.* 6 *Taunt.* 151; *Proprietors of Quincy Canal Co. v. Newcomb*, 7 *Metz. (Mass.)* 276.

10. **Rights to the water.** The rules governing the right to use water in streams pronounced inapplicable to water passing through canal locks; such water being accumulated, under authority of the legislature, for a particular purpose. *Staffordshire &c. Co. v. Birmingham &c. Co.* 35 *Law J. Ch.* 757; 1 *Law R. H. L.* 254.

11. Where the waters of the defendant's canal, had for seventy years, whenever the lock at the junction was opened, flowed into the canal of the plaintiff's, both canals being made by special acts,—*Held*, that neither by implied contract nor length of user, had the plaintiff's company acquired a right in the waters flowing from the defendant's canal. By reason of the duties of a canal company, the waters of the canal, so far as respects the capacity of other persons to acquire a right in them, stand on a different footing from waters flowing naturally, and from artificial waters of an ordinary character. *Id.* Compare *Blackmore v. Glamorgan Canal Co.* 2 *Crompt. M. & R.* 183; 1 *Gale*, 78; 5 *Tyrie*, 603; 1 *Clark & F.* 263; 5 *Bligh. N. S.* 547.

12. **Obstructing a canal.** That it is no defence to an action brought by a canal company, for a nuisance which obstructed its works, to show that the works were not skillfully constructed—see *Delaware & Hudson Canal Co. v. Torrey*, 33 *Pa. St.* 148.

13. **Obligations of company in maintaining canal.** Independent of any statute, the common law imposes upon a canal company to take reasonable care, so long as they keep their canal open for the public use of all who may choose to navigate it, that it is free from obstructions dangerous to the safety of those who may navigate. The owner of a boat injured by running against a boat sunk in the canal, of which the company had notice, and which they did not take reasonable pains to remove or give public warning of, may recover damages from the corporation. *Each. Ch.* 1839, *Lancaster Canal Co. v. Parnaby*, 11 *Ad. & El.* 223; 3 *Perr. & D.* 162; 1 *Eng. Railw. Cas.* 696.

14. A canal-boat in all respects suitable for navigating the defendants' canal, and properly managed, while making a trip, struck against a stone in the bottom of the

canal, and, with its cargo, was injured and sunk; and it appeared that the same boat had made previous trips in safety during the same season, one of which was about a week before the injury. *Held*, that the company were not liable, in the absence of proof that they had failed to use reasonable care and caution to keep the canal in a suitable condition for safe navigation; and that the facts of the case did not raise a presumption of negligence. *N. Y. Superior Ct.* 1863, *Exchange Fire Ins. Co. v. Delaware & Hudson Canal Co.* 10 *Bow.* 180.

15. That where a canal company has pumped foul water into their canal, so as to make the canal a nuisance, it is no defence that the foulness was caused by other persons,—see *Attorney-General v. Bradford Navigation Co.* 35 *Law J. Ch.* 619.

16. A canal company, not liable for damages by a mere accidental breach of their canal—see *Higgins v. Chesapeake & Delaware Canal Co.* 8 *Harring.* 411.

17. Charter obligation to keep a lock excludes the right of passing any water through the lock, though necessary to the lower part of the canal, except that which passes when barges are lowered through the lock—see *Blackmore v. Glamorgan Canal Co.* 2 *C. M. & R.* 133; 1 *Gale*, 78; 5 *Tyr.* 603; *S. C.* (in error) 1 *Clark & F.* 263; 5 *Bligh. N. S.* 547.

18. That canal commissioners cannot delegate the authority vested in them to enter upon and take possession of lands for canal purposes; but this must be done by themselves, or under their *express* directions,—see *Lyon v. Jerome*, 26 *Wend.* 485.

As to the right of canal companies to Take lands necessary for the construction of their works, see EMINENT DOMAIN.

CAPITAL.

1. The capital of a bank embraces all its property, real and personal. *Conn. Ct. of Errors*, 1862, *New Haven v. City Bank*, 31 *Conn.* 106; *Ind. Supreme Ct.* 1845, *State Bank v. Brackenridge*, 7 *Blackf.* 395.

2. The capital of a corporation which is subject to taxation is the fund upon which it transacts its business, which would be liable to its creditors, and in case of insolvency pass to a receiver. *N. Y. Supreme Ct.* 1858, *International Life Assurance Society v. Com-*

missioners of Taxes, 28 *Barb.* 818; 17 *How. Pr.* 206.

3. The term "capital stock," in an act of incorporation, means the amount contributed or advanced by the stockholders as members of the company, and does not refer to the property thereof. *N. J. Supreme Ct.* 1851, *The State v. Morristown Fire Association*, 8 *Zabr.* 195.

4. The capital stock of a bank, upon which, under the banking law of Wisconsin, a certain per cent. is to be paid annually in lieu of all other taxation, is the amount of funds paid in by the stockholders to be used by the banking association for banking purposes. The accumulated profits of a bank, which have never been divided among the stockholders, but have been retained for banking purposes, are not a part of its capital stock in such a sense as to be exempt from the general rules of taxation applicable to other taxable property. *Wis. Supreme Ct.* 1864, *State Bank of Wisconsin v. City of Milwaukee*, 18 *Wis.* 281.

5. It is the amount of shares subscribed, and not the sums actually paid in, which constitute the capital stock of a company. *Ga. Supreme Ct.* 1850, *Hightower v. Thornton*, 8 *Ga.* 486.

6. A limit imposed upon the capital stock of the corporation does not operate as a limitation of the amount of *property* which it may own, either real or personal, or of the amount of its liabilities or outstanding obligations. *N. Y. V. Chan. Ct.* 1844, *Barry v. Merchants' Exchange Co.* 1 *Sandf.* 280.

7. Such a limit is rather regarded as the sum upon which calls may be made upon subscribers, and dividends are to be paid to stockholders. Accordingly, where the capital stock of a building corporation was limited to one million of dollars,—*Held*, that this did not restrict the company from expending in their buildings two millions of dollars, and from incurring debts on bonds and mortgages for the excess of cost beyond their capital—their power to take and hold real estate being, in other respects, unlimited by the terms of their charter. *Id.*

As to What property is to be deemed taxable as the capital of a corporation, see TAXES.

8. Limit as to amount. That notwithstanding a provision in a bank charter directing that the capital stock shall consist of fifty

thousand shares of ten dollars each, the bank may lawfully commence operations with a capital less than that number of shares,—see *Minor v. Mechanics' Bank &c.* 1 *Pet.* 46.

9. Increasing. That a bank incorporated with the privilege of creating a stock not less than one sum nor greater than another, may commence business with the smaller capital, and afterwards increase it to the larger,—see *Gray v. Portland Bank*, 3 *Mass.* 364.

10. Reducing. That it is not competent for all the shareholders to reduce the amount of the capital stock, by mutual consent, below that fixed in the charter,—see *Society of Practical Knowledge v. Abbott*, 2 *Beavan*, 559.

11. Paying in. Where a statute authorizing the formation of a corporation requires its capital stock to be paid in in money, a payment of the full value in any other property will not suffice to save the corporation from a judgment of dissolution. *N. Y. Supreme Ct.* 1865, *People v. Troy House Co.* 44 *Barb.* 625.

12. A statute requiring that five per cent. of the amount subscribed shall be paid in prior to incorporation, does not require five per cent. of each subscription, but five per cent. of the gross amount. *N. Y. Ct. of Appeals*, 1866, *Eastern Plank Road Co. v. Vaughan*, 14 *N. Y.* 546; *S. P.* 1854, *Rensselaer & W. Plank Road Co. v. Barton*, 16 *N. Y.* 457, note; 1857, *Lake Ontario &c. R. R. Co. v. Mason*, *Id.* 451.

13. Under a statute authorizing a corporation to receive subscriptions for stock, payable "in such a manner as the board of directors should direct," the directors have power to receive payment in promissory notes. *N. Y. Supreme Ct.* 1859, *Magee v. Badger*, 30 *Barb.* 246.

14. A bank charter provided that the capital stock "may consist" of a certain amount, divided into shares of a certain amount each, and "shall be paid" in the following manner, viz.: one dollar on each share in sixty, and one in ninety days after subscription, "the remainder to be called for as the president and directors may deem proper, &c." and there was no clause expressly restricting the operation of the bank, until a certain amount of the stock was subscribed,—*Held*, that the word "may" should be construed in its ordinary sense, and not by the common rule as synonymous with the word "must;" and that a *bona fide* subscription of

the capital stock prescribed by the charter, was not a condition precedent to the corporate existence or legal operation of the bank. *U. S. Supreme Ct.* 1828, *Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46.

15. Under a statute requiring it to be paid or secured, actual payment of the capital is not required to precede organization. The whole capital of an association must be paid, or secured to be paid, when it is organized; but it is secured to be paid, in the sense of the law, by force of the subscriptions of the associates, just as certainly as if each had given his note or bond for the amount of his shares. *N. Y. Superior Ct.* 1849, *Palmer v. Lawrence*, 3 *Sandf.* 161.

16. Where the charter of a corporation requires its capital to be paid in or secured, and securities have been taken, the directors have power, on a transfer of stock so secured, to relinquish the original and take other good security. *N. Y. Chancery*, 1848, *Johnson v. Bush*, 8 *Barb. Ch.* 207.

17. Where the articles of association of an incorporated bank provided that a part of the stock might be paid otherwise than in cash, and subsequently a charter was obtained which required the whole capital to be in cash,—*Held*, that the property which was delivered in lieu of cash upon the original subscription was not to be returned to the subscribers, but belonged to the corporation. *U. S. Supreme Ct.* 1822, *Holbrook v. Union Bank of Alexandria*, 7 *Wheat.* 553.

18. Proof of payment. An affidavit which states that the sum required by a general incorporation act—*e. g.* *N. Y. Laws of 1850*, 211, ch. 140, § 2—"has been in good faith subscribed to the capital stock of said company, and that ten per cent. has been paid in cash on said subscriptions," necessarily implies that the money has been paid to the directors named in the articles. If it has not been so paid, the affidavit is false, and perjury may be assigned upon it. It would be no defence to show that the money had been delivered to any other person than a director or an authorized agent. *N. Y. Ct. of Appeals*, 1859, *Buffalo & Pittsburgh R. R. Co. v. Hatch*, 20 *N. Y.* 157.

19. Such an affidavit also necessarily implies that the payment has been made in good faith; that the money has been delivered by the subscribers to apply as payment upon the subscription; and that the title to the money

will vest in the directors, as trustees of the corporation, when the papers are filed and recorded by the secretary of state. Anything short of such a payment will not satisfy the language of the affidavit. *Id.*

See ORGANIZATION.

20. Fraudulent agreement. A corporation cannot make a valid agreement with one who delivers to them securities to form a part of their original capital, and going to make up the amount of such capital required by law, that they will subsequently surrender the same for a less security, which will not meet the requirements of the law. Such an agreement is a fraud upon the law, and the surrender and canceling of such a security, in pursuance of the agreement, does not release the liability of the one who gave it to the corporation. *N. Y. Supreme Ct. 1860, Tuckerman v. Brown, 11 Abb. Pr. 389.* Approved and followed, 1862, *Tuckerman v. Brown, 23 How. Pr. 109.*

21. Where the charter of a railroad company required that "its treasurer and president should, before receiving an instalment from the State, satisfactorily assure the board of internal improvements, by a certificate under the seal of the company, that an amount of the private subscription has been paid, in equal proportion to the payment required of the State,"—*Held*, that for the railroad company to take as cash the notes of individuals made, for the occasion, to enable the officers to make the certificate, under a promise that such notes were not to be enforced, was immoral and against public policy, and that such individuals, being *in pari delicto*, had no equity to be relieved against such notes. *N. C. Supreme Ct. 1860, McRae v. Atlantic & North Carolina R. R. Co. 5 Jones' Eq. 395.*

22. Investment. A sum is "invested" whenever its amount is represented by anything but money. *People ex rel. Parker Mills v. Commissioners of Taxes, 23 N. Y. 242, 244; 23 How. Pr. 143.*

23. A railway company incorporated by act of parliament is bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever. *O. P. 1851, East Anglian Railways Co. v. Eastern Counties Railway Co. 7 Eng. L. & Eq. 505; 21 Law J. N. S. 23; 11 C. B. 775; Exch. Cham. 1852, Macgregor v. Dover & Deal Railway*

Co. 16 Eng. L. & Eq. 180; 18 Q. B. 618; 22 Law J. N. S. Q. B. 69; 17 Jur. 21.

24. That a charter provision to the effect that it shall be lawful for the company to invest the capital stock, does not warrant buying the notes of a party to be used as offsets to an anticipated claim,—see *Strauss v. Eagle Ins. Co. 5 Ohio St. 59.*

25. The company was authorized to invest their capital or moneys in any stock or funded debt, created by or under any act of the United States, or of any particular State. *Held*, that it could invest in the stock of a bank created by any such act. *N. Y. V. Chan. Ct. 1831, Verplanck v. Mercantile Ins. Co. 1 Edw. 84.*

26. Incumbering or withdrawing capital. A power given to directors to make calls when necessary; and to borrow "on the security of the funds or property of the society," and to cause the funds or property of the society to be conveyed, by way of mortgage. *Held*, not a power to mortgage future calls so as to create a special charge thereon. *Chancery, 1864, Re British Provident Life & Fire Assurance Society, 33 Law J. N. S. 535.*

27. An unincorporated company levied and collected an assessment on its stockholders, which it afterwards repaid to said stockholders by an issue and sale of additional stock. The company subsequently became a corporation. *Held*, that this transaction by the company in no way diminished the capital of the corporation, and constituted no fraud on its creditors. *Ga. Supreme Ct. 1855, Matthews v. Stanford, 17 Ga. 543.*

See MONEYED CORPORATIONS.

As to what Property may be owned and held by corporations, see PROPERTY.

As to rules relative to capital, and property of particular Kinds of corporations, see the titles of the various companies.

28. A statute declaring it unlawful for the directors, "to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock, or to reduce the same, without the consent of the legislature;" and that in case of any violation of the provisions of the said section, the directors concerned therein shall be individually liable "to said corporation," "and to the creditors thereof, in the event of its dissolution," and the amount of the capital stock so withdrawn, reduced &c. does not have the effect to make void a note given to the bank in consideration of a

transaction in violation of that provision. The act is for the protection of the bank—i. e. the stockholders; and though the *directors* are personally liable for such a transaction, it may still be valid as to all other parties, including the bank. *N. Y. Superior Ct.* 1828, *City Bank v. Barnard*, 1 *Hall*, 70.

CHARTERS.

[Includes matters relative to charter as an entire instrument:—its nature, enactment and authentication,—the acceptance of charters by the corporators,—their validity,—and general principles of interpretation,—the power of the legislative authority to alter or repeal a charter, and the limits of that power,—the surrender, expiration, renewal, and revival of charters,—and double charters. But the interpretation and effect of charter provisions are under the titles embracing the subjects to which those provisions relate,—e. g.,—charter provisions prescribing the manner of electing officers, are under *ELECTIONS*,—unless those subjects are necessarily confined to a single class of corporations, in which case the provisions are under the title of that corporation,—e. g., provisions regulating the issue of policies of insurance, are under *INSURANCE COMPANIES*.]

I. ACCEPTANCE.

II. VALIDITY.

III. AUTHENTICATION AND PROOF.

IV. INTERPRETATION AND EFFECT.

V. ALTERATION AND REPEAL.

1. *The inviolability of charters.*
2. *Alteration; amendment.*
3. *Repeal.*

VI. SURRENDER.

VII. DOUBLE CHARTERS.

1. ACCEPTANCE.

1. The general rule is that a charter is inoperative until it is accepted by the persons intended to be incorporated. * *Mass. Supreme Ct.* 1817, *Ellis v. Marshall*, 2 *Mass.* 269; *Me. Supreme Ct.* 1820, *Lincoln v. Kennebec Bank*, 1 *Me.* (1 *Greenl.*) 79.

2. An act obtained at the solicitation of individuals, incorporating them and their associates for the purpose of constructing a street or other way over their lands for their emolument or advantage, and authorizing the corporation to assess the members for expenses, must be deemed a private act, and a grant or charter, which does not bind one

who was named in it without his assent express or implied. *Mass. Supreme Ct.* 1807, *Ellis v. Marshall*, 2 *Mass.* 269.

3. That a charter may be repealed, at any time before it has been accepted,—see *Canal Co. v. Railroad Co.* 4 *Gill & J.* 1.

4. That an offer of a charter, by the legislature, may be withdrawn at any time before acceptance; and an amendment of the State Constitution prohibiting the charter, passed between its enactment and acceptance, operates as a withdrawal,—see *State v. Dawson*, 16 *Ind.* 40.

5. Effect of acceptance. Though it is optional with members of a private corporation whether they will take the benefit of their charter, yet after they have made their election by executing the powers granted, and claiming the rights given, the duties and liabilities which the charter imposes, attach, from which they cannot be discharged, but by a forfeiture or repeal. *Mass. Supreme Ct.* 1810, *Riddle v. Proprietors of Locks and Canals*, 7 *Mass.* 160; *Conn. Supreme Ct.* 1828, *Goshen &c. Turnpike Co. v. Sears*, 7 *Conn.* 80.

6. If a charter is voluntarily accepted, the corporation are bound by all it contains. *N. Y. V. Chan. Ct.* 1839, *Bushwick & Newtown Bridge Co. v. Ebbets*, 3 *Edw.* 353.

7. That in general a charter cannot be accepted in part; it must be accepted entire, as it is offered, if at all,—see *Rex v. Amery*, 1 *Durnf. & E.* 575; *Rex v. Passmore*, 3 *Durnf. & E.* 199, 240; *Rex v. Cambridge*, 3 *Burr.* 1647; 1 *Wm. Blackst.* 547; *Rex v. Westwood*, 4 *Barn. & C.* 781; 7 *Dowl. & R.* 267; *Ewre v. Strickland*, *Cro. Jac.* 240.

8. It is not competent for an existing corporation, to whom a charter is offered by the crown, to accept it in part, unless it is manifestly the intention of the crown, to be gathered from the terms of the instrument itself, that the grantees shall have the liberty to accept in part and reject in part. A charter must be accepted or rejected by the corporate body *in toto*; otherwise a corporation might reject the obligation imposed, and accept the benefit conferred upon them. *House of Lords*, 1830, *Rex v. Westwood*, 7 *Bing.* 1, 90; 2 *Dow & C.* 21.

9. Exception as to Municipal Corporations. Towns exist at the pleasure of the state, and not at their own; and it is not necessary that a newly incorporated town should accept the act of incorporation. The rule

* Upon this rule see also, *Rex v. Passmore*, 3 *Durnf. & E.* 199; *Dagg's case*, 1 *Rolle*, 224; 2 *Brownl. & G.* 100; *Rex v. Vice Chancellor of Cambridge*, 3 *Burr.* 1647; 1 *Wm. Blackst.* 547; *Askew's case*, 4 *Burr.* 2200; *Attorney General v. Master &c. of Catherine Hall*, *Jac.* 861; *Attorney General v. Drapers Co.* 6 *Beac.* 832.

requiring acceptance of charters applies only to private corporations. *Ma. Supreme Ct.* 1842, *Gorham v. Springfield*, 21 *Ma.* 58.

10. By the mere passage of an act incorporating a town or other public corporation of a municipal character, the corporation is completely constituted and entitled to the rights and subject to the liabilities thereof, whether the inhabitants are pleased or displeased. Municipal corporations are absolutely created by the act of incorporation itself, without the acceptance of the people, or any act on their part, unless otherwise provided by the act itself. *N. H. Supreme Ct.* 1856, *Berlin v. Gorham*, 34 *N. H.* 260.

11. A charter granted by the legislature to a municipal corporation, may however be, constitutionally, submitted to the corporators for their acceptance before it goes into operation; and its going into effect may be made to depend on their acceptance or rejection. It is well settled that the legislative authority cannot be delegated; but a vote of acceptance by the corporators, of the charter as tendered, is not an act of legislation. *N. Y. Supreme Ct.* 1854, *City of Paterson v. Society for establishing &c.* 4 *Zabr.* 385.

12. As to corporations under general acts. Where a corporation is organized under a general law, no acceptance of the charter is requisite. *Cal. Supreme Ct.* 1863, *Spring Valley Water Works v. San Francisco*, 22 *Cal.* 434.

13. What is a sufficient acceptance. After the enactment of a law, which in contravention of the constitution, altered the administrative part of the charter of a college by making the governor of the State ex-officio one of the trustees &c. a vote of the boards that they "acquiesced" in the statute does not import their assent thereto; nor could their approval, if given, give effect to an unconstitutional act. The legislature and the boards are not the only parties interested. The people have an interest in maintaining the constitutional limits of legislative authority. *U. S. Circ. Ct.* 1838, *Allen v. McKean*, 1 *Sumn.* 276.

14. Application for a charter and appearance before the legislative committee by one or more of the corporators acting by authority of the others, and acceptance by such corporators, is sufficient acceptance of the charter. *Ind. Supreme Ct.* 1864, *State v. Dawson*, 22 *Ind.* 272.

15. No specific form of acceptance of a charter has been provided; and therefore any unequivocal act, showing a desire and intention to accept a charter, will be sufficient, provided it is done by a majority of the grantees. *K. B.* 1828, *Rex v. Hughes*, 7 *Barn. & C.* 708; 1 *Mann. & R.* 625; *Mass. Supreme Ct.* 1833, *Russell v. McLellan*, 14 *Pick.* 63. And see *St. Paul Division &c., v. Brown*, 11 *Minn.* 356.

16. Where a corporation exercise the powers and claim the privileges conferred upon them by the acts of the legislature, they cannot exonerate themselves from responsibility for the conditions of the acts by asserting that they have not filed the specific evidence required by the statute to evince their decision of acceptance. *U. S. Supreme Ct.* 1859, *Zabriskie v. Cleveland, &c., R. R. Co.* 23 *How.* 381.

17. A member of a mutual insurance company, who has accepted a policy, cannot object, in an action to recover an assessment upon his premium note, that the company did not give notice to the secretary of the state of their acceptance of the charter. *Mass. Supreme Ct.* 1864, *Traders' Mutual Fire Ins. Co. v. Stone*, 9 *Allen*, 483.

18. A charter procured for the incorporation of a pre-existing society cannot be considered as accepted by the society merely because it was carried around among the members of the society, and signatures of a majority procured, without any meeting or notice thereof. Such an assent does not bind the society, nor any individual except those who signed it. *Pa. Supreme Ct.* 1841, *Shortz v. Unangst*, 8 *Watts & S.* 45.

19. The same principle is applicable to the case of acceptance of the amendment of an existing charter. *Pa. Supreme Ct.* 1850, *Commonwealth v. Cullen*, 13 *Pa. St.* 133.

20. Acceptance implied from corporate acts. In general, if the act imposes no particular mode of expressing acceptance, the fact that the corporate body have acted under it, sufficiently evinces that it has been accepted. *Me. Supreme Ct.* 1859, *Bangor &c. R. R. Co. v. Smith*, 47 *Me.* 34.*

S. P. as to a municipal corporation, *N. O. Supreme Ct.* 1855, *Taylor v. Commissioners of Newberne*, 2 *Jones' Eq.* 141.

* And see *Bank of United States v. Dandridge*, 12 *Wheat.* 64. 71; *Wetumpka and Coosa Railroad v. Bingham*, 5 *Ala.* 657.

21. To establish the corporate character of the plaintiffs, in an action by a corporation, the acceptance by them of the charter, or of an act amending it,—*e. g.* by changing their name,—may be proved by showing the exercise of the corporate powers therein granted, and without proof of a vote of acceptance by the corporate body. *Mass. Supreme Ct.* 1841, *Middlesex Husbandmen &c. v. Davis*, 3 *Metc.* 133. *Mass. Supreme Ct.* 1839, *Penobscot Boom Corp. v. Lamson*, 16 *Me.* 224; 1849, *South Meadow Dam Co. v. Gray*, 30 *Me.* 547. *N. H. Superior Ct.* 1840, *Ameriscoggin Bridge Co. v. Bragg*, 11 *N. H.* 103.

22. Where a statute incorporates A. with liberty to take associates, he may, without associates, exercise the franchise granted to him; and his doing so is sufficient evidence of acceptance of the charter. *Mass. Supreme Ct.* 1839, *Penobscot Boom Co. v. Lamson*, 16 *Me.* 224.

23. Where an act of the legislature, in addition to a former act creating a corporation for the management of a trust fund, was passed without the knowledge or request of the corporation, and was never accepted by any direct vote; but the corporation elected certain officers provided for by the additional act, and such officers exercised the powers thereby conferred on them for nearly ten years;—*Held*, that these proceedings were equivalent to, or sufficient evidence of, a formal assent and adoption by the corporation. *Mass. Supreme Ct.* 1848, *Trustees of Third School District in Blandford v. Gibbs*, 3 *Cush.* 89.

As to acceptance of Alterations in the charter, see *infra*.

24. The acceptance of a charter by a corporation, and of amendments to an existing charter, may be proved by the acts of the officers and members of the corporation, from which the fact of acceptance may be inferred. *Mo. Supreme Ct.* 1867, *Sumrall v. Sun Mut. Ins. Co.* 40 *Mo.* 27; *Ind. Supreme Ct.* 1858, *Smead v. Indianapolis &c. R. R. Co.* 11 *Ind.* 104.

25. Where a statute was passed authorizing a turnpike company to re-survey and alter their route, and permitting certain persons to pass over the turnpike road without paying toll, who were not exempted by the act incorporating the turnpike company,—*Held*, that the act of the company, in surveying the ground, but without making any record

of the survey, or altering the road, was not an acceptance of such amendment. *Vt. Supreme Ct.* 1826, *Pingry v. Washburn*, 1 *Aik.* 264.

26. When acceptance may be presumed. Acceptance of a charter, and due organization under it, may be presumed from a long lapse of time and the continued exercise of the corporate powers, or from the fact that the particular charter was applied for and granted upon such application. *Mass. Supreme Ct.* 1841, *Middlesex Husbandmen & Manuf. Society v. Davis*, 3 *Metc.* 133.

27. Long acquiescence will be considered as equivalent to a consent. Whatever ground of equity an individual stockholder may originally have had, a counter equity may arise from lapse of time. *N. J. Chancery*, 1854, *Gifford v. New Jersey R. R. Co.* 2 *Stockt.* 171.

28. Where a statute transferring the powers of a corporation to commissioners, appears, from its preamble, to have been procured at the special instance of the stockholders of the corporation, the consent of the stockholders must be understood to have been given to its passage, and the statute will therefore not be deemed unconstitutional. *Ky. Ct. of Appeals*, 1824, *Farmers & Mechanics' Bank of Shelbyville v. Jarvis*, 1 *Monr.* 4.

29. A charter granted to certain persons therein named, is presumed to have been granted at their instance, and to have been accepted by them; but such presumption is rebutted by evidence that no proceedings were ever had under the charter, although seven years had elapsed since its date. *Circ. Ct. D. C.* 1840, *Newton v. Carberry*, 5 *Cranch C. Ct.* 632.

30. A member of a voluntary association, who unites in their application for a charter, is bound by it if accepted by the majority of the incorporators without his dissenting, though he was not present at the organization under the charter. *N. Y. V. Chan. Ct.* 1837, *Ferris v. Strong*, 3 *Edw.* 127.

31. In a proceeding penal in its character, the fact of the acceptance by a corporation of an alteration of its charter, must in some way be affirmatively shown to the satisfaction of the court. The acceptance of it cannot be inferred from the supposed beneficial character of its provisions. *Penn. Com. Pl.* 1841, *Commonwealth v. U. States Bank*, 2 *Ashmead*, 349.

II. VALIDITY.

32. Charter not impeachable collaterally. That a charter should be treated as valid, in any collateral proceedings, until it has been adjudged invalid in a proceeding to set it aside,—see *Robinson v. London Hospital*, 21 *Eng. L. & Eq.* 371; *Buncombe Turnpike Co. v. McCarson*, 1 *Dev. & B.* 306.

That Charges of forfeiture will not be entertained in collateral proceedings,—see *FORFEITURE*.

33. Fraud. The well settled rule that, in a controversy between a corporation and an individual, the question of fraud in obtaining a charter cannot be inquired into, applies, whether the grant of corporate functions is consummated by the charter, or there is a condition precedent to the exercise of a certain franchise, which an official act of a public officer must affirm has been performed. In the latter case an individual cannot question the legality of the exercise of the franchise by alleging fraud practiced upon the public officer to whom the power was delegated. *Ala. Supreme Ct.* 1849, *Duke v. Cahawba Nav. Co.* 16 *Ala. N. S.* 372.

34. Where a company is incorporated by act of assembly, the act of organization is the work of the State, and the charter is conclusive evidence of its validity as against all persons dealing with it; but where the act of organization is conducted by the association, under a general law, the charter, though binding on the members, covers no fraud that may have been used in procuring it; and creditors of the corporation may show such fraud, in order to set aside the immunity which a charter, fairly obtained, is intended to furnish. *Pa. Supreme Ct.* 1868, *Paterson v. Arnold*, 45 *Pa. St.* 410.

35. Unconstitutionality. A court will not enjoin a railway company from building their road, at the suit of a land-owner, on the alleged ground of the unconstitutionality of the company's charter; but the case must take the ordinary course of judicial proceedings, and for all preliminary purposes, and until the hearing upon the merits, the constitutionality of the company's act will be assumed. *Me. Supreme Ct.* 1850, *Deering v. York & Cumberland R. R. Co.* 31 *Me.* 172. Compare *Moore v. Veazie*, *Id.* 860.

36. The people cannot set up, to invalidate a charter granted by the legislature,

that it confers a power in violation of the constitution of the United States,—as a power to bridge a navigable stream. Such objection, if valid, can be taken only by those who have been impeded in lawful commerce. *N. Y. Supreme Ct.* 1836, *People v. Saratoga & Rensselaer R. R. Co.* 15 *Wend.* 118.

37. That a town incorporated by an act declared to be unconstitutional, has no legal existence as a corporation, and a judgment against it is a mere nullity,—see *Colton v. Rossi*, 9 *Cal.* 595.

38. Omission to give notice of a petition for a charter, as required by a general statute of the State, does not affect the validity of the charter if granted. The statute is for convenience of legislative business, and the legislature may proceed without it. *Me. Supreme Ct.* 1832, *Day v. Stetson*, 8 *Me.* (8 *Greenl.*) 865.

39. A second charter granted on a void surrender of a former charter is void. *K. B.* 1699, *Piper v. Dennis*, 12 *Mod.* 258.

III. AUTHENTICATION AND PROOF.

40. When noticed. That judicial notice is not taken of an ordinary charter of a private corporation,—see *City Council of Montgomery v. Montgomery and W. Plank Road Co.* 31 *Ala. N. S.* 76.

41. A charter passed by a State legislature, which, by its own provisions at the general law of the State, is made a public act, must be noticed as such by the courts of the United States, held within the State, in the same manner as by the State courts. *U. S. Supreme Ct.* 1830, *Beaty v. Knowler*, 4 *Pet.* 152; 1857, *Covington Drawbridge Co. v. Shepherd*, 20 *How.* 227.

42. That giving a private corporation charge of public interests may render its charter a public act,—see *State v. Trustees of Vincennes University*, 5 *Ind.* 77.

43. A charter incorporating a bank which reserves to the use and benefit of the State certain shares of the capital stock, to be subscribed for in such manner as the legislature may direct, and also provides that any director &c. holding any shares therein, who shall commit any fraud &c. shall be liable to prosecution by indictment in the name of the State, is a public law, and must be judicially taken notice of. *Md. Ct. of Appeals*, 1823, *Towson v. Havre de Grace Bank*, 6 *Har. & J.* 47.

44. Statutes establishing banks in Virginia

are public laws, and to be judicially noticed by the courts.* They are recognized as public acts in the official publication; and, moreover, it seems that they are such, intrinsically, by reason of containing several provisions affecting the public. *Va. Ct. of Appeals*, 1827, *Stribling v. Bank of the Valley &c.* 5 *Rand.* 182; 1852, *Hays v. Northwestern Bank of Virginia*, 9 *Gratt.* 127.

To the contrary in Tennessee,—see *King v. Doolittle*, 1 *Head*, 77.

45. If a charter be declared to be a public act, a subsequent act enlarging the powers of the corporation must also be deemed a public act, of which every person is to take notice. *N. Y. Supreme Ct.* 1820, *Bank of Utica v. Magher*, 18 *Johns.* 841.

46. How proved. Under the act of Congress of May 26, 1790, a charter granted by the legislature of one State may be proved in the courts of another State, or of the United States, by a copy having the seal of the former State affixed thereto, without other proof. *U. S. Circ. Ct. Pa.* 1806, *United States v. Johns*, 4 *Dall.* 412; *S. C.* 1 *Wash. Circ. C.* 363; *N. H. Superior Ct.* 1831, *State v. Carr*, 5 *N. H.* 367.

47. In the absence of an authentication of the copy charter produced, its accuracy may be proved by a witness. *N. H. Superior Ct.* 1820, *Soc. for Prop. the Gospel v. Young*, 2 *N. H.* 310.

48. Where the defence to an action for foreclosure was that the mortgagors were a corporation, and the deed was not sealed with the corporate seal,—*Held*, that it did not appear that the mortgagors were a corporation, because the statute, creating them a corporation, being a private one, should have been given in evidence, as the statute which made printed copies of private laws evidence did not change the common-law rule that they must be given in evidence. *Mo. Supreme Ct.* 1848, *Bailey v. Trustees of Lincoln Academy*, 13 *Mo.* 174.

For cases upon the presumption in proof of Corporate existence as distinguished from

proof of charter as an instrument,—see INCORPORATION.

IV. INTERPRETATION AND EFFECT.

49. No precise form of words necessary to create a corporation. *Goshorn v. Supervisors Ohio Co.* 1 *West Va.* 308; *Commonwealth v. Westchester R. R. Co.* 8 *Grant.* 200.

As far as practicable, cases on the construction and effect of charter clauses regulating particular corporate acts and dealings,—*a. g.* By-laws of corporations; corporate Contracts, and Elections; qualifications, rights and duties of Members and Officers; are placed under the head under which those acts and dealings are treated. Where, however, such cases are confined, in application, to a Single class of corporations, they are found under the title of that class.

50. Taking effect. Where there is a general law that public acts shall not take effect until thirty days after the session of the legislature, unless otherwise provided, the words in a charter that a body “be and the same hereby is incorporated” &c., do not alone suffice to show an intention that the incorporation should take immediate effect. *Mo. Supreme Ct.* 1842, *Gorham v. Springfield*, 21 *Mo.* 5. And see *Cooper v. Curtis*, 80 *Mo.* 488.

51. A charter which is a private act is to be deemed received on the day on which it is to take effect, and the corporation may legally act under the charter on that day. A transfer of shares made on the same day of the same month of the next year, is not made “within twelve months after receiving the charter,” in the meaning of a provision forbidding a transfer within that time. *Mo. Supreme Ct.* 1844, *Agricultural Bank v. Burr*, 24 *Mo.* 256.

52. Terminating. The word “until,” in the act continuing the charter of a corporation “until the first day of January,” is exclusive in its meaning, and the charter expires on December 31st. It should not be construed so as to give the corporation one day’s existence in a new legal and political year. *So held*, where to give it the former construction operated to exonerate the bank from payment of an annual contribution required upon January 1st, from the banks of the State to a safety fund to secure the payment of the obligations of the banks. *N. Y. Ct. of Appeals*, 1858, *People v. Walker*, 17 *N. Y.* 502.

* Charters of particular banks—*Held*, public acts, in view of special provisions or circumstances. *Vance v. Farmers & Mechanics’ Bank*, 1 *Blackf.* 80; *Williams v. Union Bank*, 2 *Humph.* 339; *State Bank v. Watkins*, 1 *Eng.* 123.

Whether railroad charters are public acts,—see *Ohio &c. R. R. Co. v. Ridge*, 5 *Blackf.* 73; *Hammitt v. Little Rock &c. R. R. Co.* 20 *Ark.* 204.

53. Whole spirit of the charter should be considered. A charter of incorporation, like a contract between individuals, is to be construed according to its spirit and meaning, as well as its letter. *N. Y. Supreme Ct.* 1853, *White v. Syracuse & Utica R. R. Co.* 14 *Barb.* 559.

54. The whole of a charter (including title and preamble) should be examined together and one part construed by another. *Me. Ct. of Appeals*, 1832, *Chesapeake &c. Canal Co. v. Ohio R. R. Co.* 4 *Gill & J.* 1; *S. P. Ga. Supreme Ct.* 1846, *Merchants' Bank v. Central Bank*, 1 *Kelly*, 418.

55. When the language admits, a charter must be construed so as to give effect to the general intent. *Ohio Supreme Ct.* 1855, *Straus v. Eagle Ins. Co.* 5 *Ohio St.* 59; *Chancery*, 1850, *Eep. Eton College*, 1 *Eng. L. & Eq.* 51; 20 *Law J. N. S.* 1; 15 *Jur.* 45. And see *Rex v. Cotterill*, 1 *B. & Ald.* 81.

56. Charter applies to corporation as a whole. The natural construction of a charter, is, that all the privileges conferred, all the duties declared, and all the burdens imposed, relate to the corporation as a whole, and not to the individuals composing it; and, although the contrary may be enacted, it ought to be clearly done, before the incorporators, as natural persons, can be affected. *N. C. Supreme Ct.* 1835, *Attorney General v. Bank of Newbern*, 1 *Dev. & Bal. Eq.* 216.

57. State law, how regarded. That a charter of corporation is construed by the law of the State chartering it,—see *Smith v. Kernochen*, 7 *How.* 198.

58. A charter of a corporation ought not to be construed so as to authorize an act,—*e. g.* the raising of a dam,—to be done in another State than the State granting it. *U. S. Circ. Ct. R. I.* 1830, *Farnum v. Blackstone Canal Corp.* 1 *Sumn.* 48.

59. Charters construed conformably to general law. A charter will in general be construed so as to conform the corporate acts and dealings to the general statute law. Thus a charter power to take "by purchase," will not be construed to authorize taking by devise contrary to the general statute of wills. *N. Y. Ct. of Errors*, 1827, *McCartee v. Orphan Asylum Society*, 9 *Cow.* 437. Compare *Lowe's Case*, 9 *Coke*, 123.

60. That a charter giving a corporation the right to construct a public work is not to be construed so as to exempt them from

the liability which the law would impose upon individuals for damages incidentally done to others in the use of their powers. *Conn. Supreme Ct.* 1843, *Hooker v. New Haven &c. Co.* 15 *Conn.* 312; *S. C.* 1841, 14 *Id.* 146, distinguishing *Hollister v. Union Co.* 9 *Id.* 489.

61. The simple embodiment in the charter of a corporation of a portion of provisions which are found in a public and general statute previously enacted, cannot be treated as a repeal, as to such corporation, of other provisions which are omitted; nor can the embodiment of such provisions in a charter as a part thereof, exonerate the corporation from duties, liabilities and obligations imposed upon similar corporations by a general statute to which no reference is made in the charter, unless the provisions of the general statute are inconsistent with those of the charter. *Me. Supreme Ct.* 1856, *Pratt v. Atlantic &c. R. R. Co.* 42 *Me.* 579. Compare *Isham v. Bennington Iron Co.* 19 *Vt.* 230, 248.

62. A provision in a charter, that the corporation shall be subject to certain of the provisions of the general statutes relating to corporations, does not, by implication, exempt it from the operation of other provisions relating to corporations, in the same statutes. Without such a proviso in the charter, the corporation would be subject to the general statutes; and the insertion of the proviso cannot be allowed to operate as an implied repeal, as respects the corporation, of other general statutes. A repeal by implication is not favored. *N. Y. Supreme Ct.* 1843, *Bowen v. Lease*, 5 *Hill*, 221.

63. A statute granting to all existing corporations of a certain class, all the rights and privileges which had been conferred on any such corporations, "so as to place all institutions of the same kind upon the same footing," must be construed to impose, by implication, similar obligations and duties also. *Tenn. Supreme Ct.* 1851, *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.* 11 *Humph.* 1.

64. The rule of strict construction. Charters, in so far as they confer privileges or powers upon the corporations created, must be strictly construed. Ambiguities and uncertainties in the expressions used, must operate against the corporation. Only what is clearly conferred, can be claimed. *U. S. Supreme Ct.* 1837, *Charles River Bridge v. Warren*

Bridge, 11 *Pet.* 420, 544; 1851, *Richmond &c. R. R. Co. v. Louisa R. R. Co.* 13 *How.* 71; 1861, *Rice v. Railroad Co.* 1 *Black*, 358; *Jefferson Branch Bank v. Skelly*, *Id.* 436; *Mass. Supreme Ct.* 1806, *Wales v. Stetson*, 2 *Mass.* 146; *N. Y. Chancery*, 1846, *Oswego Falls Bridge Co. v. Fish*, 1 *Barb. Ch.* 547; *Ga. Supreme Ct.* 1851, *Shorter v. Smith*, 9 *Ga.* 517; 1853, *Macon & Western Railroad v. Davis*, 13 *Ga.* 68; *Vt. Supreme Ct.* 1855, *Thorpe v. Rutland &c. R. R. Co.* 27 *Vt.* 140; *Ohio Supreme Ct.* 1856, *State v. Chase*, 5 *Ohio St.* 528; *Pa. Supreme Ct.* 1866, *Commonwealth v. Central Passenger Railway*, 52 *Pa.* 506; *Miss. Ct. of Errors*, 1856, *Collins v. Sherman*, 31 *Miss.* 679; *C. P.* 1828, *Scales v. Pickering*, 4 *Bingh.* 448; 1 *Moore & P.* 195.

65. So, if the language of a statute provision conferring privileges upon a corporation is ambiguous or inconsistent with itself, a construction which favors the public convenience and trade, and abridges the grant, is to have preference over one which favors the company. *Pa. Supreme Ct.* 1850, *Stormfeltz v. Manor Turnpike Co.* 13 *Pa. St.* 555; *Ga. Supreme Ct.* 1851, *McLeod v. Burroughs*, 9 *Ga.* 213; *Justices &c. v. Griffin & West Point Plank Road Co.* *Id.* 475; *K. B.* 1831, *Stourbridge Canal Co. v. Wheeley*, 3 *Barn. & Ad.* 792; *C. P.* 1844, *Parker v. Great Western Railway Co.* 7 *Mann. & G.* 253; 13 *Law J. N. S.* 105; 7 *Scott N. R.* 835; 3 *Eng. Railw. Cas.* 563.

66. Privileges granted in a charter of a corporation will not be deemed exclusive, so as to render unconstitutional a subsequent charter of another company, conferring similar privileges, unless it clearly appear in the charter of the first that the grant made to it was exclusive, and that it was intended to preclude the State from subsequently granting similar privileges to any other.* *Miss. Ct. of Errors*, 1856, *Collins v. Sherman*, 31 *Miss.* 679.

67. Provisions of statute authorizing companies to levy any charge upon the public, must be construed strictly. *House of Lords*, 1844, *Stockton & Darlington Railway Co. v. Barrett*, 11 *Clark & F.* 590; 8 *Scott N. R.* 641; 7 *Mann. & G.* 870; *Heddy v. Wheelhouse*, *Cro. Eliz.* 558, 591.

* Rules for construing a charter with reference to the question whether a subsequent statute is void, as impairing the obligation of a contract. *Planters' Bank v. Sharp*, 6 *How.* 301.

68. The right to take tolls, freight, and fares can only be exercised by corporations under an express grant in their charters, and can never be raised by implication; charters conferring this right will always be construed most favorably to the public. *N. J. Ct. of Errors*, 1850, *Camden & Amboy R. R. Co. v. Briggs*, 2 *Zabr.* 623.

69. Words intended to limit the powers of the corporation cannot be construed to describe, and so to limit, the rights of the public. *U. S. Supreme Ct.* 1850, *Perrine v. Chesapeake & Delaware Canal Co.* 9 *How.* 172.

70. Corporate powers cannot be created by implication, nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words. *Penn. Supreme Ct.* 1852, *Pennsylvania Railroad Co. v. Canal Commissioners*, 21 *Pa. St.* 9; *S. P. N. Y. Supreme Ct.* 1841, *Wright v. Briggs*, 2 *Hill*, 77; *Ga. Supreme Ct.* 1849, *Mayor &c. of Macon v. Macon & Western R. R. Co.* 7 *Ga.* 221.

71. The principle upon which charters are construed most favorably to the State is as follows: 'All rights which are asserted against the State must be clearly defined, and not raised by inference or presumption, and if the charter is silent about a power, it does not exist. If, on the fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambiguity, and the powers conferred are plainly marked, and their limit can be readily ascertained, then it is to be sustained, and the true intention of the parties to be carried out.' *U. S. Supreme Ct.* 1865, *Binghamton Bridge*, 3 *Wall.* 51.

72. The rules of construction which apply to statutes on subjects in which the public at large are interested are essentially different from those which apply to private grants to individuals* of powers or privileges designed

* But compare *State v. Noyes*, 47 *Me.* 189, where it is said that the contract between the government and a corporation created by its charter, should be construed upon the same principles which are applied to contracts between individuals.

to be exercised with special reference to their own advantage, though involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted; the latter liberally in favor of the public, and strictly as against the grantees. *Conn. Supreme Ct.* 1851, *Bradley v. New York & N. H. R. R. Co.* 21 *Conn.* 294; *Fla. Supreme Ct.* 1862, *Florida &c. R. R. Co. v. Pensacola & Georgia R. R. Co.* 10 *Fla.* 145.

73. As a rule of construction, the legislature ought to be considered as intending to grant, by a charter of incorporation, such powers only as are necessary or useful to the end or object which they had in view in creating the corporation; and should not be understood as granting anything more, unless the intention to do so is expressed plainly or beyond a doubt. In public grants, the grantee can take nothing not clearly given him by the grant; and in cases of ambiguity the grant is construed in favor of the State and most strongly against grantee. *N. J. Chancery*, 1863, *Morris Canal & Banking Co. v. Central R. R. Co.* 16 *N. J. Eq.* (1 *Green*) 419.

74. Instances of its application. Charters which confer power to take private property for public use, should be strictly construed.* *Ohio Supreme Ct.* 1848, *Moorhead v. Little Miami R. R. Co.* 17 *Ohio*, 340.

75. A legislative act authorizing a municipal corporation, in the construction of public works, to purchase land necessary for such purpose, must be construed in subordination to that provision of the constitution which prohibits the legislature from investing any corporation or individuals with the privilege of taking private property for public use, without making compensation or giving adequate security therefor, before such property shall be taken. *Pa. Supreme Ct.* 1849, *Borough of Harrisburg v. Crangle*, 3 *Watts & S.* 460.

76. — to railroad charters. The rule of strict construction ought to be applied to railroad charters; but the rule can only be applied where there is ambiguity, or where a

power is claimed by inference or implication. See *Newhall v. Galena & Chicago Co.* 14 *Ill.* 273.

77. A railroad corporation can claim nothing that is not clearly given them in the act of incorporation; and any ambiguity in the terms of the charter must be construed against the company, and in favor of the public. Yet this rule of construction is not to deprive them of the benefit arising from the obvious sense of the charter. *Tenn. Supreme Ct.* 1859, *Tennessee & Alabama R. R. Co. v. Adams*, 3 *Head*, 596.

78. Where a charter is granted to private individuals for the construction of a railway for the profit of the corporators, although it is deemed that the work is so far a public one that property taken for it may be deemed as taken for a public use, yet the corporators are to be regarded, not as acting as representatives of the State, nor with a special reference to the benefit of the public, as is the case when roads or other public improvements are made under the immediate direction and superintendence of the State, or its agents, constituted for that purpose, and for the general accommodation or benefit of the community; but under a special grant of power, deemed to be acquired from the State, for a valuable consideration, and for the promotion of their own direct and private advantage; and the rule of construction applicable to general legislation for the public welfare that it is to be expounded largely and beneficially for the purpose, does not apply. Private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving, in their exercise, incidental benefits to the community generally, are to be expounded liberally in favor of the public, and strictly as against the grantees. *Conn. Supreme Ct.* 1851, *Bradley v. N. Y. & New Haven R. R. Co.* 21 *Conn.* 294.

79. The power to take land for their road, conferred on a railroad company, is to be strictly construed; and if a power to change the route is given in terms which contemplate changes before the construction is completed, a power to change the route after the construction is completed will not be implied. *Ohio Supreme Ct.* 1848, *Morehead v. Little Miami R. R. Co.* 17 *Ohio*, 340; 1853, *Little Miami R. R. Co. v. Naylor*, 2 *Ohio St.* 235. See also *Blakemore v. Glamorganshire Canal Co.* 1 *Mylne & K.* 154.

* Compare *Chesapeake & Ohio Canal Co. v. Key*, 3 *Cran. & C. Ct.* 599, where it is said that a strict construction is not to be given merely upon the ground that the charter authorizes taking private property for public uses upon compensation, and therefore is in derogation of common right, but that the construction is to be that which would best carry into effect the will of the legislature.

80. Where a power to lay a railway on a street, or public highway, is claimed by construction and inference, all doubts are to be solved against the company. *Pa. Supreme Ct.* 1856, *Commonwealth v. Erie & Northeast R. R. Co.* 27 *Pa. St.* 389. See also *Alleghany v. Ohio & Pennsylvania R. R. Co.* 26 *Pa. St.* 855.

81. — to bridge charters. The same principle applies in the case of the exclusive privileges granted to a bridge company. *N. Y. Chancery*, 1837, *Mohawk Bridge Co. v. Utica & Schenectady R. R. Co.* 6 *Paige R.* 554; 1830, *Cayuga Bridge Co. v. Magee*, 2 *Paige*, 116.

82. The rule that any ambiguity in the terms of the charter must operate against the company, which can claim only what is clearly given, is the settled principle of the English law, and there is nothing in our local situation or political institutions which should lead us to depart from it. [8 *Pet.* 783, 8 *Id.* 289, 4 *Id.* 168, 514.] Hence under a grant by the State of the franchise to build a toll-bridge and take tolls, with no exclusive privilege given, and no engagement from the State that another bridge shall not be erected and no undertaking not to sanction competition nor to make improvements which shall diminish its income, the right to such exclusive privileges cannot be implied from the nature of the grant; and it is competent for the legislature to authorize another bridge to be built, which, being free, destroys the value of the franchise. In charters of this description, no rights are taken from the public or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. The whole community are interested, and the power of the State to promote the public convenience shall not be construed to have been surrendered or diminished, unless it appear by plain words, that it was intended to be done. *U. S. Supreme Ct.* 1837, *Charles River Bridge v. Warren Bridge*, 11 *Pet.* 420.

83. That charters granting rights to build what may be an obstruction in navigable waters, must be construed strictly,—see *Newark Plank R. Co. v. Elmer*, 1 *Stockt.* 754.

84. — to turnpike charters. That the rule of strict construction applies to charters claimed to authorize a turnpike company to obstruct a highway,—see *Wales v. Stetson*, 2 *Mass.* 146.

85. A grant to a plank road company, of power to construct a road over a highway, when it shall be necessary to use any part of the same, while it is to be strictly construed, is to be interpreted so as to secure to the company beneficial results. The necessity contemplated by the legislature, is not such a necessity of using a highway, as would defeat the enterprise, if such use were not allowed, but a reasonable necessity. *Ga. Supreme Ct.* 1851, *Justices &c. v. Griffin & West Point Plank Road Co.* 9 *Ga.* 475.

86. The company are to judge of the necessity in the first instance, subject to be finally controlled by the action of the courts; and whether the necessity exists or not, is a question of fact to be determined on the production of evidence. *Id.*

87. — to municipal charters. Municipal charters, like all others, are to be strictly construed. *Miss. Ct. of Errors*, 1858, *Leonard v. City of Canton*, 35 *Miss.* 189; *Cal. Supreme Ct.* 1861, *Douglas v. Mayor &c. of Placerville*, 18 *Cal.* 643.

88. — to taxation. The rule of construction is fully settled that a corporation takes nothing by its charter but what is plainly and unequivocally granted; and that in all things else the powers which the State may exercise over its affairs are as full and ample as if it were a private individual, carrying on the same business. Hence the State does not lose the power of taxing the dividends of a bank by not reserving a power to tax in the charter. *Pa. Supreme Ct.* 1852, *Bank of Pennsylvania v. Commonwealth*, 19 *Pa. St.* 144; *S. P. U. S. Supreme Ct.* 1861, *Jefferson v. Bank of Skelly*, 1 *Black.* 436.

89. The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burthens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist. Hence the grant of a power to trade in money to a given amount, does not imply an exemption of the stock in trade from taxation. *U. S. Supreme Ct.* 1830, *Providence Bank v. Billings & Pittman*, 4 *Pet.* 514.

90. — to exceptions. Under the rule that a grant of privileges by the State to a body of corporators must be construed strictly

in favor of the public and against the grantees; a prohibition, reservation, or exception in a charter will stand in full force, though it destroy or make nugatory powers given to the company. *Tenn. Supreme Ct.* 1859, *Talmadge v. North American Coal & Co.* 3 *Head*, 337. *Pa. Supreme Ct.* 1856, *Commonwealth v. Erie & North East R. R. Co.* 27 *Pa. St.* 389.

91. — to provisos. Where the charter of a railroad company, after breach of a condition, was renewed by the legislature with a proviso that if they should not expend a certain sum upon the road within two years, or if they should not complete and put in operation the road within four years, their rights and powers should be void,—*Held*, that the true construction was not that they should do either at their option within the time fixed, but that they should do both. *Conn. Supreme Ct.* 1853, *Danbury & C. R. R. Co. v. Wilson*, 23 *Conn.* 435.

92. Where a privilege was given by statute, to be exercised as thereafter provided, and two provisos were attached,—*Held*, that both must be considered, and the privilege must be exercised in a manner consistent with both, unless they were repugnant. *Pa. Supreme Ct.* 1852, *Packer v. Sunbury & Erie R. R. Co.* 19 *Pa. St.* 211.

93. — to exemptions. That words of exemption in a charter are to be construed strictly,—see *Mayor & C. of Truro v. Reynolds*, 1 *Moore & S.* 272; *Lord Middleton v. Lambert*, 1 *Ad. & E.* 401.

94. Limits of the rule. The charter is not to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded. But if, upon such an examination, there is doubt or ambiguity in its terms, and the power claimed is not clearly given, it cannot be exercised. The rights of the public are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears in the law. *U. S. Supreme Ct.* 1849, *Perrine v. Chesapeake & Delaware Canal Co.* 9 *How.* 172.

95. Although neither privileges, powers, nor authorities, can pass by an act of incorporation, unless they be given in unambiguous words, and an act giving special privileges must be construed strictly, and in such a case, where a sentence is capable of two

distinct meanings, that construction must be given to it most favorable to the public;—yet these principles must be applied with reference to the subject-matter contemplated by the legislature as a whole, and its manifested intention and design not be defeated. *U. S. Supreme Ct.* 1860, *Curtis v. County of Butler*, 24 *How.* 435; *S. P.* 1862, *Moran v. Commissioners of Miami County*, 2 *Black*, 722.

96. An express and unequivocal grant of rights to a private company, contained in the body of the act, is not to be restricted merely because the terms of the grant are more extensive than those of the title and preamble of the act. [7 *Pick.* 455.] *N. H. Supreme Ct.* 1834, *Piscataqua Bridge Co. v. New Hampshire Bridge Co.* 7 *N. H.* 35.

97. Necessary incidents to the principal powers conferred by a charter, are implied. *Pa. Supreme Ct.* 1856, *Linton v. Sharpsburg Bridge*, 1 *Grant*, 414; *Tenn. Supreme Ct.* 1859, *Tennessee & Alabama R. R. Co. v. Adams*, 8 *Head*, 596.

98. Thus when a charter authorizes a road to be made, it authorizes the taking of the land needed for the purpose, although it do not expressly say so. And where it authorizes the erection of a bridge it authorizes taking land for the abutments (on making compensation) without express terms to that effect. *Id.*

99. Where the charter of a railroad company gives to the corporation "all powers, privileges, and immunities, which are or may be necessary to carry into effect the purposes and objects" of the charter, it is the duty of the court to give the provisions of the charter such construction as will give them full effect; and this can be done only by so treating the powers of the company, as that it shall have right, in a constitutional manner, to sequester both land and water, to take property both corporeal and incorporeal, or to interfere with privileges given by other previous charters which may lie in its way, for the necessary completion of the work which it was empowered to construct; and the entire language of both charters must be read with an eye to this object. *Conn. Supreme Ct.* 1846, *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.* 17 *Conn.* 454.

100. A provision in the charter of the latter corporation that nothing therein contained shall impair the rights of the former company, does not alter the case. Such a provision does not protect against the exercise of the

right of eminent domain, but secures the same right of compensation that other citizens have. *Id.*

See EMINENT DOMAIN.

101. Directory and imperative provisions. Whether a duty imposed upon a corporation by law is merely directory, or essential to the enjoyment of some of their rights, must be determined by its nature and object, by the public convenience, and by what may be understood to have been the intention of the legislature. [12 Wheat. 64.] *Me. Supreme Ct.* 1836, *Middle Bridge Proprietors v. Brooks*, 18 *Me.* 391. Compare *Foss v. Harbottle*, 2 *Hare*, 461.

102. A provision that it "shall and may be lawful" for the corporation to set aside a part of its capital, as an annuity fund,—*Held*, not imperative. *N. Y. F. Chan. Ct.* 1831, *Verplanck v. Mercantile Ins. Co.* 1 *Edw.* 84.

103. A mere power conferred by charter on a corporation—*e. g.* where a canal company charter provided that if any boat should be sunk, and the owners should not raise it, *it should be lawful* for the company to raise it, and detain it for expenses—does not imply a duty to perform the act, nor render the corporation liable in damages for non-performance. *Exch. Ch.* 1839, *Lancaster Canal Co. v. Parmaby*, 11 *Ad. & E.* 223; 8 *Perr. & D.* 162; 1 *Eng. Railw. Cas.* 696.

104. Words of permission in a charter, if tending to promote the public benefit, are obligatory; therefore, where a charter declared that the mayor and jurats of an ancient town might hold a court of record for the holding of pleas, but this power had been long disused, a mandamus was granted to compel such court to be held, at the instance of an inhabitant of the town, though he was not a corporator. *K. B.* 1822, *Rex v. Mayor &c of Hastings*, 1 *Dowl. & R.* 148; 5 *Barn. & Ald.* 692, n.

For the general doctrine that a corporation is bound to exercise its corporate franchises and powers, with the exceptions and qualifications incident to the rule, see FRANCHISES; POWERS.

105. Collateral aids to interpretation. Contemporaneous documents, proceedings in causes relating to a charter, and parol testimony, may be resorted to in order to explain a charter, but not to contradict it. *Exch. Ch.* 1828, *Governors of Lucton School v. Scarlett*, 2 *You. & J.* 380, 363.

106. The court can look only to the particular charter, and not to the charters of similar corporations, for powers claimed under it. *N. Y. Supreme Ct.* 1841, *Wright v. Briggs*, 2 *Hill*, 77.

107. That a founder's statutes may be looked at to expound the meaning of the charter,—see *Davis v. Waddington*, 7 *Mann. & G.* 37.

108. That a by-law cannot explain a doubtful charter; if there be any ambiguity on the face of the charter, it is the province of the court to expound it,—see *Rex v. Tucker*, 2 *Selv.* 1144.

109. That in interpreting an act of incorporation, the message of the governor and journals of the house are not available as guides to the legislative intent,—see *Bank of Pennsylvania v. Commonwealth*, 19 *Pa.* 144.

110. Proof of what was said in debate on the passage of a charter, is not admissible to determine the construction of the language of the act. *Md. Chancery*, 1829, *Binney's Case*, 2 *Bland*, 99, 149.

111. If petitioners for a charter, in their petition evidently use a term in a particular sense, their use of it may be referred to, in order to explain the term as used in the charter. *R. I. Supreme Ct.* 1859, *Dexter Lime Rock Co. v. Dexter*, 6 *R. I.* 353.

112. Usage. Where the public officers and legislature of the State had, for a period of eighteen years, acted upon a certain construction of a bank charter,—*Held*, that a mistake by the officers would not be presumed, and that the construction so acted upon should be followed.* *N. C. Supreme Ct.* 1835, *Attorney General v. Bank of Newbern*, 1 *Dev. & B. Eq.* 216.

V. ALTERATION AND REPEAL.

1. The Inviolability of Charters.

113. The Dartmouth College case. As the grant of corporate franchises to a private corporation, becomes a contract executed, within the prohibitory clause of the Constitution of the United States,—which declares that no State shall pass any law impairing the obligation of contracts, a law altering a charter of such a corporation in a material respect

* There are many English cases authorizing a resort to usage to aid in the interpretation of charters; many of which turn upon the peculiar effect given to usages of long-existent municipal corporations, and are not fully applicable to American corporations.

is unconstitutional and void, unless a power to alter was reserved in the grant. A grant is a contract [6 Cranch, 87.] and implies an obligation not to reassert the right granted. And a gift of franchises and powers, as distinguished from a gift of property, is within this rule. Whether there was any consideration for it, moving from the corporation to the grantor of the charter, is immaterial. If a consideration were necessary it might be found in the implied stipulations on the part of the grantees, and in the acts of those who deal with them on the faith of it. [8 Durnf. & E. 199.] And such grant is not incapable of being deemed a contract because the corporation has no existence when the grant is made. *U. S. Supreme Ct.* 1819, *Dartmouth College v. Woodward*, 4 *Wheat.* 518; * 1853, *Piqua Branch of the State Bank of Ohio v. Knoop*, 16 *How.* 369; 1855, *Dodge v. Woolsey*, 18 *How.* 331; 1851, *Jefferson Branch Bank v. Skelly*, 1 *Black*, 436; *Franklin Branch Bank v. Ohio*, *Id.* 474.

114. No distinction is recognized in this

* The general doctrine of the *Dartmouth College* case, that a corporate charter is a contract protected by the Federal Constitution, has been recognized, and the case itself followed as an authority, in numerous cases throughout the States; particularly in *Mass. Supreme Ct.* 1829, *Charles River Bridge v. Warren Bridge*, 7 *Pick.* 371; 1854, *Boston & Lowell R. R. Co. v. Salem & Lowell &c. R. R. Co.* 2 *Gray*, 1; *Conn. Supreme Ct.* 1828, *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 *Conn.* 28; 1835, *Derby Turnpike Co. v. Parks*, 10 *Id.* 522; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.* 17 *Id.* 40; 1846, *Washington Bridge Co. v. Connecticut*, 18 *Id.* 53; *N. H. Superior Ct.* 1834, *Piscataqua Bridge Co. v. N. Hampshire Bridge Co.* 7 *N. H.* 25; 17 *Supreme Ct.* 1836, *Pingry v. Washburn*, 1 *Atk.* 264; *N. J. Supreme Ct.* 1852, *State v. Branin*, 3 *Zabr.* 484; *Pa. Com. Pl.* 1841, *Commonwealth v. United States Bank*, 2 *Ashm.* 349; *Pa. Supreme Ct.* 1847, *Brown v. Hummel*, 6 *Barr.* 86; *Ohio Supreme Ct.* 1823, *State v. Commercial Bank of Cincinnati*, 7 *Ohio*, 125; *Mich. Supreme Ct.* 1844, *Michigan Bank v. Hastings*, 1 *Doug.* 225; *Ind. Supreme Ct.* 1868, *Smead v. Indianapolis &c. R. R. Co.* 11 *Ind.* 104; *Md. Ct. of Appeals*, 1868, *Regents of University of Maryland v. Williams*, 9 *Harl. & J.* 365; *Ga. Supreme Ct.* 1849, *Young v. Harrison*, 6 *Ga.* 180; 1853, *Macon & Western Railroad v. Davis*, 18 *Id.* 63; *Ky. Ct. of Appeals*, 1855, *City of Louisville v. University of Louisville*, 15 *B. Monr.* 642; *Tenn. Supreme Ct.* 1866, *Woodfork v. Union Bank*, 8 *Coldw.* 483; *Miss. Ct. of Errors*, 1846, *Nevill v. Bank of Port Gibson*, 6 *Smed. & M.* 513, 568; *Mo. Supreme Ct.* 1858, *Gorman v. Pacific R. R.* 26 *Mo.* 441. See also *Wales v. Stetson*, 2 *Mass.* 143; *Thorpe v. Rutland &c. R. R. Co.* 27 *Vt.* 140; *Seymour v. Hartford*, 21 *Conn.* 486; *Hartford Bridge Co. v. Union Ferry Co.* 29 *Conn.* 210; *Commonwealth v. Cullen*, 18 *Pa. St.* 133; *State v. Dawson*, 23 *Ind.* 272; *Gullicotte v. City of New Orleans*, 12 *La. Ann.* 432.

To the contrary see *State v. Southern &c. R. R. Co.* 24 *Taz.* 80; *Toledo Bank v. Bond*, 1 *Ohio St.* 622; and *Mechanics & Traders' Bank v. Debolt*, *Id.* 591; which last case was reversed in the Supreme Court of the United States, 18 *How.* 360.

respect between the franchises and the administrative part of the charter. Unless a power be reserved for this purpose, the government cannot, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the property, or compel the corporation to receive a new charter. *Supreme Ct.* 1819, *Dartmouth College v. Woodward*, 4 *Wheat.* 518.

115. Thus, where a college charter incorporated twelve members, therein mentioned, as trustees of the college, and granted to them and their successors the usual corporate privileges and powers, and declared that the trustees should forever thereafter consist of twelve, and no more, and should govern the college, and fill up all vacancies which might be created in their body,—*Held*, that a statute which increased the number of trustees to twenty-one, and gave the appointment of the additional members to the executive to the State, and created a board of overseers, with power to inspect and control important acts of the trustees,—being passed without the previous or subsequent assent of the trustees,—was unconstitutional and void. *Id.*

116. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the corporation be public property, or the State, as a government, be alone interested in its transactions, the legislature in such a case may freely modify its charter.* But if it be a private eleemosynary institution—*e. g.* a college for the education of young men—endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter, and the donors have stipulated for the management of those funds in a prescribed manner, the charter is a contract which the legislature cannot impair without the consent of the corporation. *Id.* *S. P. U. S. Circ. Ct. Me.* 1833, *Allen v. McKeen*, 1 *Sumn.* 276.

* The principal cases on this doctrine are collected *infra*, 158. See the proposition in the text qualified and explained as referring to the government and public of the State whose power was the subject of consideration; and not to any subordinate community or local public within the State. *City of Louisville v. University of Louisville*, 15 *B. Monr.* 642.

117. The fact that the purpose of the corporation is an object of national concern, and a proper subject for legislation, does not render it a public institution, nor does the fact of incorporation change the character of the institution in this respect, or give the legislature any power over it. The right to change civil institutions is not founded in their being incorporated, but on their being the instruments of government created for its purposes. *Ib. Ib.*

118. It makes no difference in the inviolability of the franchise granted by the legislature that the corporation was originally established and endowed by the State; especially where it has also received funds from private donors. *U. S. Circ. Ct. Me.* 1833, *Allen v. McKeen*, 1 *Sumn.* 276.

119. It makes no difference in the application of these principles that the corporation in question was chartered at the request of a municipal corporation, for public educational purposes, and received as its principal endowment a donation by such municipal corporation. *Ky. Ct. of Appeals*, 1855, *City of Louisville v. University of Louisville*, 15 *B. Monr.* 642.

120. Where a city endows a college or university, funds so given are no longer to be deemed public property merely because the institution exists for the purpose of promoting education. The creation of the corporation for such purpose is not such an assumption by the government of the duty of education as makes the corporation its instrument or agent for the performance of that governmental duty. It is only the creation of an instrument to be adopted and employed by others for the purpose of promoting education. The fact that the municipal corporation was given power to fill vacancies in the number of the trustees of the college, does not alter the case; nor can the concurrence of the city in an attempt by the legislature to alter the charter, give it validity. *Ib.*

121. Corporations created by the king of Great Britain previous to the revolution, are equally within the protection of the constitution with those since created by the different States. *U. S. Supreme Ct.* 1819, *Dartmouth College v. Woodward*, 4 *Wheat.* 518; 1823, *Society for the Propagation of the Gospel v. Town of New Haven*, 8 *Id.* 464; S. P. 1815, *Terrett v. Taylor*, 9 *Cranch*, 43. And see *Vermont v. Society for the Propagation of the Gospel*, 1 *Paine*, 652.

122. It is no answer to the constitutional objection to the alteration of a charter of a private corporation, that neither the founder nor the beneficiaries of the institution complain of it. Gifts to an eleemosynary institution are made upon the consideration that the fund will be perpetually applied to its objects in the mode prescribed by the donors. In this respect the trustees of the corporation represent the donors; and the aggregate rights of both donors and beneficiaries are to be asserted and protected by the corporation. *U. S. Supreme Ct.* 1819, *Dartmouth College v. Woodward*, 4 *Wheat.* 518.

123. The concurrence of the donors, in any legislative act injurious to the corporation and inconsistent with the charter, is of no avail, not only because they have transferred their rights and vested their powers as donors in the trustees or corporation, but because the incorporated trustees form a third party to the contract, which, there being no reservation to that effect, can no more be dissolved or changed than it could have been originally made without their consent; and it makes no difference in this respect, that a municipal corporation subject to the same supreme power, is the principal or only donor. *Ky. Ct. of Appeals*, 1855, *City of Louisville v. University of Louisville*, 15 *B. Monr.* 642.

See TRUSTS.

124. Grounds and extent of the rule. The right to incorporate belongs to the legislative powers, but not to be exercised as in general legislation to grant and repeal at pleasure. In one sense an act of incorporation of a private corporation is a law, in another it is a grant. As between the State and the corporators it is a grant of powers &c. which by the act pass out of the State and are vested in the corporation, and can only be forfeited by breach of condition. The persons who compose it cannot be dispossessed of their privileges but by the law of the land. [2 *Kent*, 244.] *S. Ct. of Appeals*, 1832, *State v. Heyward*, 3 *Rich. Law*, 389.

125. Where a single corporation is formed by charters granted by several States, for the purpose of constructing a public work, extending into both States, and contemplated as one continuous and entire highway, the charters become a compact between the States and the company, and the assent of all is necessary to give validity to a statute of either State infringing the powers of the

corporation in such State. *Md. Ct. of Appeals*, 1832, *Chesapeake &c. Canal Co. v. Ohio R. R. Co.* 4 *Gill & J.* 1, 140.

126. That it is for the party whose rights are invaded, only, to plead the nullity of a law as impairing the obligation of a contract,—see *New Orleans Canal &c. Co. v. City of New Orleans*, 12 *La. Ann.* 364.

127. The limit against legislative interference is not confined to the time when no judgment of forfeiture has been pronounced. After the corporation has been dissolved, the legislature have no power to force a modification of the original charter upon the corporation. Upon an accepted surrender of a charter, a continued existence cannot be forced upon the corporation. [8 *Pet.* 281.] Nor can this be done after judgment of forfeiture executed. *Miss. Ct. of Errors*, 1846, *Nevitt v. Bank of Port Gibson*, 6 *Smed. & M.* 513, 563.

For many parallel cases to those here stated, but relating to the Inviolability of property or franchises granted to corporations, independent of the grant being contained in the charter, see *FRANCHISE*; *GRANT*.

128. Instances of its application. Where a corporation having vested rights, is authorized by a new charter to surrender them to the new company, which the new one accepts, the latter stands in the place of the former; and a statute assuming to grant hostile rights to a third corporation, though enacted before the charter of the new company, is invalid as against the latter. *Md. Ct. of Appeals*, 1832, *Chesapeake &c. Canal Co. v. Ohio R. R. Co.* 4 *Gill & J.* 1.

129. — to banks. That a bank charter is a contract, within the provision of the constitution protecting contracts,—see *Payne v. Baldwin*, 8 *Smed. & M.* 661; *Commonwealth v. United States Bank*, 2 *Ashm.* 349.

130. A power to do a banking business conferred upon a water company, without reservation of the right to repeal, creates a vested right which the legislature cannot take away by subsequent general laws regulating banking. *N. Y. Supreme Ct.* 1832, *People v. Manhattan Co.* 9 *Wend.* 351.

131. Where a State bank is chartered as an institution to be employed in the administration of the government, the State being its only stockholder, its funds being wholly public funds, and there being no second party whose concurrent act was to give it existence, its

charter is doubtless subject to repeal, although no power to repeal be reserved in it. But the legislature cannot impair the rights of its creditors by an act withdrawing the capital. Such an act impairs not only the obligation of the contracts of the bank, but also the obligation of the contract between the bank and the creditors, arising from the provisions of the charter devoting the funds to the payment of the debts. *U. S. Supreme Ct.* 1853, *Curran v. State of Arkansas*, 15 *How.* 304.

132. When the charter of a banking corporation is extended and modified by an acceptance of an amendment by a majority of the stockholders, a dissentient stockholder will not be permitted, during the existence of the corporation, to withdraw his stock before the corporate business is wound up and its liabilities ascertained and discharged, on the ground of a conversion of his stock by the new corporation, and the existence, of more onerous and stringent provisions in the new charter. The stock of a banking corporation is not the absolute property of the individual shareholders. It is deemed a pledge or trust fund, for the payment of the debts of the bank. Hence the charter relieves the individual stockholders from personal responsibility, and substitutes this fund in its place. During the existence of the corporation it belongs solely to the corporation and may be applied under the restrictions of the charter. The *residuum*, after meeting all demands upon it, and not the stock itself, belongs to the shareholders; and this cannot be ascertained until the corporation is wound up. *Tenn. Supreme Ct.* 1866, *Woodfork v. Union Bank*, 3 *Coldw.* 488.

133. — to bridge companies. Where a charter of a bridge company was amended by imposing new burdens on the company which would supersede the necessity of a neighboring ferry, and directing that the ferry should be discontinued, was accepted and carried into effect,—*Held*, that it constituted a contract, equally obligatory upon the State, as the provisions of the original charter; and there being no sufficient power to repeal reserved, the legislature could not re-establish the ferry without the consent of the company. *Conn. Supreme Ct.* 1844, *Hartford Bridge Co. v. East Hartford*, 16 *Conn.* 149.

134. This amendment was not unconstitutional, on the ground of its being an attempt

by the legislature, to divest itself of the right of eminent domain; for it is well settled that the legislature may modify or restrict the future exercise of its own powers, by a contract, vesting private rights which it cannot impair. *Conn. Supreme Ct.* 1845, *East Hartford v. Hartford Bridge Co.** 17 *Conn.* 79. And see *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.* *Id.* 40.

135. The plaintiffs had a grant to build a bridge over the Housatonic river, in 1802, and by additional acts in 1808, the grant was made exclusive for six miles on the river, provided that nothing contained in the grant should be construed to impair the rights of persons navigating the river. The company built their bridge, and kept it in repair according to the terms of the charter, until 1845, when the legislature passed a resolve requiring them to construct a draw &c. of a specified kind, and providing that plaintiffs should be deprived of their power to take their tolls as formerly until the draw should be completed, and accepted. Plaintiffs having failed to comply with this resolve,—*Held*, that the resolve was not binding upon the bridge company, no reservation being made in the former acts and resolves, of power to vary or impose new burdens upon the corporation without its consent. *Id.* 1846, *Washington Bridge Co. v. State*, 18 *Conn.* 53.

136. An act of incorporation, authorizing the building of a toll-bridge across a navigable river, "with two suitable draws, which shall be at least thirty feet wide," constitutes, when accepted, a contract between the commonwealth and the corporation, which, if the legislature have not reserved the power to change the charter, cannot be affected by a subsequent act, requiring the corporation to maintain draws of a greater width. Without the assent of the corporation the legislature cannot in any way affect or impair the original terms of the charter, by annexing new conditions, or imposing additional duties, onerous in their nature, or inconsistent with a reasonable construction of the compact. [Ang. & A. on Corp. §§ 81, 82, 767; 2 *Mass.* 146; 3 *Pick.* 342; 2 *Gray*, 30.] But the original charter, since it requires "suitable draws" obliges the corporation to enlarge their draws, when necessary for the convenient

accommodation of vessels having occasion to navigate the river; and the question whether the draws are thus suitable, is not to be determined by the legislature, nor by the corporation, but by the courts. *Mass. Supreme Ct.* 1854, *Commonwealth v. New Bedford Bridge*, 2 *Gray*, 339.

137. — to canal companies. Where a charter empowers a navigation improvement company to make such canals along the river as it might deem necessary from time to time, and to take lands upon the bank for that purpose (no power to repeal being reserved), the legislature cannot, by granting a subsequent charter to a railroad company, take away or diminish the prior and paramount right of the former company to take lands whenever they think proper, by allowing the latter, without the assent of the former, to occupy any of the difficult passes or other places along the river so as to preclude the former from a priority in the choice of a site for its own authorized works, or in any manner restrict its exercise of a prior right of election. *Md. Ct. of Appeals*, 1832, *Chesapeake &c. Canal Co. v. Ohio R. R. Co.* 4 *Gill & J.* 1, 108.

138. — to educational corporations. An act incorporating an university and empowering it to acquire and hold property, and to receive donations for its purposes, is a contract within the provision of the constitution and the bills of rights; and the legislature have no power to destroy it, and transfer its property to a new corporation created for the purpose. A consideration moving to the State is not essential to constitute such a contract. And even apart from any constitutional provision, the legislature have no power thus to interfere with private property. *Md. Ct. of Appeals*, 1838, *Regents of University of Maryland v. Williams*, 9 *Gill & J.* 365; S. P. 1860, *Sheriff v. Lowndes*, 16 *Md.* 357. And see *Rex v. Cambridge*, 3 *Burr.* 1647; 1 *Wm. Blackst.* 517.

139. If the charter of a college recites that a certain sum "be annually and forever hereafter given and granted, as a donation by the public to the use of the said college," the legislature cannot repeal such a grant. *Md. Ct. of Appeals*, 1859, *Visitors &c. of St. John's College v. State*, 15 *Md.* 330.

140. In the absence of any power expressly reserved, no authority exists in the government to regulate, control or direct a corporation or its funds, except where the corporation

* Affirmed in the Supreme Court of the United States; but without passing on this question. 10 *How. U. S.* 511.

is in the strictest sense a public corporation; i. e. where its whole interests and franchises are the exclusive property and domain of the government itself. [4 Wheat. 518.] Where the State has granted school lands for the use of the schools in a town, and have, at the instance of the town incorporated trustees and empowered them to sell the lands, invest the proceeds, and apply the income to the support of schools, and empowering them to fill vacancies in their own board, this constitutes a contract within the provision of the constitution; and a subsequent statute authorizing the town to choose new trustees, and directing the former trustees to deliver the property to them, is unconstitutional and void. *McC. Supreme Ct.* 1834, *Trustees &c. v. Bradbury*, 2 Fairf. 118; *S. P. Md. Ct. of Appeals*, 1834, *Norris v. Trustees of Abingdon Academy*, 7 Gill & J. 7.

141. Where an incorporated academy, in performance of the condition of an act of the legislature, enlarging its powers, and for a pecuniary consideration, had conveyed all their estate and effects to the State to the use of the school,—*Held*, this did not work a dissolution of the company. *Md. Ct. of Appeals*, 1834, *Norris v. Abingdon Academy*, 7 Gill & J. 7.

142. — to railroad companies. It is competent for the legislature creating a corporation for the purpose of constructing roads or other public works and improvements, to grant, without reservation of a power to repeal, an exclusive right, and to stipulate that the State shall not subsequently make any other grant inconsistent with such exclusive right. It is true that for general purposes of legislation, the legislature has full power to repeal former laws, and, of course, the last legislative act is binding, and necessarily repeals all prior acts which are repugnant. But in addition to the law-making power, the legislature is the representative of the whole people, with authority to control and regulate public property and public rights, to grant lands and franchises for purposes necessary or useful to the public, to bind the community by their contracts therefor, and generally to regulate all public rights and interests; and of the necessity and convenience of such improvements, of their fitness and the best modes of providing them, the established government of the State, acting by the legislature for the time being, must necessarily

judge and determine. In making such grants and stipulations, no doubt great caution and foresight are requisite on the part of the legislature, and a just estimate of the public benefit to be procured, and the cost at which it is to be obtained; and, as great changes in the state of things may take place in the progress of time, a great increase of travel, for instance on a given line, which changes cannot be specifically foreseen, it is the part of wisdom to provide for this. But when such a contract has been made on considerations of an equivalent public benefit, and when the grantees have advanced their money to the public upon the faith of it, the State is bound, by the plain principles of justice, faithfully to respect all grants and rights thus created and vested by the contract. Such a power of regulating public rights is everywhere recognized as one distinguishable from that of legislation, a power incident and necessary to all well-regulated governments, and when rightly exercised, is within the constitutional power of the legislature, and binding upon the government and people. [7 N. H. 85; 9 Johns. 507; 7 Pick. 344; 11 Pet. 420; 6 Cranch, 135.] *Id.**

143. The act incorporating the Boston & Lowell Railroad corporation (which was one of the earliest railroad charters passed, *Mass. St.* 1830, c. 4) provided that no other railroad than the one hereby granted shall, within thirty years from and after the passing of this act, be authorized to be made, leading from Boston, Charlestown or Cambridge, to Lowell, the legislature also reserving, in the act, the right to regulate the tolls to a certain extent, and to purchase the franchise upon certain terms. *Held*, that this provision, contained as it was in the charter as an inseparable part of it, constituted a contract by the commonwealth with the corporation, that no other such railroad should be lawfully made for thirty years. He who has the power of conferring a right or a franchise lying solely in grant, and who stipulates for a valuable consideration, that another shall have and enjoy it undisturbed and unmolested by any act or permission of his, in effect grants such right or franchise. But, more especially, when such right is

* To the same effect, *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co. Conn. Supreme Ct.* 1845, 17 Conn. 40.

conferred by the community in the form of a statute having all the forms of law, and is sanctioned by the government acting in behalf of all the people, and having power to bind them by law, such right would seem to be clothed with as much solemnity, and to have the same effect and force as if it were the grant of an exclusive right in terms. *Mass. Supreme Ct.* 1854, *Boston & Lowell R.R. Co. v. Salem & Lowell R.R. Co.* 2 *Gray*, 1.

144. Granting to several other railroad corporations the right to establish, by means of junctions with each other, a continuous line of transportation by railway from Lowell to Boston,—*Held*, to be beyond the power of the legislature, such a connection being justly deemed to be making a railway within the meaning of the plaintiff's charter, and such an infringement as to be a nuisance to their rights. *Id.*

145. — to turnpike companies. An act allowing a turnpike company to collect increased tolls on certain vehicles, passed on the suggestion that the original limit was fixed by mistake, may be regarded as a modification of the original grant, and as to be treated as a part of it, and not repealable without the consent of the company, rather than as a mere license, and therefore repealable. Whether it is considered as an explanation of the original grant, or an addition, it is equally protected by the constitution. *Conn. Supreme Ct.* 1835, *Derby Turnpike Co. v. Parks*, 10 *Conn.* 522.

146. Limitations and exceptions. If a State grant no exclusive privileges to one company which it has incorporated, it impairs no contract by incorporating a second one, which itself largely manages and profits by, to the injury of the first. *U. S. Supreme Ct.* 1865, *Turnpike Co. v. State*, 8 *Wall.* 210.

That a Grant of a franchise not expressed to be exclusive, does not prevent the legislature from granting a rival privilege, see FRANCHISE.

That the legislature may authorize the Franchise of one company to be taken for the use of another, on making compensation, see EMINENT DOMAIN; FRANCHISE.

147. A law giving the representatives of one killed in a railroad accident an action against the railroad in all cases where he would have had an action had he survived, is not a law impairing the obligation of the contracts entered into between the State and

roads previously chartered. *Ga. Supreme Ct.* 1858, *Southwestern R. R. Co. v. Paulk*, 24 *Ga.* 356.

148. A provision in the charter of a railroad company, that if the company do not locate their road according to the provisions of the act, they shall forfeit one million of dollars to the State, for the benefit of a particular county, though assented to by the company, does not constitute a case of contract, but one of penalty, subject, as to its enforcement, to the will and pleasure of the legislature. *Md. Ct. of Appeals*, 1842, *State v. Baltimore & Ohio R. R. Co.* 12 *Gill & J.* 399.

149. By incorporating a medical faculty with power to appoint a board of examiners, and prohibiting all persons from practicing medicine within the State without having been examined by the board and having paid a license fee to the corporation, the legislature does not part with their power to regulate the practice of medicine; and it may nevertheless subsequently grant a charter to an university with power to issue diplomas authorizing the graduates to practice medicine. The former law must be deemed to be in the nature of a regulation of internal police for the public good, and does not vest inviolable rights in the faculty. *Md. Ct. of Appeals*, 1838, *Regents of University of Md. v. Williams*, 9 *Gill & J.* 865.

As to the general power of the government to Legislate with respect to corporations,—see LEGISLATION.

150. The legislature has the same power to repeal or modify acts of incorporation or amendments thereof, until rights have accrued under them, unless the repeal would impose upon the corporation some additional burden or liabilities, that it has to repeal or alter any other statute. The power to create necessarily implies its power to abrogate or annul, but the exercise of the power to accomplish the latter object, is subject to constitutional limitations, imposed for the purpose of guarding against legislative aggression upon vested rights. Hence, acts of the legislature, amendatory of a railroad charter, providing for taking the vote of the people in relation to a tax to be laid for making a railroad, are a mere privilege to take the vote of the people as to their desire to become stockholders in the road, and confer no rights which prevent the legislature from re-

pealing them before an actual subscription is made. *Ky. Ct. of Appeals*, 1851, Covington & Lexington R. R. Co. v. Kenton Co. Court, 12 *B. Monr.* 144; *U. S. Supreme Ct.* 1851, Baltimore & Susquehanna R. R. Co. v. Nesbit, 10 *How.* 395.

151. Peculiar remedies prescribed by a charter, may be altered by the legislature where the alteration does not affect the rights or interests of the corporation. Thus, a statute authorizing suits against insurance companies to be brought in the county where an agency of the company is established, instead of in a county prescribed in the charter, is no infringement of the charter. *Ky. Ct. of Appeals*, 1852, Howard v. Kentucky & Louisville Mutual Ins. Co. 13 *B. Monr.* 282.

152. A provision in a bank charter giving the bank a privilege of speedy judgment against debtors, and without appeal or writ of error, can only regulate courts established under the authority of the State granting the charter. There is a difference between rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and peculiar remedies bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate. Hence, a subsequent statute of the United States creating a federal court and giving error or appeal from its decisions, gives the debtors of the bank sued in such court, the right of appeal, notwithstanding a saving clause in the statute, providing that nothing in it should impair the rights of any corporation. *U. S. Supreme Ct.* 1808, Young v. Bank of Alexandria, 4 *Cranch*, 384.

153. A provision in a charter giving to the corporation a summary process in the nature of an attachment, against persons entering into certain contracts, is no part of its corporate franchises, but a mere remedy, and may be repealed or altered at pleasure by the legislature. *U. S. Supreme Ct.* 1819, Bank of Columbia v. Okely, 4 *Wheat.* 235; *S. P.* 1819, Sturges v. Crowninshield, 4 *Wheat.* 122.

154. A repeal of a charter, if effectual as against the corporation, cannot be regarded as void as against creditors who had suits pending against the company, and had levied attachments on its property, because the dissolution will defeat such remedy. The legis-

lature may change or take away a remedy. [2 *Fairf.* 284; 18 *Me.* 109.] And such change may constitutionally affect pending suits. *Me. Supreme Ct.* 1843, Read v. Frankfort Bank, 23 *Me.* 318.

155. Authorizing dissolution. An act authorizing a corporation to surrender its charter and be dissolved, is not invalid, as impairing the obligation of its contracts. The obligation of the contracts survives. *U. S. Supreme Ct.* 1834, Mumma v. Potomac Co. 8 *Pet.* 281.

See DISSOLUTION.

156. A statute enacting that all corporations then existing, whose powers would expire, either by express limitation or otherwise, should be continued corporate bodies for three years after their powers would otherwise expire, for the purpose of prosecuting and defending all suits that then were or thereafter might be commenced, &c. but not for the purpose of continuing business, is constitutional and valid. It is not retrospective in the proper sense of that term; for it provides for a future existence of the corporation, for limited and specific purposes. It does not infringe or interfere with any of the privileges secured by the charter, unless it be considered a privilege to be secured from the payment of debts, or the performance of contracts; and this is a kind of privilege which the constitution was not intended to protect. It does not impair the force or obligation of contracts; but, on the contrary, provides a way of enforcing them both in favor of, and against the corporation. *Mass. Supreme Ct.* 1819, Foster v. Essex Bank, 16 *Mass.* 245. Approved and followed, *Me. Supreme Ct.* 1820, Lincoln & Kennebec Bank v. Richardson, 1 *Me.* (1 *Greenl.*) 79.

157. Where a bank whose charter had already expired, when a similar act applying to it was passed, thereafter brought an action,—*Held*, that the same principle applied; and that the bank might recover, since by bringing the action it had accepted the revival of the charter; especially as the defendant was sued as a stockholder, and therefore was bound by such acceptance.* *Me. Supreme Ct.* 1820, Lincoln & Kennebec Bank v. Richardson, 1 *Me.* (1 *Greenl.*) 79.

* But compare *Commonwealth v. Cullen*, 18 *Pa. St.* 133, where the power of the directors to bind the stockholders to a change in the charter is qualified.

158. As to public corporations. A charter of a public corporation created for the purposes of government, cannot be considered as a contract. Public corporations which exist only for public purposes, as counties, cities, and towns, the legislature, under proper limitations, have a right to change, modify, enlarge or restrain, securing, however, the property, for the uses of those for whom it was purchased. [4 Conn. 269; Breese, 120; 21 Wend. 679; 3 Story on Cons. § 1387; Ang. & A. on Corp. 503; 2 Kent, 245.] *Ohio Supreme Ct.* 1831, *Town of Marietta v. Fearing*, 4 Ham. 427; S. P. *N. H. Supreme Ct.* 1856, *Berlin v. Gorham*, 34 N. H. 266; *Ill. Supreme Ct.* 1850, *County of Richland v. County of Lawrence*, 13 Ill. 1. See *Bradford v. Cary*, 5 Me. (5 Greenl.) 339; *La. Supreme Ct.* 1857, *Layton v. New Orleans*, 12 La. Ann. 515; *N. Y. Superior Ct.* *Davidson v. Mayor &c. of New York*, 27 How. Pr. 342; *Terrett v. Taylor*, 9 Cranch, 43; *Shorter v. Smith*, 9 Ga. 517.

159. Such grants of political power are for the public good, and confer no vested rights as against the government. *N. Y. Supreme Ct.* 1835, *People v. Morris*, 13 Wend. 325.

160. Where the grantees as well as the grantors of a franchise are public bodies, created solely for municipal and political objects, the grant is not beyond the legislative power to revoke. A legislative body cannot part with its powers or delegate them to municipalities, so as to be unable to exercise them on all suitable occasions. Thus a grant to a town of the right to establish a ferry is both from the relation of the parties and the subject-matter, to be deemed rather as a public law than as a contract; and is repealable. *U. S. Supreme Ct.* 1850, *East Hartford v. Hartford Bridge Co.* 10 How. 511.

161. Municipal corporations are at the control of the legislature, and their powers may be enlarged or diminished by the legislature at will. And this need not be done by an act professing, in terms, to amend the charter; but may as effectually be done by an act incorporating a railway company. *Ill. Supreme Ct.* 1859, *Robertson v. City of Rockford*, 21 Ill. 451.

162. Where the mayor and aldermen of a city corporation were, by statute, made commissioners of the jail of the county in which the city was situated, and they built a jail

partly at the expense of the county and partly at the expense of the city, claiming to be reimbursed from the county for the latter part,—*Held*, that the right of inspection and direction over the jail, with the power to appoint a jailor, were not vested franchises in the corporation, and that the legislature might repeal the statute without the consent of the city. Although private corporations cannot be deprived of their franchises but by a judicial judgment, all such corporations as are made merely for the purpose of city government or town police, are so far the creatures of the legislature that they may be controlled by it, and have their constitutions altered and amended by the government in such manner as the public interest may require. [9 Cranch, 43; 4 Wheat. 518] *Ga. Superior Ct.* 1823, *State v. Mayor &c. of Savannah*, R. M. Charlt. 250.

163. A town or other municipal corporation may be abolished, although it is the trustee of a public charity. There can be no insuperable difficulty in the exercise of such legislative power, though it has the incidental effect to leave the trust estate and fund without the trustee as created by the charter. The principle that the legislature can no more defeat the title of a trustee or affect his right over the trust fund, than they can divert or destroy the fund itself, must not be regarded as depriving the State of their power to alter or abolish the municipal organization of towns, when it is deemed necessary for public interests. If a town was organized for the purpose of aiding the State in sustaining its form of government, the power must necessarily reside in the State to abolish that organization, when it ceases to have that effect. If towns, by their charters or in any other way, are made trustees of such an estate for such purposes, their right and title as such is held subject to be defeated, whenever the State shall deem it necessary to abolish their existence as a town, or as a municipal organization. *Vt. Supreme Ct.* 1856, *Town of Montpelier v. Town of East Montpelier*, 29 Vt. 12.

164. It is true that there cannot be at the same time two municipal corporations in the same place, exercising the same or similar powers, jurisdictions, and privileges [Willc. Corp. 27]. But the legislature may alter the limits of the old corporation, alter its franchises or create a new corporation, and so far

as the two charters may conflict, the latter is a repeal of the former. *N. J. Supreme Ct.* 1854, *City of Patterson v. The Society for Manufactures*, 4 *Zabr.* 386.

165. A legislative act looking to the extension of the limits of a municipal corporation is not in the nature of a contract, as no private vested rights are affected in the sense of the constitution; and may be repealed at the discretion of the law-making power. The persons who are taken in by such extension cannot be heard to complain; they have no voice in the matter; no power to resist; nor any legal rights infringed thereby. *Tenn. Supreme Ct.* 1859, *McCallie v. Mayor &c. of Chattanooga*, 3 *Head*, 317.

166. Where a statute dividing a town enacts that the new incorporation shall pay a share of certain future expenses, and they are accordingly paid for several years, a subsequent statute, exonerating the new town from this liability, is unconstitutional, as it impairs the obligation of the contract created by the act of division and incorporation. *Ms. Supreme Ct.* 1829, *Bowdoinham v. Richmond*, 6 *Me.* (6 *Greenl.*) 112.

167. The assent of the original town to the statute cannot be inferred from its neglect to oppose the petition upon which it was enacted. *Id.*

168. Although it is well settled that the charters of public or municipal corporations may be altered by the legislature at pleasure, yet where a franchise conferred upon such a corporation partakes of the character both of a power conferred for public purposes, and of one conferred for the private advantage or emolument of the corporation, the legislature cannot transfer to others the advantage or emolument while the franchise continues. Thus, where the charter of a municipal corporation gives power to license liquor dealers, restricting the number, and collecting a license fee from each, and to appropriate the moneys to city purposes, the legislature, though they may repeal the power wholly, cannot constitutionally continue the franchise and permit its exercise, and yet divert the advantage to another purpose; because that would invade the private interest of the corporation. It may take away the franchise entirely; but if it be permitted still to reside with the corporation it must remain with all its incidents and advantages. [3 *Hill*, 539; 10 *Wend.* 547; 18 *Id.* 325.] *Miss. Ct. of Errors*, 1850, *Trustees of*

Aberdeen Acad. v. Mayor &c. of Aberdeen, 18 *Smed. & M.* 645; S. P. 1847, *Corporation of Aberdeen v. Saunderson*, 8 *Smed. & M.* 663.

169. Where the legislature incorporated a city, and by the same act relinquished to the corporation certain lands for its benefit, with power to sell and apply the purchase money to build a jail and court-house for the county, the remainder to be applied for educational purposes within the city, and the charter was subsequently revoked,—*Held*, that the charter did not confer a vested right upon the city to the erection of the court-house out of the fund; that until the trust had been executed it was competent for the legislature to change or abolish it, and that the trust for education (while unexecuted) was also dependent on legislative will, and could be revoked. *Tex. Supreme Ct.* 1854, *Bass v. Fontleroy*, 11 *Tex.* 698.

170. The State does not possess unrestrained power over a corporation not invested with political power, nor created to be employed and partake in the administration of government, or to control funds belonging to the State, or to conduct transactions in which the State alone is interested. It has unrestrained power over such corporations only as may be characterized as the agents or instruments of the government. A university is not such a corporation, and funds bestowed upon it by a city are beyond legislative control. *Ky. Ct. of Appeals*, 1855, *City of Louisville v. University of Louisville*, 15 *B. Monr.* 642.

171. If the funds of an incorporated university are wholly public property, and the persons who have rendered services have all received compensation, the charter does not constitute a contract, for there is no consideration. Such a corporation is a public corporation; and the charter may be altered, amended or repealed by the legislature, at pleasure. *Ala. Supreme Ct.* 1833, *Trustees of University of Alabama v. Winston*, 5 *Stew. & P.* 17.

For the distinction between Public corporations and Private corporations, see those titles.

2. Alteration; Amendment.

172. The general power to alter or amend. The general power which the State possesses over all corporations, under proper limitations, to change, modify, enlarge or

restrain its franchises, with a due regard however, to the security of the corporate property for the use of the corporators, is restricted in case of private corporations, whether civil or eleemosynary, to the passing of such amendments to the charter as are merely ancillary to the main design of the corporation. It cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation judicially ascertained and declared. If the alteration proposed in the charter of such a corporation, by legislative enactment, are merely ancillary and not fundamental, they may be accepted by a majority of the corporators; and when so assented to, they are binding on the whole; but when the alterations are fundamental, the acceptance must then be unanimous. *Tenn. Supreme Ct. 1866, Woodfork v. Union Bank, 8 Coldw. 488.*

For the power of the State to Legislate over corporations, otherwise than in enacting, amending or repealing their charters, see LEGISLATION.

173. The modification of a charter in enlarging the time of commencing and completing the work for which the company was incorporated, is such an incident to all charters as becomes within the constitutional power of the State to exercise, and with due notice of which all its citizens must be presumed to contract. It is not such a fundamental radical change as diverts the funds from the original purpose to which they were dedicated, or is manifestly prejudicial to the stockholders, but is auxiliary to the original object of the incorporation, and beneficial to the stockholders. *Md. Ct. of Appeals, 1866, Taggart v. Western Maryland R. R. Co. 24 Md. 568.*

174. A corporation for religious or eleemosynary purposes, whose funds have increased to an amount much in excess of the purposes of its foundation, may, without violation of the constitutional provision prohibiting a State from passing any law impairing the obligation of contracts, apply for and obtain an amendment of its charter, by which its name changed, and it may be authorized to apply its surplus funds to other purposes than those for which the charity was originally established. *S. C. Ct. of Errors, 1859, Attorney General v. Clergy Society, 10 Rich. Eq. 604.*

175. The recognition of the existence of a corporation by the written constitution of a State does not make its charter a part of the organic law so that the legislature cannot modify it with the consent of the corporators. *Ill. Supreme Ct. 1844, People v. Marshall, 1 Gil. 672.*

176. A provision in the charter of a corporation that it should not be revoked, altered or restrained, without consent of the corporation, and limiting the power of the legislature so as to prevent any subsequent imposition upon the corporation "of any other or further duties, liabilities or obligations," does not preclude the legislature from providing more effectual remedies to compel a performance of the duties and liabilities of such corporation, and fixing the mode, time when, and court where such remedy shall be enforced. *Me. Supreme Ct. 1857, Gowen v. Penobscot R. R. Co 44 Me. 140.*

177. Consent of a State. The act of separation of Maine from the State of Massachusetts provided that the powers of Bowdoin College should not be altered without the subsequent agreement of both States; and subsequently the legislature of Massachusetts passed a resolve, "that the consent and agreement of the commonwealth be, and hereby is given to any alteration or modification of the above-mentioned clause or provision in said act relating to Bowdoin College, not affecting the rights or interests of this commonwealth, which the president &c. or others, having authority to act for said corporation, may make therein, with the consent of the legislature of the State of Maine; and such alterations &c. made as aforesaid, are hereby ratified on the part of this commonwealth;"—*Held*, that this resolve did not authorize the legislature of Maine to make alterations in the charter of the college which should divert the funds of the founder from their original objects, or vest the visitatorial power in other bodies or persons than the trustees &c. marked out in the charter; and, *a fortiori*, did not justify the transfer of those powers from the trustees to any other persons not in privity with them. *U. S. Circ. Ct. Me. 1883, Allen v. McKeen, 1 Sumn. 276.*

178. Such resolve authorizes alterations and modifications to be made by the boards of the college, or by persons authorized by

the boards, with the consent of the legislature, and not by the legislature without their consent. *Id.*

179. Application for an amendment. A court of equity has no power by injunction, either at the instance of a stockholder, or of a third party, to restrain a corporation from applying to the legislature for an alteration of its charter. *N. J. Chancery*, 1863, *Story v. Jersey City &c. Plank Road Co.* 16 *N. J. Eq.* (1 *Green*) 13.

180. Where a turnpike company petitioned the legislature for, and obtained an amendment to their charter, increasing the tolls of mail coaches without informing the legislature that such a coach ran on their road, and without giving notice of their application to the proprietor of the coach,—*Held*, that the amendment was not therefore to be deemed fraudulently obtained and void. *Conn. Supreme Ct.* 1835, *Derby Turnpike Co. v. Parks*, 10 *Conn.* 522.

181. Necessity of corporate acceptance of amendment. That in general, when there is no power reserved to the legislature to alter the charter, an amendment which substantially changes the charter, requires assent or acceptance by the corporation,—see *Lincoln v. Kennebec Bank*, 1 *Me.* (1 *Greenl.*) 79; *Galena & Chicago R. R. Co. v. Appleby*, 28 *Ill.* 283; *Illinois River R. R. Co. v. Zimmer*, 20 *Ill.* 654,—also, *supra* 1—81.

182. That the rule applies to an act extending the term of a corporation,—see *Lincoln v. Kennebec Bank*, 1 *Me.* (1 *Greenl.*) 79.

183. Although the charter of an incorporated company may be altered by the procurement of the company, in furtherance of the designs and objects of the company; yet due regard must be had, in all such cases, to the inviolability of private contracts. The assent of subscribers must be obtained to any amendment of the charter which materially or essentially alters the conditions upon which the original contract of the parties was made. *Ga. Supreme Ct.* 1852, *Winter v. Muscogee R. R. Co.* 11 *Ga.* 438.

184. Amendments of the charter of an incorporated company which are necessary to carry into effect its main design, may be made without the consent of a shareholder. But an amendment which fundamentally changes the objects and purposes of the act of incorporation, may be resisted by the stockholders, unless provided for in the char-

ter itself, or in the general laws of the State in force at the time the act of incorporation was passed. *Ky. Ct. of Appeals*, 1859, *Fry v. Lexington & Big Sandy R. R. Co.* 2 *Metc.* 314; *S. P. Mich. Supreme Ct.* 1863, *Joy v. Jackson &c. Plank Road Co.* 11 *Mich.* 155.

185. If a corporation whose charter contains no reservation of power by the legislature to amend it, accept a subsequent statute which grants new privileges and reserves to the legislature power to amend the charter, they are bound by the reservation, and the charter may thereafter be altered without their consent. *Pa. Supreme Ct.* 1847, *Mongahela Nav. Co. v. Coon*, 6 *Pa. St.* 379.

186. It seems that an act altering the charter must all be accepted, or no part of it. *Ehrenzeller v. Union Canal Co.* 1 *Rawle*, 181.

187. By whom acceptance may be made. In those corporate bodies where the whole body of stockholders, or other persons in interest, compose the corporation, the right of assenting to any proposed change in the charter resides in them, though they be ordinarily represented by a board of directors charged with the exercise of the corporate powers. These, in their capacity of managers, have no authority either to call for or assent to a change of the corporate constitution, but by the agreement of a majority of the corporators. Hence their assent to an amendment of the charter cannot be deemed to amount to an acceptance on the part of the corporation. *Pa. Supreme Ct.* 1850, *Commonwealth v. Cullen*, 13 *Pa. St.* 183.

188. The will of the majority of a corporation should govern in the adoption of an amendment to their charter of incorporation, unless there is fraud, or the original purpose of the corporation be entirely changed by the amendment. *Ill. Supreme Ct.* 1857, *Sprague v. Illinois River R. R. Co.* 19 *Ill.* 174.

189. An amendment of the charter of a plank road company authorizing it to mortgage its road to secure its bonds, is such an amendment as may be accepted by a majority of the stockholders. *Mich. Supreme Ct.* 1863, *Joy v. Jackson &c. Co.* 11 *Mich.* 155.

190. A *mandamus* will not be issued, on the petition of a majority of the members of an incorporated society, to compel the body in whom the corporate powers are vested, to affix the common seal to alterations and amendments of the charter, contrary to their own judgment. Where a charter vests the

control of the corporate concerns in a select body or board, the shareholders at large have no right to interfere with the doings of these, their charter agents. *Pa. Supreme Ct.* 1821, *Commonwealth v. Trustees of St. Mary's Church*, 6 *Serg. & R.* 508.

191. The acceptance of an amendment to the charter of a railroad corporation by the president and directors of the company, under the authority of a majority of the stockholders, is not obligatory upon non-assenting subscribers; but if accepted by stockholders representing a majority of all the stock, it will be obligatory upon all the subscribers for stock. *Ark. Supreme Ct.* 1859, *Witter v. Mississippi &c. R. R. Co.* 20 *Ark.* 463.

192. A charter incorporated the members of a religious society under the title of "The Trustees of the Roman Catholic Society," &c. and declared that the trustees and their successors to be elected as hereinafter mentioned, should have perpetual succession &c. and generally that such trustees should have all the powers of a corporation. It also named the trustees in the first instance, and provided that the future trustees should consist of the pastors of the church not exceeding three in number, and of eight lay members to be elected annually by the society. And it made seven trustees a quorum, and vested in them the management of the temporal business of the corporation. A subsequent statute authorizing the corporation to amend its charter under the statute [*Pa. Stat.* 1791], provided that corporations might submit amendments to the court, who should certify upon their lawfulness. *Held*, that the congregation could propose or signify their assent to alterations only through the trustees. It is implied that the act of the *government* of the corporation, if fairly obtained, shall be sufficient evidence of the assent of all to the proposed alterations. Under such a charter, the trustees are the corporate organ, not only for ordinary business, but for the expression of its will in regard to the alteration of a fundamental article of the charter. *Pa. Supreme Ct.* 1821, *St. Mary's Church case*, 6 *Serg. & R.* 498; again, 1822, 7 *Serg. & R.* 517.

193. In such case, however, the amendments proposed, are not to be considered as the act of the corporation, merely because they are offered under the corporate seal.

The seal is not conclusive, but at most, presumptive evidence of the corporate act, and the court may inquire into the authority by which it was affixed. *Pa. Supreme Ct.* 1822, *St. Mary's Church case*, 7 *Serg. & R.* 517.

194. Since in this case the trustees consisted of different classes, holding by different tenures, and the object of the proposed alteration was to remove the clerical class from the trusteeship, and constitute the trustees wholly of lay members, and it appeared that one of the former was excluded from the board without authority, by a resolution of the latter, and was therefore absent from the meeting at which the resolutions for altering the charter were adopted,—*Held*, that the act of the board was illegal, and the amendments could not be deemed lawful. *Id.*

195. In corporations where there are different classes, the majority of each class must consent before the charter can be altered, if there is no provision in the charter respecting alterations. *Id.*

196. Time of acceptance. The legislature may alter a charter if the alteration be agreed to either before or after the passage of the act. The assent of the stockholders relates back to the date of the law. *Pa. Supreme Ct.* 1829, *Ehrenzeller v. Union Canal Co.* 1 *Rawle*, 181.

197. How acceptance may be shown. When an act amendatory of the charter of a corporation contains no provision requiring a formal acceptance of it, acceptance may be implied from corporate acts. Grants beneficial to a corporation may be presumed to have been accepted. [7 *Pick.* 344.] *Ms. Supreme Ct.* 1859, *Bangor &c. R. R. Co. v. Smith*, 47 *Ms.* 84.

198. Even when a particular mode of acceptance has been prescribed, and has not been followed, corporate acts may amount to acceptance, binding the corporation and stockholders taking part in them, as towards third persons. *Ohio Supreme Ct.* 1861, *Owen v. Purdy*, 12 *Ohio St.* 73.

199. Assent of the corporators at large may be presumed from long acquiescence in the acts and declarations of the officers of the company, recognizing the amendment. But where the amendment was one which dispensed with an election for the year, continuing the same persons in office, and it

did not appear that such officers notified the corporators of the amendment,—*Held*, that the omission to hold such election, and the non-action of the corporators for two months, during which it did not appear that the officers acted as such with the knowledge of the corporators, did not amount to evidence of an acceptance on the part of the latter. *Pa. Supreme Ct.* 1850, *Commonwealth v. Cullen*, 13 *Pa. St.* 183.

200. The assent of a corporation to an act altering or destroying its charter can be inferred only from the acts of the corporation itself. It cannot be inferred from the fact that individual members accepted and held offices under a new corporation which it was the object of the law in question to create. Nor can it be inferred from a subsequent non-user of the corporate franchises, especially after the corporation, by express vote, formally protested against the law. *Md. Ct. of Appeals*, 1838, *Regents of University of Md. v. Williams*, 9 *Gill & J.* 865.

201. An amendment authorizing an election of officers to be held is not to be deemed accepted on the part of the corporation by the act of a majority of the corporators holding the election accordingly, in the face of a remonstrance against it on the ground of the non-acceptance of the amendment. Such dissent on the part of the minority renders it necessary that the acceptance of the amendment should be deliberated on in a meeting regularly convened. *Pa. Supreme Ct.* 1850, *Commonwealth v. Cullen*, 13 *Pa. St.* 183.

202. **Validity of reserved power to alter.** A reservation, in a charter, of power to the legislature to alter or repeal the charter in future, is valid, and alterations made within it are binding upon the corporation. *N. Y. Chancery*, 1828, *McLaren v. Pennington*, 1 *Paige*, 102; *N. Y. Supreme Ct.* 1832, *People v. Manhattan Co.* 9 *Wend.* 351; *Minn. Supreme Ct.* 1854, *Perrin v. Oliver*, 1 *Minn.* 202; *Mass. Supreme Ct.* 1850, *Roxbury v. Boston & Providence R. R. Corporation*, 6 *Cush.* 424; *N. J. Ct. of Errors*, 1864, *State v. Miller*, 31 *N. J. Law* (2 *Vroom*), 521.

203. Where the charter reserves to the legislature the power to modify, a modification of a charter, assented to by a majority of the stockholders, is not unconstitutional, as against those who do not assent, as impairing the obligation of a contract.

N. Y. Supreme Ct. 1853, *White v. Syracuse & Utica R. R. Co.* 14 *Barb.* 559. And see *Troy & Rutland R. R. Co. v. Kerr*, 17 *Id.* 581.

204. A provision in a charter that the constitution of the body shall never be altered in any other manner than by an act of the legislature, is equivalent to an express reservation of power by the legislature to amend it without the consent of the corporators. *Pa. Supreme Ct.* 1838, *Commonwealth v. Bonsall*, 3 *Whart.* 560.

205. **Reservation by a general law.** Where a general law provides that the charter of every corporation granted by the legislature shall be subject to alteration, suspension, or repeal, in its discretion, the legislature, in granting a charter, must be deemed to have reserved to themselves the right of altering, suspending, or repealing the same whenever, in their discretion, the public good may require it, as fully as if the reservation were inserted in the charter. And all contracts, express or implied, resulting from the act of incorporation and its acceptance by the stockholders, must be deemed to have been entered into by both parties subject to that reservation. *N. J. Chancery*, 1863, *Story v. Jersey City &c. Plank Road Co.* 16 *N. J. Eq.* (1 *Green*), 13. Compare *Troy v. Rutland Plank Road Co. v. Kerr*, 17 *Barb.* 581.

206. A charter which was granted after the enactment of a general statute reserving power to alter &c. corporate charters generally, may be altered &c. by virtue of such reservation, notwithstanding the charter itself contain no express reservation of a power in the legislature to change it. Such a general act is not unconstitutional in its application to charters subsequently granted. It must be taken as forming a part of all subsequent charters, and to be agreed to by their acceptance. *Mass. Supreme Ct.* 1855, *Mass. General Hospital v. State Mutual Life Assurance Co.* 4 *Gray*, 227; *N. Y. Supreme Ct.* 1850, *Suydam v. Moore*, 8 *Barb.* 358.

207. **Construction of statutes reserving power to alter charters.** The charter of a bank, organized in New York in 1843, provided that the legislature might, at any time, alter it; and the then existing constitution of 1821, contained a provision requiring two-thirds of the members of the legislature to concur in an act for the alter-

ation of a corporation. *Held*, that this constitutional provision did not enter into the contract between the State and corporations chartered while that constitution was in force, so as to prevent alteration of their charters by a mere majority vote, as allowed by the subsequent constitution of 1846. The power reserved in a charter to amend it, is one to be exercised by the legislative power, in any mode consistent with the constitution for the time being. *N. Y. Ct. of Appeals*, 1860, *Matter of Reciprocity Bank*, 22 *N. Y.* 9; 17 *How. Pr.* 328.

208. The provision of the New York constitution of 1846—that nothing therein contained shall affect any charter theretofore granted by the State—forms a part of a general saving provision, intended to prevent vested rights from being impaired by its direct operation. It was never intended that all charters, so far as regarded the instruments of external control to which they were subject, should remain the same as before. Thus, modifications introduced into the constitution of 1846, relative to the mode of passing statutes affecting corporations, apply to statutes affecting corporations formed before the adoption of that constitution. *N. Y. Supreme Ct.* 1853, *White v. Syracuse & Utica R. R. Co.* 14 *Barb.* 559.

209. Where the right to alter the charter is reserved to the legislature, the meaning is, that it shall be exercised by the body of men who answer that description at the time that the alteration is to be made, governed by the rules which shall, at that time, be prescribed by the fundamental law of the State. Even if the then existing constitution was contemplated by the parties, it must also have been contemplated by them that the sovereign power of the State might change the fundamental law at any time. And it would necessarily become a part of the contract that any future legislature might alter the charter of the company, provided that it did not violate any provision of the constitution in force at the time of the alteration. *Id.*

210. The restrictive clause in a general plank-road law which provides that any future alteration or amendment shall not affect the corporate rights of companies formed under it, unless specially named in the act of amendment is in fact, but a stipulation that the rights of such companies shall not

be affected to their prejudice without their consent, by any such alterations; but it does not prevent the legislature, by general amendment, from removing any restrictions, or releasing or diminishing any obligations imposed upon such companies by the general act. *Mich. Supreme Ct.* 1862, *People v. Grand &c. Plank Road Co.* 10 *Mich.* 400.

211. Where the charter of a bridge company provided, that, whenever the tolls should reimburse to the company the sums advanced by them in building the bridge, and certain other expenses, with an interest of 12 per cent. per annum thereon, the bridge &c. and rate of tolls should be subject to such regulations and orders as the general assembly should think proper to make; and in a subsequent part of the same section, provided that the grant might receive such alterations from time to time, by the general assembly, as experience should evince to be necessary or expedient,—*Held*, that these provisions did not reserve a power to repeal or alter the charter at pleasure; but were to be construed together, the former as securing to the company its tolls and revenues free from legislative control, until the contingency specified should occur, and the latter as reserving power to direct necessary or convenient alterations in the structure, and perhaps in the supervision of it, as experience should require. *Conn. Supreme Ct.* 1844, *Hartford Bridge Co. v. East Hartford*, 16 *Conn.* 149.

212. A subsequent amendment of such a charter expressed to be subject to alteration, amendment or repeal, in the same manner as the original act, is not to be construed as reserving any greater power of repeal than the original charter. *Id.*

213. The charter of a railroad corporation required that in case of disagreement as to price of land, application should be made to a vice-chancellor. An amendatory act transferred the authority of the vice-chancellor to any court of record of the county where the land was taken. *Held*, that a county court had jurisdiction. *N. Y. Supreme Ct.* 1853, *Mosier v. Hilton*, 15 *Barb.* 657.

214. A railroad charter was subjected by the charter to a certain tax on the cost of the road, as soon as the net proceeds should equal seven per cent. in lieu of all other taxes. The charter by its own terms could be al-

tered or repealed by the legislature. A subsequent general tax law subjected to taxation the real estate of all private corporations, "except those which by virtue of any irrevocable contract in their charter or other contracts with the State, are expressly exempt from taxation," and it repealed all acts, whether special or local, inconsistent with its provisions. *Held*, that the provisions of the charter relating to taxation were repealed by the general law; and, under the latter, assessments upon the real estate of the corporation could be made. *N. J. Ct. of Errors*, 1864, *State v. Miller*, 31 *N. J. Law* (2 *Vroom*), 521; 1865, *State v. Mayor &c. of Jersey City*, *Id.* 575.

215. In a charter authorizing the company to collect fees or tolls, and fixing the rates, a provision that "the fees aforesaid shall at all times hereafter be subject to alteration by the legislature," is not fully exercised and spent by a single statute altering the fees, without also expressly reserving the power to alter again. The provision is, in effect, that the fees for the purposes aforesaid are subject to alteration, and the power to alter is continuous. *Me. Supreme Ct.* 1831, *Proprietors of Side Booms v. Haskell*, 7 *Me.* (7 *Greenl.*), 474.

216. A general railroad act declared existing corporations to be subject to its provisions "not inconsistent with their charters," relative to acquiring title to lands. *Held*, that a pre-existing company, whose charter provided a distinct and complete method of acquiring title, was not bound to pursue the new method, but might still take that authorized by their own charter. Since the provisions of the latter act could not be grafted on the former, leaving it entire, they must be deemed inconsistent. *N. Y. Ct. of Appeals*, 1855, *Clarkson v. Hudson River R. R. Co.* 12 *N. Y.* (3 *Kern.*), 304; *N. Y. Supreme Ct.* 1853, *Visscher v. Hudson River R. R. Co.* 15 *Barb.* 37; *Mosier v. Hilton*, *Id.* 657.

217. Extent of the power reserved. Under a power reserved to amend a charter, the legislature may give to third persons a right to damages already sustained by them by acts of the corporation, and a remedy against the corporation therefor, which would not exist but for such amendment. *Pa. Supreme Ct.* 1847, *Monongahela Nav. Co. v. Coon*, 6 *Barr*, 879.

218. The right thus reserved to alter or

amend a charter refers to matters of public concern, but not to an alteration or amendment solely of individual advantage, and such as seriously affects rights of property previously acquired and paid for by the corporation under the original charter. *N. Y. Supreme Ct.* 1850, *Milliman v. Oswego & Syracuse R. R. Co.* 10 *Barb.* 87. And see *Booe v. Junction R. R. Co.* 10 *Ind.* 93.

219. A reservation in a legislative charter of the power to alter, repeal, or amend the same, does not imply the power to alter the vested rights acquired by the corporators under the charter, and to add new parties and managers without the consent of the corporators. And such a reservation carries with it the necessary implication of a power in the corporators to accept or reject any amendment or alteration made by the legislature. *Ky. Ct. of Appeals*, 1854, *Sage v. Dillard*, 15 *B. Monr.* 340.

220. A railroad charter did not impose upon them the burden of constructing new roads laid out across their track; but it contained a reservation of legislative power to alter, modify, or repeal it. After the construction of defendants' road, an act was passed providing that highways might be laid out across the track of any railroad, without compensation to the corporation owning it, and requiring the railroad company to construct the crossing, under penalty for neglect. *Held*, that the act was unconstitutional in its application to this company. The power reserved in the charter did not include the right to authorize the taking of their property without compensation. *N. Y. Supreme Ct.* 1856, *Miller v. N. Y. & Erie R. R. Co.* 21 *Barb.* 513.

221. The power which the legislature reserves by declaring that every act of incorporation shall at all times be subject to amendment, alteration, or repeal, at the pleasure of the legislature, must have some limit in extreme cases. Thus, where a power is given to a corporation, upon their payment of damages caused by its exercise to third persons, and they accept the power and pay the damages, no subsequent statute can take away the property or rights which have become vested thereby. *Mass. Supreme Ct.* 1859, *Commonwealth v. Essex Co.* 13 *Gray*, 289.

222. Where a mill company were required by their charter to construct and maintain

sufficient fishways for the passage of fish up the stream, to be approved by the county officers, and they constructed such as were approved by those officers, but they proved insufficient, and the legislature subsequently granted the application of the company for an amendment to their charter, with a proviso that the company should indemnify all persons having fish rights which were injured by the dam, and the company accepted the act, and paid large sums of money for such damages,—*Held*, that this constituted a contract between the company and the State, such that the legislature could not subsequently impose upon the company the duty of constructing new fishways, even though they had by a general law reserved power to amend and repeal all charters. *Mass. Supreme Ct. 1859, Commonwealth v. Essex Co. 13 Gray, 239.*

223. It is the charter only, and the rights and liabilities of the company and its corporators as such in consequence thereof, that can be varied by an act of the legislature, and not the private contracts made between the company as one party, and its corporators as the other. And there can be no distinction in this respect between contracts to pay money for its stock and contracts to pay it for any other purpose. *Me. Supreme Ct. 1855, Oldtown &c. R. R. Co. v. Veazie, 39 Me. 571.*

224. The usual reservation in a charter of legislative power to alter, modify, or repeal the charter, does not authorize the legislature to impose pecuniary burdens upon the company of a character different from any others in the charter, such as allowing a proposed new street or highway to be laid out across their track without compensation to them, and requiring them to cause the necessary excavations, embankments, and other work to be done at their own expense. *N. Y. Supreme Ct. 1856, Miller v. New York & Erie R. R. Co. 21 Barb. 518.*

225. As to the extent to which the reserved power to alter the charter may be exercised without consent of the corporation,—see *White v. Syracuse & Utica R. R. Co. 14 Barb. (N. Y.), 559*; *Poughkeepsie & Salt Point Plank Road Co. v. Griffin, 21 Barb. 454*; *Troy & Rutland R. R. Co. v. Kerr, 17 Barb. 581*; *Hyatt v. McMahon, 25 Barb. 457.*

226. It extends to individual liability.

A member of a corporation whose charter the legislature has reserved the power to repeal or modify, holds his stock subject to such liability as may attach to him in consequence of an extension or renewal of the charter, without his application or consent. *N. Y. Ct. of Appeals, 1862, Bailey v. Hollister, 26 N. Y. 112.*

227. Where an association is formed under a general law which authorizes the members to prescribe, by their articles, the conditions of the individual liability of stockholders, a general reservation, in the law, of the power to repeal or alter the act, reserves to the legislature, by necessary construction, power to alter the articles of association in that respect. *U. S. Supreme Ct. 1861, Sherman v. Smith, 1 Black, 587.*

228. Where the charter of a mutual insurance company reserves to the legislature the right to alter it, notes given to the company are subject to this provision, and a statute declaring that if the assets of such corporation should pass into the hands of a receiver, he might make assessments upon the notes, is a legitimate exercise of the reserved power. Such reserved power may be exercised in all cases, to any extent, to carry out the original purposes of the incorporation, and to secure the due administration of justice in regard to the rights of the creditors of the corporation, and the proper disposition of its assets. *N. Y. Supreme Ct. 1857, Hyatt v. McMahon, 25 Barb. 457.*

229. New enactments imposing individual liability,—*Held*, not unconstitutional as impairing the obligation of contracts, in their application to a corporation previously chartered, where the charter provided that the legislature might at any time alter, modify, or repeal the charter, or any of its provisions. *Matter of Reciprocity Bank, 17 How. Pr. 323.*

3. Repeal.

230. General power. That a charter is held upon an implied condition that it may be repealed for abuse—see *State v. New Orleans Gas Light & Banking Co. 2 Rob. 529.*

For the power to dissolve a corporation for its abuse of its powers, or other causes, see *DISSOLUTION*; *FORFEITURE.*

231. Where a private corporation, and a municipal corporation within the limits of the territory of the private corporation, were

both created by the same act,—*Held*, that the charter of the latter might be altered or repealed by the legislature, without reference to the former. *N. J. Supreme Ct.* 1854, *City of Paterson v. Society for Manufactures &c.* 4 *Zabr.* 385.

232. Reservation of power to repeal. The power which the constitution of Delaware requires to be reserved to the legislature on every grant of a charter, to revoke the same, is not an arbitrary power, but one to be used only for cause, of which the legislature is to judge; and therefore a reservation of the power of revocation in a charter, expressed to be "on conviction of misuse or abuse of privileges," is a constitutional reservation. *Del. Superior Ct.* 1854, *Delaware R. R. Co. v. Tharp*, 5 *Harring.* 454.

233. A charter granted by the State of Delaware is not void because it does not contain an express reservation of a power to repeal. The power of the legislature to revoke corporate charters is reserved by the constitution. *Ib.*

234. A clause in a charter declaring that the corporation should possess the same privileges and authority given by law to others, subject to the rules and restrictions thereafter provided,—*Held*, not to render the charter subject to the legislative power of repeal reserved in other charters. *Pa. Com. Pl.* 1841, *Commonwealth v. United States Bank*, 2 *Ashm.* 849.

235. Construction of such reservations. Where charter provides that if the company abuse or misuse any of their privileges, the legislature may resume the rights granted, the charter is repealable after any such abuse or misuse; and a judicial trial is not necessary to establish the fact of the violation. The fact on which the right of repeal depends may be noticed by the legislature without the assistance of the judiciary. [23 *Pick.* 234; 1 *Paige*, 107.] *Iowa Supreme Ct.* 1848, *Miners' Bank of Dubuque v. United States*, 1 *Greene*, 553; *Pa. Supreme Ct.* 1856, *Erie & Northeast Railroad v. Casey*, 26 *Pa. St.* 287; *S. P. Ark. Supreme Ct.* 1851, *State v. Curran*, 7 *Eng.* 321, 356.

236. The right reserved by the legislature, in a corporation charter, to repeal it for abuse, is not affected or suspended by judicial proceedings to restrain such abuse; nor is it defeated by the discontinuance of the abuse. The right of repeal under such

a reservation can be successfully denied only where the corporators are able to show that no abuse was ever committed. *Pa. Supreme Ct.* 1856, *Erie & North-Eastern R. R. Co. v. Casey*, 26 *Pa. St.* 287.

237. The corporation cannot, in defence to a *quo warranto*, impeach the repeal on the ground that there has been no abuse or misuse of their privileges. The decision of the legislature, manifested by the act of repeal is conclusive. *Iowa Supreme Ct.* 1848, *Miner's Bank of Dubuque v. United States*, 1 *Greene*, 553.

238. Under a provision in a charter, that the legislature "may grant further powers to, or alter, limit, annul, or restrain any of the powers by this act vested in the said corporation, as shall be judged necessary to promote the best interest of the college," the legislature is confined to the enlarging, altering, annulling or restraining the powers of the corporation, and has no authority to extinguish its corporate existence, resume its property, and annihilate all its powers. *U. S. Circ. Ct. Me.* 1833, *Allen v. McKeen*, 1 *Sumn.* 276, 302.

239. Provisions contained in the charter of a railroad company, that it shall be void if not carried into effect within a time limited, and, that after twenty years, the commonwealth may, in a certain contingency, purchase the franchise of the road, do not constitute an express limitation of duration, within the Massachusetts act of 1830, c. 81 [Rev. Stat. c. 44, § 23], which reserves to the legislature power to repeal or amend all charters except such as contain an express limitation of duration. *Mass. Supreme Ct.* 1850, *Roxbury v. Boston & Providence R. R. Corporation*, 6 *Cush.* 424.

240. That such reservations do not limit or defeat judicial proceedings to dissolve the corporation,—see *Grand Gulf Railroad & Banking Co. v. State*, 10 *Smed. & M.* 428; *Eastern Archipelago Co. v. Regina*, 2 *Ell. & B.* 856; 23 *Law J. N. S. Q. B.* 82; 23 *Eng. L. & Eq.* 828.

241. What is a repeal. There is no difference in the legislative proceeding by which an act of incorporation is repealed, and that by which any other act is repealed. For, by the common law, every affirmative statute is a repeal by implication, of a precedent affirmative statute, so far as it is

contrary thereto. *Ga. Supreme Ct.* 1853, Union Branch R. R. Co. v. East Tennessee & Georgia R. R. Co. 14 *Ga.* 327.

242. If a corporation, which has forfeited its charter, accepts an act of the legislature restoring the charter on new conditions, the old charter is thereby repealed; and the corporation is estopped to deny the validity of the law to which it has thus assented. *Pa. Supreme Ct.* 1856, Erie & Northeast. R. R. Co. v. Casey, 26 *Pa. St.* 287.

243. That an act repealing the charter of a bank cannot be construed to be a repeal of the charter of the president, directors and company of the bank,—see *People v. Oakland County Bank*, 1 *Dougl. (Mich.)* 282.

244. Its effect. By N. H. Rev. Stat. ch. 146, § 26, no repeal of the charter of a corporation can take away or impair the remedy of a creditor against it for previously incurred liability, or affect a pending suit against it. *N. H. Supreme Ct.* 1859, Blake v. Portsmouth & Concord Railroad, 89 *N. H.* 485.

VI. SURRENDER.

245. The power. A corporation may at any time surrender its charter, and accept a new one with other and different provisions. *S. C. Ct. of Errors*, 1859, Attorney General v. Clergy Society, 10 *Rich. Eq.* 604.

246. In whom vested. The charter and franchises of a corporation cannot be surrendered by the officers and a portion of the members, against the will of a majority of the members. *S. C. Chancery*, 1813, Smith v. Smith, 3 *Desaus.* 557. Compare Ward v. Society of Attorneys, 1 *Colly.* 370; Kean v. Johnson, 1 *Stockt.* 401.

247. Acceptance requisite. In general a surrender of a charter cannot be effectual without an acceptance on the part of the government. *Mass. Supreme Ct.* 1834, Revere v. Boston Copper Co. 15 *Pick.* 351; *Conn. Supreme Ct.* 1828, Enfield Toll Bridge Co. v. Conn. River Co. 7 *Conn.* 28. And see *State v. Fourth N. H. Turnpike Co.* 15 *N. H.* 162; *Rex v. Osborne*, 4 *East.* 327. *Butler v. Palmer*, 1 *Salk.* 190; *Piper v. Dennis*, 13 *Mod.* 253.

248. What amounts to a surrender. That a lease by an educational corporation, made for the purpose of carrying on the school according to the charter, is not a

surrender of the charter,—see *Wesleyan University v. Troy Conference Academy*, 5 *N. Y. Surr.* (1 *Redf.*) 287.

249. That the corporate existence may continue though its possessions have been surrendered, provided the objects of its creation can be fulfilled without the possession of corporate property. Thus, a dean and chapter may surrender all their corporate possessions and still continue a corporation; for their function of advising the bishop may be performed without the possession of real property in right of the corporation. See *Dean and Chapter of Norwich Case*, 8 *Co.* 73.

250. Validity. Where a legislature authorized a corporation, its stockholders assenting, to surrender their charter to a new corporation, the latter being required to receive, in payment for subscription for stock, stock in the old company at par, and debts of the old company, certified by its officers, to an aggregate amount not exceeding a specified sum,—*Held*, that, if the debts exceeded that limit, and some who were creditors were therefore excluded, one so excluded could not maintain a bill against the new company for payment of his debts. It was competent for the legislature to authorize a surrender of the charter; and the change did not impair the obligation of the contract of any creditor, or place him in a worse position respecting his demand. *U. S. Supreme Ct.* 1840, Smith v. Chesapeake & Ohio Canal Co. 14 *Pet.* 45.

251. When may be presumed. That surrender of charter may be presumed from long neglect to use,—see *State v. Trustees of Vincennes University*, 5 *Ind.* 77.

252. Under a charter which authorizes the formation of a corporation, and appoints commissioners to open subscription for stock, and that if the required sum should not be subscribed, they might open them anew at such times as they should determine;—the subscriptions must be made openly and within a reasonable time. If after failing to obtain the required amount, the commissioners relinquish the subscriptions and repay the amount received, they cannot, after the lapse of years, organize a corporation by receiving subscriptions anew without public notice. *Conn. Supreme Ct.* 1844, *State v. Bull*, 16 *Conn.* 179.

253. It seems that having abandoned the

effort, and after the lapse of ten years, the commissioners must be deemed to have surrendered their trust and cannot resume it without further legislative authority. *Ib.*

VII. DOUBLE CHARTERS.

254. Validity. A corporation, notwithstanding its charter and the liberties thereby granted have been confirmed by parliament under the king's great seal, may be reincorporated with a charter containing altered or additional powers. *K. B. 1826, Rex v. Haythorne, 5 Barn. & C. 410; 8 Dowl. & R. 228.*

255. And a second charter will not be avoided merely because it refers to a preceding charter as valid, which in fact was void, unless it be founded on such charter. *Ib.*

256. Acceptance. A corporation already in being, and acting either under a former charter or prescriptive usage, which accepts a new charter before the expiration of the old, may still act under the former, or partly under the one and partly under the other. In this respect there is a vast difference between an original charter granted to a new corporation, and a new charter granted to an old corporation. In the former case, the charter must be accepted *in toto*, or not at all; but in the latter the corporation may act partly under both the new and the old charters. [3 Burr. 1656; Ang. & A. on Corp. 650.] *Tenn. Supreme Ct. 1866, Woodfork v. Union Bank, 3 Coldw. 488.*

257. That a corporation is presumed to act under the old charter, unless the contrary appear—see *Rex v. Mayor of Bridgewater, 11 Mod. 291.*

258. That a corporation accepting a new charter may use it as a grant or confirmation,—see *Rex v. Larwood, 1 Ld. Raym. 29; Salk. 167.*

259. That where a new charter is given which professes to confirm a former one, in the provisions of which it nevertheless introduces variations, the having acted according to the new provisions is evidence that the corporation have accepted the new charter not as a confirmation of the old one, but as a fresh grant,—see *Ib. Rex v. Larwood, Salk. 167; 1 Ld. Raym. 29.*

260. Acceptance of new charter not necessarily a surrender of old one. Where the

citizens of a town already incorporated procured a new incorporation which did not expressly repeal the former, but set forth different boundaries,—*Held*, that there was no surrender of the original charter, nor dissolution of the corporation, but merely an amendment, and that the corporation were not thereafter precluded from collecting a tax previously assessed. In order to make a surrender of a corporate charter effectual, it is necessary that it be accepted by the government, and that a record thereof be made. *Tenn. Supreme Ct. 1851, Norris v. Mayor &c. of Smithville, 1 Swan, 164.*

261. Certain parties incorporated themselves by a recorded agreement or declaration under a statute authorizing persons to prosecute the business of manufacturing with corporate powers. Afterwards the legislature gave them a charter, declaring, *inter alia*, that they should possess and enjoy all the franchises then held by them,—*Held*, that these two acts, so far as they are consistent, were their charter, as the acceptance of the new act did not destroy, but only modified the old organization. *Ga. Supreme Ct. 1858, Johnson v. Crawley, 25 Ga. 316.*

CHEMICAL COMPANIES.

MANUFACTURING COMPANIES.

CHURCHES.

RELIGIOUS CORPORATIONS.

CLUBS.

1. English clubs not "companies" within the joint stock companies' winding up acts,—see *Re St. James Club, 16 Jur. 1075; 13 Eng. L. & Eq. 589.*

2. Rules. Every member of a club must be presumed to be acquainted with its rules. See *Raggett v. Musgrave, 2 Carr. & P. 556.*

3. Suits. That suits against the member of a club for arrears of their subscriptions are properly brought by the club-house master,—see *Raggett v. Bishop, 2 Carr. & P. 843.*

4. A managing committee of a club who are in possession of its assets for the purpose of winding up the affairs of the club, may be sued by one member, "on behalf," &c. for an account of the moneys received, and their application, and to bring back the balance, if any, without making the other members parties, and without seeking a general winding up of the concern. *Chancery*, 1847, *Richardson v. Hastings*, 11 *Beav.* 17; 16 *Law J. N. S. Ch.* 322.

5. Liability of members. That every member of a club who either concurs in, or subsequently assents to, an order for goods given by one of the members, is liable therefor, unless it appears clearly that the tradesman meant to give credit to that member only; and making him a debtor in the tradesman's books, and sending in the bill to him, does not sufficiently show such intention,—see *Delauney v. Strickland*, 2 *Stark.* 416.

6. That members of a club, merely as such, are not liable for debts incurred by a committee for work done or goods supplied for the use of the club; unless the articles give the committee authority to pledge the personal credit of the members,—see *Fleming v. Hector*, 2 *Mees. & W.* 172; 2 *Gale*, 180.

7. The members of a club, at a general meeting, authorized the members of the committee of management to borrow money on their own responsibility, but with the guarantee of the society for its repayment. The money was borrowed and placed to the account of the committee, one of whom drew checks upon the bank where it was deposited, and otherwise so conducted himself as to show his knowledge of the whole transaction. *Held*, that he was liable to an action for contribution by another member of the committee from whom the lender had received the whole sum. *C. P.* 1853, *Mount-cashell v. Barber*, 24 *Eng. L. & Eq.* 862. 28 *Law J. N. S.* 43.

8. A club was formed, by the regulations of which the members paid entrance-money and an annual subscription, and cash was paid for provisions supplied to the house. The funds of the club were deposited at the banker's, and a committee was appointed to manage the affairs of the club, and to administer the funds; but no member of the committee had authority to draw cheques, except three who were chosen for that pur-

pose, and whose signatures were countersigned by the secretary. *Held*, in an action brought against two of the committee by a tradesman, who had supplied wine on credit ordered by a member of the committee for the use of the club, that the tradesman was not entitled to recover, without proving either that the defendants were privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club. *Exch.* 1841, *Todd v. Emly*, 7 *Mees. & W.* 427.

9. In an action against the defendants to recover the price of wine furnished to a subscription club, of the committee of which the defendants were members, it was proved that the wine was ordered by the house-steward, who stated that he had authority to do so from the members of the committee. It was not shown that the defendants had either personally interfered in ordering the wine, or been present at any meeting of the committee when the authority to order the wine was given; but merely that they were members of the general body of the committee. *Held*, that, under these circumstances, the question for the jury was not, whether the defendants, by their course of dealing, had held themselves out as personally responsible to the plaintiffs, but whether they had individually authorized the making of the contract in the ordering of the wine. *Exch.* 1841, *Todd v. Emly*, 8 *Mees. & W.* 505.

10. When members of clubs are individually liable,—see also, *Wood v. Finch*, 2 *Fost. & F.* 447; *Cockerell v. Aucompte*, 40 *Eng. L. & Eq.* 279.

As to Individual liability of stockholders in corporations generally,—see INDIVIDUAL LIABILITY.

11. New York general act. Clubs for social and recreative purposes. Five or more persons of full age, citizens of the United States, a majority of whom shall be also citizens of this State, who shall desire to associate themselves for social, temperance, benefit, gymnastic, æsthetic, musical, yachting, hunting, fishing, bathing, or lawful sporting purposes, may organize as a corporation, by filing a certificate with the written consent and approbation of one of the justices of the Supreme Court of the district. Powers of such societies defined. *N. Y. Laws of* 1865, 692, ch. 368, as amended by *Id.* 1370, ch. 668.

12. Club to relieve against draft. A club formed for the purpose of relieving its members from draft, provided that the sum of \$300 should be paid to every member who

should volunteer or put in a substitute. The funds of the association were paid by its treasurer to the defendants who were not members, upon the agreement that they would fill the quota of the whole township. The plaintiff, a member of the club, was drafted, and put in a substitute. *Held*, that the fund passed to the defendants, covered with a trust to pay it according to the terms of the subscription; that they stood in the position of the club; and that the plaintiff was entitled to his share of the fund. *Pa. Supreme Ct.* 1867, *Foley v. Tovey*, 54 *Pa. St.* 190.

COLLEGES.

1. Are private corporations. That colleges are, in general, private and not public corporations,—see *Dartmouth College v. Woodward*, 4 *Wheat.* 518; *Allen v. McKeen*, 1 *Sumn.* 276. Compare *Bracken v. William & Mary College*, 1 *Call*, 161; 3 *Call*, 578.

2. Incorporation under general act. That in an application for an order to incorporate a college under the California act of 1850, providing that the proposed college shall have an endowment of a specified sum, it is necessary that the subscriptions of real estate should define the boundaries or situation of the lands proposed to be given, otherwise the application will be denied,—see *Matter of California College*, 1 *Cal.* 329.

3. That statutes in favor of colleges should be liberally construed,—see *Pitts v. James*, *Hob.* 122.

4. The statute of Massachusetts, (Stat. of 1819, ch. 87,) which forbids innkeepers, &c. to give credit to any undergraduate of a college, without consent of the president thereof, or of such other officer as may be authorized by the government of the college, or in violation of any rules and regulations of the college, is constitutional. But no penalty is incurred by an innkeeper, &c. under the statute, unless some rules have been made by the college on the subject of giving credit, nor unless some officer has been authorized to give or withhold his consent; and in action for the penalty imposed by the statute, a declaration is fatally defective, which omits to allege these facts. *Mass. Supreme Ct.* 1822, *Soper v. Harvard College*, 1 *Pick.* 177

5. Scholarships. That a college may lawfully stipulate, in consideration of a subscription to its endowment, to give one free scholarship forever to the subscriber, his heirs or assigns, in another incorporated seminary of learning. *N. Y. Ct. of Appeals*, 1868, *Genesee College v. Dodge*, 26 *N. Y.* 218.

6. Trust. How far a college is held (in England) accountable, in equity, for its administration of trust funds,—see *Attorney General v. Baliol College*, 9 *Mod.* 407; *Attorney General v. Talbot*, 1 *Ves. sr.* 78; *Attorney General v. Cairns College*, 2 *Keen*, 150; *Attorney General v. Mayor &c. of Norwich*, 3 *Mylne & K.* 651.

7. Before equity will give relief from abuses of management of a school it must be satisfied that there is a trust in the college in the sense that the words are understood in equity, otherwise the remedy is through the visitor. *Rolls Ct.* 1847, *Attorney General v. Magdalen College, Oxford*, 10 *Beav.* 402.

8. National endowment of agricultural colleges. "That there be granted to the several States, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of 1860: *Provided*, That no mineral lands shall be selected or purchased under the provisions of this act." Act of Congress of July 2, 1862, § 1, 12 *U. S. Stat. at L.* 503.

9. Survey, apportionment, location &c. of such lands, regulated. *Id.* § 2.

10. All expenses in management, &c., of said lands and their proceeds, must be paid from treasuries of States, respectively. *Id.* § 3.

11. "All moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section 5 of this act) and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial

classes in the several pursuits and professions in life." *Id.* § 4.

12. The grant of land and land-scrip hereby authorized shall be made on the following conditions, to which the previous assent of the several States shall be signified by legislative acts:

1. If the fund invested be diminished or lost, it shall be replaced by the State to which it belongs; except that a sum not exceeding ten per cent. upon the amount received by any State may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective legislatures of said States.

2. No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretense whatever, to the purchase, erection, preservation or repair of any building or buildings.

3. Any State which may take and claim the benefit of the provisions of this act, shall provide within five years, at least not less than one college, as described in section 4 of this act, or the grant to such State shall cease, and said State shall be bound to pay the United States the amount received of any lands previously sold; and the title to purchasers under the State shall be valid.

4. An annual report shall be made regarding the progress of each college; one copy shall be transmitted to all the other colleges endowed under the provisions of this act, and one copy to the secretary of the interior.

5. When lands shall be selected from those which have been raised to double the minimum price, in consequence of railroad grants, they shall be computed to the States at the maximum price, and the number of acres proportionately diminished.

6. No State in rebellion or insurrection shall be entitled to the benefit of this act.

7. No State shall be entitled to the benefits of this act, unless it shall express its acceptance thereof by its legislature within two years from the date of its approval by the president.* *Id.* § 5.

13. **Donation.** That a donation of lands by the United States to a board of trustees of a college to be established in a particular State, becomes vested in such board when established, and the State cannot afterwards do any act whereby the trust may be defeated,—see *Vincennes University v. Indiana*, 14 *How. (U. S.)* 268.

For the law protecting Gifts of property to support eleemosynary corporations, including colleges,—see **BEQUESTS**; **DEVISES**; **TRUSTS**.

For the powers and duties of Visitors of colleges and other eleemosynary corporations,—see **VISITATION**.

* By act of Congress of Apr. 14, 1864 (18 *U. S. Stat. at L.* 47), this time was extended to two years from date of this latter act; and the benefit of both acts was extended to West Virginia.

For rules applicable to other Educational corporations,—see **ACADEMIES**; **SCHOOLS**; **SEMINARIES**.

COMMITTEES.

1. **Powers of majority.** In general, if a number of persons are appointed by a corporation for a particular purpose, all must act; and no contract can be made by a portion of them, although a majority, which will bind the corporation. *N. Y. Supreme Ct.* 1857, *Corn Exchange Bank v. Cumberland Coal Co.* 1 *Bosc.* 486.

2. In the absence of any by-law of a municipal corporation to the contrary, a majority of a committee, to whom is referred a project, constitute a quorum and are competent to act on the subject-matter. *N. J. Supreme Ct.* 1859, *State v. Jersey City*, 3 *Dutch.* 493. And see, to nearly same effect, *Jenkins v. Union School District*, 89 *Me.* 220.

3. A sale of land in the city of San Francisco by a portion of the board of commissioners of the funded debt, does not pass a legal title on which ejectment can be maintained. A majority may control, yet all must meet and consult, or have notice of meeting, that they may attend if they desire. A general resolution passed by the whole board, a year before, that they would sell all the city property to pay its debts, will not give validity to the sale of a particular lot subsequently made, in pursuance of a resolution adopted by the board, when two of the five were absent. *Cal. Supreme Ct.* 1856, *Leonard v. Darlington*, 6 *Cal.* 123.

As to the power of a Portion of a committee or other body, acting in the name of all, to contract for, or otherwise bind the corporation,—see **CONTRACTS**; **MAJORITY**; **OFFICERS**; **QUORUM**; **POWERS**.

4. A committee appointed to rebuild a bridge, have implied power to bind the town by the necessary contracts for building, although also authorized by vote to borrow money for the purpose of rebuilding. *Mass. Supreme Ct.* 1839, *Simonds v. Heard*, 28 *Pick.* 120. And see *Damon v. Granby*, 3 *Id.* 345. But compare *Kupfer v. South Parish in Augusta*, 12 *Mass.* 185; *Hayward v. Pilgrim Society*, 21 *Pick.* 270.

5. A board of bank directors may delegate authority to a committee of its mem-

bers to alienate or mortgage real estate; and such authority to convey real estate necessarily implies authority to execute proper instruments for that purpose, and to affix the corporate seal thereto. *Mass. Supreme Ct.* 1840, *Burrill v. Nahant Bank*, 12 *Met.* 163.

6. The trustees of a university being authorized, by special act, to change the location of the institution, provided they should file with the secretary of state a resolution by a majority of all the members of the board, electing to make such change,—the board appointed a committee to examine legal difficulties interposed, and hear arguments; and provided that if the committee should report that the difficulties were not sufficient to prevent a removal, the resolution of the board should be absolute, and the officers of the board should be thereupon authorized to file in the secretary of state's office, a resolution in a prescribed form, purporting to be the election of the board. *Held*, that even if this were to be deemed an authorized delegation of power, the committee had no authority to file the resolution, until all the members of the committee had met, examined the legal difficulties, heard arguments upon them, and reported that they were insufficient. *N. Y. Supreme Ct. Sp. T.* 1850, *Hascall v. Madison University*, 8 *Barb.* 174.

7. The report of a committee of an ecclesiastical society, not acted upon by the society, is not evidence against the society; and if acted upon, it could not be shown by parol testimony. [3 *Day*, 493.] *Conn. Supreme Ct.* 1850, *Southington Ecclesiastical Society v. Gridley*, 20 *Conn.* 200.

8. Ratification of acts of committee by corporation will cure any defects in original appointment. *N. Y. Superior Ct. Sp. T.* 1867, *Madison Av. Baptist Ch. v. Baptist Ch. in Oliver St.* 2 *Abb. Pr. N. S.* 254; 8 *C.* 32 *How. Pr.* 335.

9. A member of a committee appointed by a town to procure subscriptions for the stock of a railroad company not an agent of the corporation,—see *Beloit and Madison R. R. Co. v. Palmer*, 19 *Wis.* 574.

That the mere fact of a person consenting to be nominated a member of a Provisional committee does not authorize the committee to pledge his credit,—see *INDIVIDUAL LIABILITY*.

10. A number of persons associated themselves together, in pursuance of a statute, for the purpose of erecting a meeting-house, and appointed three of their number a building committee, to superintend the erection of the house. *Held*, that the mere acceptance of the appointment did not amount to a personal undertaking, on the part of the committee, to build the house, but that the only direct effect was to constitute the members of the committee agents and representatives of the society, to act upon joint consideration and advice, with power to make all contracts, and authorize all expenditures, which the purposes of the agency required; that they might as effectually bind the society by a contract concluded with one of their own number, as with a stranger; and that one of their own number so contracted with, might recover, by an action of book account, brought in his individual name against the society, any balance that might be due to him for services and expenditures. *Vt. Supreme Ct.* 1846, *Sawyer v. Methodist Epis. Soc. in Royalton*, 18 *Vt.* 405.

COMPENSATION.

[As the right conferred upon a corporation to take private property for corporate use is a delegation to the corporation of the right of eminent domain originally inhering in the sovereign power, that right is treated under EMINENT DOMAIN, where also is explained the condition or obligation which American constitutional law imposes, of making compensation for property thus taken. In the present chapter we present the law applicable to corporations generally, governing the right to claim compensation for property required for corporate uses, the principles by which such compensation is measured, the general nature of the proceedings usually provided for assessing it and enforcing payment, how far these proceedings are exclusive of other remedies, and how far they are affected by special agreements for compensation made between the corporation and the owner. But so far as rules on any of these subjects appear to be peculiar to one class of corporations—*e. g.* RAILROAD COMPANIES—they are under the title of that class. And rules governing details of procedure to assess or collect compensation, as they are for the most part prescribed by statute, and are of local force only, are not embraced.]

I. THE RIGHT TO CLAIM IT.

1. *For what property or injuries compensation may be claimed.*
2. *Different interests in the same property.*

II. THE MEASURE OF DAMAGES.

III. ASSESSMENT AND RECOVERY.

1. *General nature of proceedings.*

2. *The assessment or appraisal.*

3. *How it may be reviewed.*

4. *Payment.*

IV. COUNTER-ALLOWANCE FOR BENEFIT.

V. REMEDY BY ACTION.

VI. WHEN THE TITLE VESTS.

VII. EFFECT OF SPECIAL CONTRACTS.

I. THE RIGHT TO CLAIM IT.

1. *For what Property or Injuries Compensation may be Claimed.*

1. What is deemed "property." Provisions of a railroad charter prescribing a general mode for assessing compensation for land taken by the company, may be applied to the interest of a turnpike company in land covered by their road, and in the road itself, as being a species of tangible property. *Vt. Supreme Ct. 1849, White River Turnpike Co. v. Vermont Central R. R. Co. 21 Vt. 590.*

2. Improvements. A market company which required lands held by a tenant under a fourteen years' lease, suffered the lease to expire, and then turned out the tenant. The lease contained a provision that at the end of the term the tenant should yield up the premises, with all fixtures and improvements. *Held*, that the tenant was entitled to compensation for good-will and the chance of beneficial renewal, but not for improvements; but that these might be considered by the jury in estimating the chance of beneficial renewal. *K. B. 1833, Rex v. Hungerford Market Co. 4 Barn. & Ad. 596.* And see *Regina v. Hungerford Market Co. 1 Perr. & D. 492; 9 Ad. & E. 463; Regina v. London & Southampton Railway Co. 2 Perr. & D. 243; 10 Ad. & E. 8; 1 Eng. Railw. Cas. 717; also infra, 16.*

3. So long as the extent of the corporate work and its execution rest in the power of the corporation, so that they may discontinue it, the owners of the ground are not bound to desist from expending money on lands proposed to be taken; and they are entitled to be paid for the property when finally taken, at its value at the time of the commissioners' report, including improvements so made meantime. *So held* in the case of property taken by a city for a local improvement. *N. Y. Supreme Ct. 1854, Matter of Wall Street, 17 Barb. 617.*

4. What constitutes damage. Under a statutory provision, that railroad corporations shall be liable to pay all damages occasioned by laying out and making and maintaining their roads, or by taking any land or materials, a party who sustains an actual and real damage, capable of being pointed out, described, and appreciated, may recover compensation therefor. Thus, where the water of a well on an estate adjoining, but not crossed by a railroad, was drawn off in consequence of the excavation made for the road, and the well thereby rendered dry and useless,—*Held*, that the owner of the estate could recover damages therefor in the same manner as for land &c. taken for the purposes of the road. *Mass. Supreme Ct. 1849, Parker v. Boston & Maine Railroad, 3 Cush. 107.*

5. The constitutional provision requiring just compensation to be made, or adequate security to be given therefor, before private property can be taken for public use, contemplates only an actual appropriation. Matters of annoyance, indirect and consequential injuries to property, and acts tending to depreciate the value, but which do not amount to a real appropriation, are outside of this provision. Therefore a railroad company, when empowered to take land for its use, is not responsible for indirect or consequential injuries, unless such liability is imposed by charter. *Pa. Supreme Ct. 1860, Watson v. Pittsburgh & Connellsville R. R. Co. 37 Pa. St. 469.*

6. One whose lands fronting on a public navigable river are taken for the construction of an aqueduct, cannot claim damages beyond the value of the land taken, on the ground that the contemplated aqueduct will obstruct the navigation of that river. *N. Y. V. Chan. Ct. 1839, Matter of the Water Commissioners, 8 Edw. 290.*

7. A verdict of a jury appointed to estimate damages for land taken by a company can only embrace injuries caused by acts of the company which are authorized by their charter. *Ms. Supreme Ct. 1863, Whitehouse v. Androscoggin R. R. Co. 52 Ms. 208.*

8. Under a statute directing the appointment of commissioners "to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken for the purposes of the company," and "to ascertain

and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the real estate appraised by them"—the office of the commissioners is to determine the compensation to be made to the owner for the land "proposed to be taken," and to be "appraised by them," and not the damages that will be occasioned by the construction of the proposed works upon his premises. It is error to consider in such a case the damage which would result to a mill on other land of the owner. *N. Y. Supreme Ct. Sp. T. 1853, Canandaigua & N. F. R. Co. v. Payne*, 16 *Barb.* 273. To nearly same effect, 1852, *Matter of Hamilton Avenue*, 14 *Barb.* 405.

9. Under such a statute, the commissioners should award damages for the value of the land taken, and the damages to the owner's adjoining land produced by the taking. They are to consider how the taking of the land, but not the use of it in any particular mode, will affect the value. *N. Y. Supreme Ct. Sp. T. 1852, Albany Northern R. R. Co. v. Lansing*, 16 *Barb.* 68.

10. A company which, being engaged in the construction of a public work, is authorized by charter to enter upon the lands adjoining the work, and take materials therefrom, is liable to landowners for materials taken by contractors in the employ of the company, under the provisions of the charter, and applied to the works to be constructed. *Ill. Supreme Ct. 1853, Hinde v. Wabash Navigation Co.* 15 *Ill.* 72.

As to the Right of the State to confer upon a corporation authority to take private property for the corporate use; as to the necessity of Providing for compensation; as to What property may be taken, or must be paid for; and as to What constitutes a "taking," see EMINENT DOMAIN.

For many Examples of the particular application of the general rules stated in this chapter to cases of lands taken by the various kinds of corporations, see their titles—especially AQUEDUCT COMPANIES; CANAL COMPANIES; DOCK COMPANIES; FERRY COMPANIES; MINING COMPANIES; RAILROAD COMPANIES; TELEGRAPH COMPANIES; TURNPIKE COMPANIES.

2. Different Interests in the same Property.

11. In general. Under a statute provid-

ing for a remedy for damages sustained by the owners of land taken by a corporation, all owners of titles in or growing out of the land, whose rights are capable of actual privation by taking, may have compensation. *Pa. Supreme Ct. 1867, Philadelphia & R. R. Co. v. Williams*, 54 *Pa. St.* 103.

12. The term "owner" as used in such a statute, by railway companies, includes every person having any title to or interest in the land, capable of being injured by the construction of the road; and extends to the interest of a lessee or termor.* *Md. Ct. of Appeals, 1856, Baltimore & Ohio R. R. Co. v. Thompson*, 10 *Md.* 76.

13. Landlord and tenant. Lessees of land for years with covenant for renewal, have such an interest in the land as will bring them within the jurisdiction of a court authorized to fix the compensation a railroad shall pay to "owners." *Pa. Supreme Ct. 1856, North Pennsylvania R. R. Co. v. Davis*, 26 *Pa. St.* 238.

14. The interest of a lessee is as potential in the eye of the law, as that of the owner of the fee, though practically of less value, and cannot be affected by a subsequent agreement between his lessor and the company made without his consent. In such case the compensation must be apportioned between the parties; and the lessor and lessee should each receive his separate share of the damages. *Md. Ct. of Appeals, 1856, Baltimore & Ohio R. R. Co. v. Thompson*, 10 *Md.* 76.

15. The lessor and lessee are each entitled to recover compensation for the damage sustained by them respectively. *Mass. Supreme Ct. 1834, Parks v. City of Boston*, 15 *Pick.* 198. Compare *Matter of Water Commissioners*, 4 *Edw.* 545. See also cases cited under RAILROAD COMPANIES.

16. A lessee, who has expended large sums upon the land demised, under a reasonable expectation of a renewal of his lease, is not

* For similar construction of such statutes, see *Colcough v. Nashville & C. R. R. Co.* 2 *Head*, 171; *Lister v. Lobley*, 2 *Har. & W.* 122; *Milley v. Southeastern R. R. Co.* 1 *Macn. & G.* 53; 1 *Hall & T.* 56; 6 *Eng. Railw. Cas.* 108; 18 *L. J. N. S. CA.* 301; 13 *Jur.* 241. Compare to the contrary, *Ross v. Elizabethtown & Somerville R. R. Co.* 1 *Spen.* 230; *Canal Bank v. Mayor of Albany*, 9 *Wend.* 244.

That the presumption is, if the jury assess compensation to one person, it is only for his interest in the premises,—see *Rex v. Nottingham Old Waterworks*, 6 *Ad. & E.* 355.

That money paid into court for land taken by a railroad company is to be divided as the land itself should have been,—see *Ross v. Adams*, 4 *Dutch.* 160.

entitled to compensation in respect of such expectancy, where the land is taken from him by an incorporated company, under a statute directing compensation to be paid to the owners and occupiers of land through, under, in or upon which the work thereby authorized should be made, for the value of such land, and also for the damages sustained by them in making such works. *K. B.* 1836, *Rex v. Liverpool & Manchester Railway Co.* 4 *Ad. & Ell.* 650; 1 *Har. & W.* 689; 6 *Nev. & M.* 186. Compare *supra*, 2.

17. That the owner of a ground-rent is not affected by proceedings of a railroad company against his tenants, to take and occupy the ground for the purposes of their road; the landlord and tenant having distinct estates,—see *Voegtly v. Pittsburgh & C. R. R. Co.* 2 *Grant's Cas.* 243.

18. A court authorized to fix the compensation to be paid by a railroad for "lands and materials," awarded to lessees, holding with a covenant of renewal, "\$4,000 including the damages arising out of the refusal by the company to renew." *Held*, that although there was no authority to assess damages for a breach of covenant, yet the decree was good, as this was, in fact, compensation for depriving the lessees of an interest they held in the land. *Pa. Supreme Ct.* 1856, *North Pennsylvania R. R. Co. v. Davis*, 26 *Pa. St.* 238.

19. Vendor and purchaser. Under a charter providing that he who is the owner of land when the road is finished, shall apply for assessment, the right to compensation belongs to the owner at the time when the road is finished, and not to his subsequent vendee; and the words "claiming under him" in such a statute, do not comprehend vendees. *S. C. Ct. of Appeals*, 1857, *Lewis v. Wilmington & Manchester R. R.* 11 *Rich. (Law)* 91.

20. Mortgagor and mortgagee. Whether a mortgagee is entitled to an assessment of damages, as between him and the mortgagor,—see *Breed v. Eastern R. R. Co.* 5 *Gray*, 470, note; *Meacham v. Fitchburg R. R. Co.* 4 *Cush.* 291; *Stewart v. Raymond R. R. Co.* 7 *Smed. & M.* 568; *Matter of John & Cherry Streets*, 19 *Wend.* 659.

21. Tenants in common. That one tenant in common cannot proceed in his own name to have the damages done, by a railway, to the common land, assessed, even where he has authority from his co-tenant to

do so,—see *Railroad Co. v. Bucher*, 7 *Watts*, 33.

22. Tenant for life and remainder man. The compensation paid by a railroad company for damages assessed against them on the condemnation of land for the construction of the road belongs to the tenant for life and remainder man in proportion to the period for which each suffers the incumbrance. *N. C. Supreme Ct.* 1860, *Joyner v. Conyers*, 6 *Jones Eq.* 78. Compare *Midland Counties' Railway Co. v. Oswin*, 8 *Eng. Railw. Cas.* 497; *Danforth v. Smith*, 23 *Vt.* 247.

23. A tenant for life may have a proceeding for damages done to her estate by the construction of a railroad, without joining the remainder man. *Pa. Supreme Ct.* 1850, *Railroad v. Boyer*, 13 *Pa. St.* 497.

24. Heir and administrator. Where land of a deceased person is taken for a railway, the heir, and not the administrator, is entitled to the damages for such taking, and to prosecute for the recovery thereof, although the administrator had previously represented the estate insolvent, and afterwards obtained a license to sell the real estate for the payment of debts. *Mass. Supreme Ct.* 1849, *Boynton v. Peterborough and Shirley R. R. Co.* 4 *Cush.* 467. Compare *Exp. Hawkins*, 3 *Eng. Railw. Cas.* 505, note.

25. Devisee and executor. That the devisee is entitled to claim consequential damages and not the executor,—see *Rex v. Commissioners of Compensation, &c.* 12 *East*, 477.

26. Dower. Where a widow is clearly entitled to dower in land taken, the commissioners should assess the value of her life estate and award it as damages to her. *N. Y. Supreme Ct.* 1839, *Matter of William and Anthony Streets*, 19 *Wend.* 678.

27. The wife of the owner of the fee of land taken for public use, is not within the provisions of a statute requiring compensation to be assessed to the persons interested in or entitled to the land. Her inchoate right, or possibility of dower, is divested by a regular taking from, and compensation to, the husband in his lifetime. *N. Y. Ct. of Appeals*, 1853, *Moore v. Mayor &c. of New York*, 8 *N. Y. (4 Seld.)* 110.

28. Trespasser. Damages assessed for the value of land taken for a railroad, though a trespasser was in possession at the time and claimed the damages, should be paid to the

true owner. *Cal. Supreme Ct.* 1856, *Rooney v. Sacramento Valley R. R. Co.* 6 *Cal.* 688.

29. The State. That legislative permission to construct a railroad over a certain route does not prevent the State from claiming compensation for lands belonging to the State and taken for the purposes of the road,—see *Commonwealth v. Boston & Maine Railroad*, 3 *Cush.* 25.

II. THE MEASURE OF DAMAGES.

30. What damages may be allowed. An appraisalment of lands taken by an incorporated company, should include prospective damages, resulting naturally and directly from the works of the company for all future time. *N. J. Chancery*, 1860, *Trenton Water Power Co. v. Chambers*, 2 *Beasl.* 199.

31. Railroad commissioners, and the jury, on appeal, when appraising damages which may be sustained by landowners, over whose lands a railroad may be constructed, should take into consideration and appraise all damages direct and consequential, present and prospective, certain and contingent, which may be judged by them fairly to result to the landowner, from the construction of a railroad in a suitable and prudent manner. For all such damages as result from an improper and unsuitable construction, the corporation must remain liable. *N. H. Superior Ct.* 1851, *Dearborn v. Boston & Montreal R. R. Co.* 4 *Fost.* 179.

S. P. as to lands taken for a canal company, *N. J. Supreme Ct.* 1843, *Van Schoick v. Delaware & Raritan Canal Co.* 1 *Spen.* 249.

32. Under the statutes of Pennsylvania, a person on whose land a turnpike or plank road is located may recover for all his land appropriated, as well as for all his improvements destroyed, deducting therefrom the benefits and advantages derived from the road and the additional value given by it to his property. *Pa. Supreme Ct.* 1852, *Plank Road Co. v. Thomas*, 20 *Pa. St.* 91.

33. The market value of land taken by a railroad company should be the measure of the damages assessed; to which should be added all actual damages which must be produced by the manner in which the road passes through the property, and affects the improvements. Contingent future disadvantages, though they may be set off against

advantages, should not be taken into consideration as an element of damages. *Pa. Supreme Ct.* 1859, *Searle v. Lackawanna & Bloomsburg R. R. Co.* 33 *Pa. St.* 57.

See the topic of Counter-allowance for benefit, in favor of the company, by way of offset to the claim for damages, treated *infra*, IV.

34. Consequential damages. That, in general, appraisers are not to allow speculative, or consequential damages, but are confined to an estimate of the value of the land taken,—see *Meacham v. Fitchburg Railway*, 4 *Cush.* 291; *Upton v. South Reading Branch Railway Co.* 8 *Cush.* 600; *Greenville & C. Railway Co. v. Partlow*, 5 *Rich.* 528; *White v. Charlottesville & S. C. Railway Co.* 6 *Rich.* 47; *A. & S. Railway Co. v. Carpenter*, 14 *Ill.* 190; *Symonds v. City of Cincinnati*, 14 *Ohio*, 147; *Brown v. Cincinnati*, *Id.* 541; *McIntire v. State*, 5 *Blackf.* 384; *State v. Digby*, *Id.* 548; *James River & Kanawha Co. v. Turner*, 9 *Leigh*, 313; *Schuylkill Co. v. Thoburn*, 7 *Serg. & R.* 411; *Henry v. Pittsburg & Alleghany Bridge Co.* 8 *Watts & S.* 85.

35. In general, railroad companies are not liable for necessary consequential damages accruing to premises not taken by them, from the prudent construction and operation of their roads. But this principle does not carry with it an exemption from liability for diverting a stream of water from its natural course, to the injury of a neighboring proprietor, especially where such damage is occasioned by a negligent construction of the road. *Vt. Supreme Ct.* 1852, *Hatch v. Vermont Central R. R. Co.* 25 *Vt.* 49.

36. But consequential damages may be claimed and assessed against a corporation if their organic law require it. Thus, where it was provided in the charter of a bridge company that referees should assess the damages, "if any," which the owner of a contiguous ferry should sustain by the erection of the bridge,—*Held*, that the words of the act required the payment of damages for all injurious consequences, proximate and remote, to the owner of the ferry. *Pa. Supreme Ct.* 1861, *Buckwalter v. Black Rock Bridge Co.* 38 *Pa. St.* 281.

37. Where consequential damages to existing works, by the erection of new ones, are required to be compensated, the period for estimation is limited to the yearly value of the works antecedent to the passing of

the act. *K. B.* 1807, *Manning v. Commissioner of Compensation &c.* 9 *East*, 165.

38. That future damages expected to accrue to landowners cannot be estimated properly until after the completion of the works,—see *Lee v. Milner*, 2 *Mees. & W.* 824; *Mur. & H.* 275; 2 *You. & C.* 611.

39. The rule for ascertaining damages. The damages should be estimated by taking the marketable value of the premises affected by the improvement, before the company enter, and from that deducting their value, under all the circumstances of the case, after the improvement is completed. *Iowa Supreme Ct.* 1855, *Henry v. Dubuque & Pacific R. R. Co.* 2 *Clarke*, 288. *S. P. Pa. Supreme Ct.* 1848, *Pennsylvania Railroad v. Heister*, 8 *Pa. St.* 445; 2 *Am. Railw. Cas.* 337.

40. The commissioners are to determine the compensation to be made to the owner for the land “proposed to be taken” and “appraised by them,” and not the damages that will be occasioned by the construction and operation of the company’s works over his premises. The true and only inquiry is, what is the whole property affected worth, now, in the market, and what will it be worth after the improvement is made. *N. Y. Supreme Ct.* 1852, *Troy & Boston R. R. Co. v. Lee*, 13 *Barb.* 169; *Sp. T.* 1853, *Candaigua & Niagara Falls R. R. Co. v. Payne*, 16 *Id.* 273.

41. The true measure of compensation for damages occasioned by the construction of a railroad through an individual’s land is the difference between what the whole property would have sold for unaffected by the railroad, and what it would have sold for as affected by it. [7 *Serg. & R.* 411.] *Pa. Supreme Ct.* 1860, *Watson v. Pittsburg & Connellsville R. R. Co.* 37 *Pa. St.* 469.

42. How the value is to be ascertained. The measure of damages to a landowner, caused by the construction of a railroad through his land, is the difference between what the property would have sold for before and after the road was built; but the fact, that others have been brought, by the construction and extension of the road, into competition with the plaintiff, cannot be construed as a ground of damage. *Pa. Supreme Ct.* 1864, *Harvey v. Lackawanna & Bloomsburg R. R. Co.* 47 *Pa. St.* 428.

43. The measure of damages for building a railroad through an individual’s

property, is the difference between the value of the land before and after the completion of the road. In estimating the disadvantages resulting from such road, consequential or speculative damages are to be rejected; and in estimating the advantages, such only as are special and peculiar to the property in question are to be considered, and not such as are common to the public. *Pa. Supreme Ct.* 1865, *Hornstein v. Atlantic & Great Western R. R. Co.* 51 *Pa. St.* 87.

44. The value of the land taken for a railroad means its actual value independent of the location of the road; and the “disadvantages” to be considered in assessing damages for such appropriation are the injuries to the part which is left, arising from the taking. *Mo. Supreme Ct.* 1857, *Pacific Railroad v. Chrystal*, 25 *Mo.* 544.

45. The object of an appraisal of damages for the taking of land by a railroad company, by commissioners, is to make the owner of the land good, by rendering an equivalent in money for the loss he sustains in the value of his property, by being deprived of a portion of it. Compensation includes, not only the value of the portion taken, but also the diminution of the value of that from which it is severed. *N. Y. Supreme Ct.* 1851, *Rochester & Syracuse R. R. Co. v. Budlong*, 6 *How. Pr.* 467.

46. In estimating the value of land taken for the purposes of a railroad, the present value of the lands, not at a forced sale, but at a sale which a prudent holder would make, if he had the power of election as to time and terms, is to govern. It is also proper to regard the location of the land, and the probabilities which a prudent man would entertain of the increased value of the property for building purposes. *N. J. Supreme Ct.* 1850, *Somerville & Easton R. R. Co. v. Doughty*, 2 *Zabr.* 495.

47. The question, however, is not,—what estimate does the owner place upon the land? but, what is its real worth, in the judgment of honest, competent, and disinterested men? The use to which the owner has applied his property is of no importance, beyond its influence upon the present value. In deciding these questions, neither the purpose to which the property is now applied, nor the intention of the owner in relation to its future enjoyment, can be

matters of much importance. In both cases, the proper inquiry is, what is the value of the property for the most advantageous uses to which it may be applied? If a man suffer his land to lie open and unimproved, that will not authorize the commissioners to say that it is worthless. They must award what the land would be worth in the hands of another who would cultivate and improve it; that is its value to the owner, because he can procure that sum of money for it. And in estimating the probable influence of any public improvement upon the value of land, the commissioners should not regard so much the intention of the owner in relation to the future use, as the purpose to which the property may be applied in the hands of one who is disposed to make it yield the greatest income. What price will it bring in the market, is the proper inquiry in a proceeding of this kind. *N. Y. Supreme Ct.* 1886, *Matter of Furman Street*, 17 *Wend.* 650, 670. Followed, 1889, *Matter of William and Anthony Streets*, 19 *Id.* 678, 690; 1852, *Troy & Boston R. R. Co. v. Lee*, 13 *Barb.* 169.

48. *Instances.* The true rule of estimating damage to the owner of land taken is, to appraise the property at its present value to the owner, considering the extent of interest which he has, and the qualified rights which may be exercised over it. In the case of a churchyard, if the church cannot use it for any purpose but burial, for such purpose one part of the ground is as valuable as another, and the part taken cannot be considered of more value than the part assessed for benefit. *N. Y. Supreme Ct.* 1834, *Matter of Albany Street*, 11 *Wend.* 149.

49. Where a part of lands used by a hospital are taken, the fact that the improvement does not render the remaining property more valuable to the society, or for any purpose of the institution, than before, is not to be regarded. The particular use to which the property is now applied is not to be considered, except where, as in the case of churches and cemeteries, the land can be put to no other use. *N. Y. Supreme Ct.* 1839, *Matter of William and Anthony Streets*, 19 *Wend.* 678.

50. In an action against a railroad company for damages done to a mill property by the construction of the road, the injury to the unused and surplus water-power of

the mill-owner is a legal ground of claim; and the measure of damages is its actual market value for any useful purpose to drive any kind of machinery which it was capable of driving, not what can be done with it if used in some supposed way, or other imagined improvements have been made. *Pa. Supreme Ct.* 1864, *Dorian v. East Brandywine &c. R. R. Co.* 46 *Pa. St.* 520.

51. The owner of land a part of which is flowed by means of a mill-dam erected by a manufacturing company, may, by reason of the situation of the part flowed in relation to the other part, sustain damages beyond the value of the land actually flowed, for which he is entitled to compensation. But the benefits likely to result from the building of the dam by reason of an increase of business and population, markets, schools, stores, and other like improvements, cannot be considered, by way of set-off to the damages done to the land flowed. The benefits to be set off must obviously be of the like kind with the opposite injuries for which damages are sought. *Mass. Supreme Ct.* 1835, *Palmer Company v. Ferrill*, 17 *Pick.* 58.

52. In assessing the damages occasioned by such erections, regard is to be had, not to the condition of the land as it may have been affected by maintaining the dam several years preceding the date of the complaint for assessment, but to the condition of the land at the commencement of the injury, as if no dam had been erected. *Id.*

53. At what date the land should be valued. The owner of land taken by a railroad company is entitled to recover the value of such interest or title in the land as he is shown to have, as it stood at the time of taking, without any diminution for any benefits, advantage, or offset whatever; such damages as result immediately and directly, as the destruction of wells, springs, barns, outhouses, &c., but not remote or speculative damages; the value of fences made necessary; the injury to his whole tract from the less convenient communication, &c. But against these special and peculiar damages may be set off any peculiar benefits resulting to his premises, beyond those enjoyed by all the neighbors. *Wis. Supreme Ct.* 1858, *Robbins v. Milwaukee & Horicon R. R. Co.* 6 *Wis.* 686. But compare, *Milwaukee & Mississippi R. R. Co. v. Eble*, 4 *Chandl.* 72.

54. The value of the property taken, in market at that time, and no other; and the injury then necessarily known to result to the owner as the necessary and immediate consequence of such use of his property, without reference to the uncertain or remote benefits or disadvantages that may or may not occur in the future, is what the owner loses, and the legislature has no power to prescribe a different measure of damages. *Miss. Ct. of Errors*, 1858, *Isom v. Mississippi Central R. R. Co.* 36 *Miss.* 800.

55. The rule of damages for land taken by a railroad corporation, is its fair market value at present without any regard to the external causes which may have contributed to make up its present value. *Ohio Supreme Ct.* 1854, *Giesy v. Cincinnati &c. R. R. Co.* 4 *Ohio St.* 808.

56. That the value of the land, at the time of trial, or at any time subsequent to the construction of the work, cannot be referred to in determining the benefits conferred upon that portion of the land not taken,—see *Indiana Central R. v. Hunter*, 8 *Ind.* 74.

III. ASSESSMENT AND RECOVERY.

1. General nature of proceedings.

57. The mode of appraisal of lands required by a corporation, may be changed by the legislative power, at any time before the title has actually become vested in the company. *U. S. Supreme Ct.* 1850, *Susquehanna R. R. Co. v. Nesbit*, 10 *How.* 395.

58. Effect of passage of a general act. The charter of a railroad company provided for the appointment upon petition of three disinterested persons to assess compensation for the taking of land by the company. A general railroad act, passed subsequently, but never accepted by the company, provided for five commissioners, instead of three. *Held*, that proceedings carried on under the old charter were valid, and that three was the proper number of appraisers. *Mo. Supreme Ct.* 1857, *North Missouri R. R. Co. v. Gott*, 25 *Mo.* 540.

59. Failure to agree with landowner. Where the provision of the statute authorizing the company to have a compulsory assessment, is that in case of disagreement between the company and the landowner, as to the price, proceedings to take the land

without his consent may be had, the owner is entitled to the benefit of an opportunity for a voluntary sale; and a disagreement as to compensation is a jurisdictional fact. [3 *Johns. Cas.* 107.] *N. Y. Ct. of Appeals*, 1851, *Dyckman v. Mayor of N. Y.* 5 *N. Y. (1 Seld.)* 484. Compare *Bellona Company's Case*, 8 *Bland.* 442.

60. Under the Pennsylvania act of 1849, which requires a railroad company about to appropriate the property of an individual to apply to the owner and endeavor to agree with him as to the compensation, unless the owner be absent or legally incapacitated till such effort has been made, the company cannot institute proceedings to acquire the land. And the petition should set forth the names of the owners whose property is desired, the fact that the company cannot agree on the compensation, or that the owner is absent or legally incapacitated to contract, and should be verified by affidavit. *Pa. Supreme Ct.* 1853, *Reitenbaugh v. Chester Valley R. R. Co.* 21 *Pa. St.* 100. And see *Neal v. Pittsburgh &c. R. R. Co.* 2 *Grant's Cas.* 137.

61. A clause in a railroad charter which provides that, where the company and owner of the soil required for the road fail to agree upon the terms of purchase and sale the court shall appoint commissioners to value the land taken, does not make an effort and failure to agree a condition precedent to the exercise of the jurisdiction of the court in the appointment of commissioners to assess the value of the land. *Tenn. Supreme Ct.* 1859, *Bigelow v. Mississippi &c. R. R. Co.* 2 *Head*, 624.

62. An original petition for the assessment of damages, occasioned by the construction of a railroad through land, which does not set forth the inability of the parties thereto to agree, and the absence or legal incapacity of the owners, may be amended before the view is taken. *Pa. Supreme Ct.* 1857, *Pennsylvania R. R. Co. v. Porter*, 29 *Pa. St.* 165.

63. That slight evidence of this failure to agree with the landowner is required,—see *Doughty v. Somerville & Easton Railway*, 1 *Zabr.* 442; *Tucker v. Erie &c. R. R. Co.* 27 *Pa. St.* 281.

64. If the record shows a disagreement, and the owner appeared on the proceeding to assess, he cannot afterwards collaterally

impeach its existence. *N. Y. Ct. of Appeals*, 1851, *Dyckman v. Mayor &c. of N. Y.* 5 *N. Y.* (1 *Seld.*) 434.

65. Notice of the proceeding. It is no objection to the constitutionality of the charter of a railroad company, that it does not contain any provisions for notice to be given to the owners of lands, of proceedings to assess damages for the appropriation of the property for the purposes of the road. *Mich. Supreme Ct.* 1852, *Swan v. Williams*, 2 *Mich.* 427; *Ill. Supreme Ct.* 1859, *Johnson v. Joliet & Chicago R. R. Co.* 23 *Ill.* 202.

66. That a notice to treat for lands under a statutory authority to take them for corporate use, constitutes the relation of vendor and purchaser, between the company and the owner of the property.—see *Doo v. London & Croydon Railway Co.* 1 *Eng. Railw. Cas.* 257. Compare *Regina v. Commissioners of Woods & Forests*, 19 *Law J. Q. B.* 497.

67. That a company cannot take some of parcels of land, of intent to take which they have given notice, and decline to take others,—see *Barker v. North Staffordshire R. R. Co.* 2 *De Gez & S.* 55; 12 *Jur.* 324, 589; 5 *Eng. Railw. Cas.* 401; *Tawney v. Lynn & Ely Railway Co.* 4 *Eng. Railw. Cas.* 615; 16 *Law J. N. S. Ch.* 282; *Stone v. Commercial Railway Co.* 4 *Myl. & C.* 122; 1 *Eng. Railw. Cas.* 375.

68. That form of notice is not material—see *Doughty v. Somerville & Easton Railway*, 1 *Zabr.* 442; *Ross v. Elizabethtown & Somerville Railway*, 1 *Spen.* 230.

69. Defect in notice, how waived. Where a notice of appraisement of damages for the taking of lands by a company is defective, nothing short of an appearance by the party whose lands are sought to be taken, and actual litigation upon merits, ought to be regarded as an implied waiver of the defect. *N. Y. Ct. of Appeals*, 1854, *Cruger v. Hudson River R. R. Co.* 12 *N. Y.* (2 *Kern.*) 190. Compare *Mohawk & Hudson R. R. Co. v. Archer*, 6 *Paige*, 84.

70. Although proceedings under the right of eminent domain, to acquire lands held by tenants in common, should be against such tenants severally (unless the statute otherwise provides), so that the damages to which each may be entitled will be separately awarded and paid, and

personal notice should be given to each person proceeded against; yet the objection that they were proceeded against jointly, and that notice was not personally served, is waived by a voluntary appearance of the parties, and contesting the proceedings on the single ground of the inadequacy of the damages awarded. *N. Y. Ct. of Appeals*, 1851, *Dyckman v. Mayor of N. Y.* 5 *N. Y.* (1 *Seld.*) 434.

71. Identifying land. The land taken for the use of the railroad must be so described, either in the petition or report of the viewers, that its identity cannot be questioned; and when there is a defect in this respect, the proceedings will be reversed. *Pa. Supreme Ct.* 1857, *Pennsylvania R. R. Co. v. Foster*, 20 *Pa.* 165.

72. The warrant issued by county commissioners, on the application of an owner of land, for a jury to assess damages for land taken for railroad, need not be in any particular form, but should set forth, with sufficient certainty, the subject-matter into which the jury are to inquire, to wit, the land over which the railroad passes, the petitioner's title to or interest in it, the location of the road, and the incidental damages, if any, which the petitioner has sustained, in addition to the value of the land taken; and this may be done either by reciting the substance of the petition in the warrant, or by annexing a copy of the petition thereto, and referring to the same in the warrant. *Mass. Supreme Ct.* 1849, *Walker v. Boston & Maine Railroad*, 3 *Cush.* 1.

2. The assessment or appraisal.

73. Hearing. The commissioners must view the premises, and hear the proofs and allegations of the parties, but may proceed in such order as they please, and give to either party the opening and closing argument, and may hear the parties either before or after viewing the premises. *N. Y. Supreme Ct. Sp. T.* 1852, *Albany Northern R. R. Co. v. Lansing*, 16 *Barb.* 68.

74. Showing title. In proceedings before commissioners, to settle land damages, possession is evidence of title. *Cal. Supreme Ct.* 1857, *Sacramento Valley R. R. Co. v. Moffat*, 7 *Cal.* 577.

75. A railway company paid for and took a conveyance of a piece of land from A. B afterwards claimed the land, and

moved to restrain the company from taking it, their compulsory powers having expired. The evidence of title was conflicting between A and B. *Held*, that B had his remedy by ejectment; and an injunction was therefore refused. *Vice Chancery*, 1851, *Webster v. Southeastern Railway Co.* 1 *Eng. L. & Eq.* 204; 15 *Jur.* 73.

76. The landowner whose property is taken for a company must show what title he has. Ownership of the fee is not to be presumed from the possession. The company pay for what title they get and can maintain, and for no more. *Wis. Supreme Ct.* 1858, *Robbins v. Milwaukee & Horicon R. R. Co.* 6 *Wis.* 636. And see *Directors &c. v. Railway*, 7 *Watts & S.* 236; *East Tennessee & Virginia R. R. Co. v. Love*, 8 *Head*, 63; *Winebiddle v. Pennsylvania R. R. Co.* 2 *Grant's Cas.* 32.

77. Showing offer to buy. In estimating the damages caused by the construction of a railroad, evidence that the company had made the petitioner an offer for his damages, is inadmissible. See *Upton v. South Reading Branch R. R. Co.* 8 *Cush.* 600.

78. — purchases adjoining. On the trial of a petition before a sheriff's jury, for an assessment of damages for land taken for a railroad, evidence is not admissible to show the price paid by the company for land adjoining the land in question, under an award of arbitrators mutually agreed upon to estimate the same. *Mass. Supreme Ct.* 1849, *White v. Fitchburg Railroad Corporation*, 4 *Cush.* 440.

79. On a hearing before a sheriff's jury to show the value of land taken for a railroad, it is not competent to show, for what price one had contracted to buy land adjoining. *Mass. Supreme Ct.* 1850, *Chapin v. Boston & Providence Railroad Corporation*, 6 *Cush.* 422.

80. Alternative order. County Commissioners in Massachusetts, in the exercise of the jurisdiction conferred upon them, relative to the raising or lowering of turnpikes, highways, &c., are required to make a specific, and not an alternative order. *Mass. Supreme Ct.* 1850, *Roxbury v. Boston & Providence Railroad Corporation*, 6 *Cush.* 424.

81. Reservation. A corporation was authorized, by a statute, to acquire title to lands by appraisement; and the appraisers were required to assess the value of land

taken and damages, without deduction for any benefit; and the defendants, on payment, were to be vested with the fee. The appraisers assessed a certain sum, with a reservation to the owners of the right to open a street, and to drain under the street; and their certificate also stated that they had assessed the value and damages without any deduction for benefit.

Held, that the certificate should be set aside. They had no power to arbitrate between the parties; and in attempting to reserve privileges to the owners by way of easement in the lands they were to appraise, they transcended their power, and their award was a nullity. The corporation were entitled to the fee, and the owners to compensation for the fee. *N. Y. Ct. of Appeals*, 1852, *Hill v. Mohawk & Hudson R. R. Co.* 7 *N. Y.* (3 *Seld.*) 152.

82. What the report must state. It is not necessary that the report should state in detail how the damages accrued. *Pa. Supreme Ct.* 1856, *Tucker v. Erie & North East R. R. Co.* 27 *Pa. St.* 281.

83. It is unnecessary for the report of such viewers to show affirmatively the presence of the parties at the time the view is had, or that witnesses were regularly called and sworn. In this respect the presumption is in favor of the regularity of the viewers; and if there is any actual illegality, the facts sustaining it must be shown. *Id.*

84. Commissioners' fees. In the absence of any statutory provision, compelling payment of compensation to county commissioners for their services performed for the benefit of a corporation, they have no power to order the company to pay the cost of their expenses and services. *Ms. Supreme Ct.* 1848, *Atlantic & St. Lawrence R. R. Co. v. Cumberland County Commissioners*, 28 *Me.* 112.

8. How it may be reviewed.

85. Objections must appear by the record. Objections to the proceedings before a sheriff's jury impanelled to assess damages for land taken for a highway or railroad, cannot be taken advantage of on appeal unless the grounds of such objection appear on the record. *Mass. Supreme Ct.* 1849, *Walker v. Boston & Maine Railroad*, 8 *Cush.* 1.

86. Evidence given before viewers appointed to assess damages done by the loca-

tion and construction of a railroad through the lands of an individual will not be noticed by the supreme court, as it constitutes no part of the record. *Pa. Supreme Ct.* 1852, *Ohio & Pennsylvania R. R. Co. v. Bradford*, 19 *Pa. St.* 368.

87. On an appeal from a judgment of the court of common pleas, accepting the verdict of a sheriff's jury impanelled to revise the estimate of county commissioners on an application for damages occasioned by the laying out of a railroad, it cannot be objected that the commissioners had no jurisdiction, by reason of the parties having agreed to refer the damages to arbitration; but such objection, if relied upon, must be taken before the commissioners as a ground for not ordering a jury. *Mass. Supreme Ct.* 1849, *Field v. Vermont & Massachusetts R. R. Co.* 4 *Cush.* 150.

88. Award may be set aside for legal errors. If commissioners appointed to assess damages for land have adopted and acted upon illegal principles in making their valuation of the land, and assessing damages, the proceedings will be set aside. *N. J. Supreme Ct.* 1839, *New Jersey R. R. &c. Co. v. Suydam*, 2 *Harr.* 25.

89. But it is not competent for the court to determine the amount of damages on the merits when the commissioners assessed the damages upon the right principle. *Id.*

90. Under a statute providing to the contrary, an award of arbitrators which takes into consideration the benefit which a landowner may receive from the construction of a railroad, in a proceeding for damages against such a corporation, is illegal. *Ind. Supreme Ct.* 1854, *McMahon v. Cincinnati &c. R. R. Co.* 5 *Ind.* 413; *Newcastle & Richmond R. R. Co. v. Brumback*, 5 *Ind.* 543; 1858, *Evansville &c. R. R. Co. v. Fitzpatrick*, 10 *Ind.* 120; *Evansville &c. R. R. Co. v. Cochran*, 10 *Ind.* 560.

91. A verdict of a jury impanelled to assess damages for lands appropriated to the purposes of a railroad, will be set aside, when it appears to the court that injustice has been done through mistake or misapprehension of the jury. *N. J. Supreme Ct.* 1865, *Cadmus v. Central R. R. Co. of New Jersey*, 31 *N. J. Law* (2 *Vroom*), 179.

92. A plank-road company, authorized to construct their road between two designated points, and to use any portion of the high-

ways for such purpose when necessary, are bound, in cases where such necessity exists, by their charter, to pay the damages resulting from the appropriation of the highway, to be ascertained in the manner pointed out in the charter, and any departure from the directions therein contained, or fraudulent or collusive acts on the part of the company, in relation to the assessment, will vitiate the whole proceeding, and subject them to injunction. *Ga. Supreme Ct.* 1851, *Justices &c. v. Griffin & West Point Plank-road Co.* 9 *Ga.* 475.

93. The courts will not set aside the award of commissioners to ascertain land damages except from substantial error. The commissioners are bound to be guided in their proceedings by the established rules of evidence, but a technical error in this respect will be disregarded. Otherwise, if the error be of such a character as to show that the commissioners have mistaken the principles that should govern their appraisal, and that the appellant may have been wronged by it. *N. Y. Supreme Ct.* 1852, *Troy & Boston R. R. Co. v. Northern Turnpike Co.* 16 *Barb.* 100. And see *N. Y. Central R. R. Co. v. Marvin*, 11 *N. Y.* (1 *Kern.*) 276; *Walker v. Boston & Maine R. R.* 3 *Cush.* 1.

94. Not for error in valuation. If the court is satisfied that the commissioners have not erred in the principles of their appraisal, no other error will suffice to induce them to send the report back for review. *N. Y. Supreme Ct.* 1852, *Troy & Boston R. R. Co. v. Lee*, 13 *Barb.* 169.

95. On an appeal from an appraisal of compensation for land taken by a railroad company, the court will not interfere upon the ground that the amount of damages awarded was too small or too great, unless the evidence of injustice is palpable on its face. *N. Y. Supreme Ct.* 1851, *Rochester & Syracuse R. R. Co. v. Budlong*, 6 *How. Pr.* 467.

96. If the proceedings of commissioners to appraise damages for land taken by a municipal corporation have been regular, and they only erred in judgment in fixing the amount of damages for the lands taken, the courts cannot interfere. *N. Y. Chancery*, 1841, *Wiggin v. Mayor &c. of N. Y.* 9 *Paige*, 18.

97. As a general rule, reviews of the report of such commissioners can extend to matter

of principle only, and not to mere questions of value. *N. Y. Supreme Ct.* 1836, Matter of Furman Street, 17 *Wend.* 649; 1839, Matter of John & Cherry Streets, 19 *Id.* 659.

98. That the courts cannot, in general, revise the assessment of land damages, upon its merits, and set it aside, upon the mere ground of inadequacy, or excess of damages—see *Willing v. Baltimore Railway*, 5 *Whart.* 460; *Tonica & c. R. R. Co. v. Unlicker*, 22 *Ill.* 221; *Same v. Roberts*, *Id.* 224; *Railroad v. Gesner*, 20 *Pa.* 240; *Winebiddle v. Pennsylvania R. R. Co.* 2 *Grant's Cas.* 32. *Re Bradshaw & c. R. R. Co.* 12 *Jur.* 998; 17 *Law J. Q. B.* 362.

99. That an award of land damages may be set aside for excessive damages,—see *Somerville & Easton Railway v. Doughty*, 2 *Zabr.* 495.

100. Award not impeachable collaterally. An adjudication condemning lands for the use of a corporation, cannot be impeached in a collateral proceeding. *Md. Chancery*, 1847, *Hamilton v. Annapolis R. R. Co.* 1 *Md. Ch. Dec.* 107. *Mo. Supreme Ct.* 1859, *Evans v. Hasfner*, 29 *Mo.* 141.

4. Payment.

101. When demandable. The owner is entitled to payment of the damages awarded when the assessment has been made and confirmed; and without waiting until the company actually take possession. *Mass. Supreme Ct.* 1862, *Shaw v. City of Charlestown*, 8 *All.* 588; and see *Neal v. Pittsburgh & c. R. R. Co.* 2 *Grant's Cas.* 137; 31 *Pa. St.* 19.

102. How enforced. Where a railway company agreed with the landowner, that the question of compensation should be settled by arbitration, and thereupon entered upon the land, by consent of the owner, and the arbitrator made an award, which became the subject of dispute, and the owner thereupon gave the company notice to quit, and brought ejectment,—*Held*, that he could not recover, although the company had not tendered the money awarded, or a conveyance, but that the owner's remedy was to proceed upon the award. The notice to quit under the circumstances did not make the company trespassers. *Q. B.* 1851, *Hudson v. Leeds & Bradford Railway Co.* 6 *Eng. L. & Eq.* 283; 15 *Jur.* 946. Compare *infra*, V.

103. Where it is shown that the party has, upon consideration, agreed to receive compensation in a particular mode, equity will enjoin him from taking proceedings under the statute, to compel payment. *Vice Chancery*, 1852, *Duke of Norfolk v. Tennant*, 10 *Eng. L. & Eq.* 237; 10 *Jur.* 898.

104. Protection of owner until payment. That when the company neglects or refuses to pay for land condemned for their use, the owner may have an injunction to protect his property from injury, until the money is paid,—see *Harness v. Chesapeake & Ohio Canal Co.* 1 *Md. Ch. Dec.* 248.

105. The acceptance of land damages, whether fixed by agreement or a verdict, without objection to the right to take, estops the party from afterwards disputing that right. *Wis. Supreme Ct.* 1859, *Burns v. Milwaukee & Mississippi R. R. Co.* 9 *Wis.* 450.

106. Where a railroad company had authority to take land one hundred feet in width, and beyond that so much as might be necessary for depots, &c., and under this authority took a lot in a city, part of which was beyond the one hundred feet, and the owner appealed from the award of the commissioners, and had judgment fixing the value of the land taken and described in the pleadings, which judgment was duly paid,—*Held*, that the owner was now estopped from claiming any part of the lot from the railroad company. *Id.*; *S. P. Burns v. Dodge*, 9 *Wis.* 458.

107. A tender, within the statute time, of the amount appraised, made to a party who acted in the proceedings for his co-tenants, by their authority, is sufficient. *N. Y. Supreme Ct.* 1849, *Dyckman v. Mayor & c. of N. Y.* 7 *Barb.* 498; affirmed 5 *N. Y. (1 Seld.)* 434.

As to how far payment is a Condition precedent to a transfer of title, see *infra*, VI.

IV. COUNTER-ALLOWANCE FOR BENEFIT.

108. Benefit is compensation. Benefit to the adjacent property of the owner whose land is taken for a public use, is, in so far, compensation for the taking, within the meaning of the Constitution; and, if it equal the loss or damage from the taking, it is a just compensation. *N. Y. Supreme Ct. Sp. T.*

1853, *Betts v. City of Williamsburgh*, 15 *Barb.* 255.

109. Under the Ohio constitution of 1802, when private property is taken for public uses, benefits may be lawfully set off against damages; and a statute incorporating a railroad, providing that appraisers shall consider both the benefit and injury which the owner shall sustain from the road, in the award of damages, is not in contravention of a constitutional provision that private property shall be inviolate, but subservient to the public welfare, if a compensation in money be made to the owner. *Ohio Supreme Ct.* 1855, *Columbus & C. R. R. Co. v. Simpson*, 5 *Ohio St.* 251.

110. The provision of the general road law of Missouri (Rev. Code of 1846, 974,) that in assessing the landowner's damages, the commissioners "shall take into consideration the advantages as well as the disadvantages of the road to such persons," is a constitutional exercise of the power of taxation by the legislature. *Mo. Supreme Ct.* 1857, *Newby v. Platte County*, 25 *Mo.* 258.

111. What benefit may be allowed. In a proceeding against a plank road company to recover damages done to land by the location and construction of the road, where the statute directs the advantages as well as disadvantages of the road to be considered, it is competent for the company to prove that the land has increased in value by the construction of the road. *Pa. Supreme Ct.* 1852, *Plank Road Co. v. Rea*, 20 *Pa. St.* 97.

112. In estimating the damages for land taken for a highway or railroad, any direct and peculiar benefit or increase of value, accruing therefrom to land of the same owner adjoining or connected with the land taken, and forming part of the same parcel or tract, is to be considered by the jury and allowed by way of set-off; but not any general benefit or increase of value received by such land in common with other lands in the neighborhood, nor any benefit to other land of the same owner, though in the same town. *Mass. Supreme Ct.* 1849, *Meacham v. Fitchburgh R. R. Co.* 4 *Cush.* 291; 1851, *Upton v. South Reading Branch R. R. Co.* 8 *Cush.* 600.

113. The benefits to be charged landowners whose lands are taken for a railroad, and deducted from the compensation to be allowed for the value of the land taken and the injury resulting to other adjoining land, must be the direct and peculiar benefits re-

sulting to them in particular, and not the general benefits they derive in common with other landowners in the vicinity from the building of the road. *Mo. Supreme Ct.* 1857, *Newby v. Platte County*, 25 *Mo.* 258; *Pacific Railroad v. Chrystal*, 25 *Mo.* 544.

114. Although general resulting benefit to the landowner, in common with that occurring to other landowners in the vicinity, is not to be taken into account, in estimating damages for land appropriated to the use of a railway; yet where a local incidental benefit to the residue of the land is blended or connected, either in locality or subject-matter, with a local incidental injury to such residue of land, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the residue of the land. *Ohio Supreme Ct.* 1856, *Cleveland & Pittsburgh R. R. Co. v. Ball*, 5 *Ohio St.* 568.

115. — In special cases. Whenever the property of an individual is required for public uses, the owner is entitled to just compensation in money. But if in addition to its intrinsic value, he claims indemnity for the losses and inconveniences which will incidentally devolve upon him in consequence of such public appropriation of his property, in estimating those losses and inconveniences, the profits, advantages and conveniences which will result to him from the uses to which the public applies the property taken, are also to be estimated, and the excess of the former over the latter is the true amount of incidental damages. The just compensation guaranteed by the constitution for the property taken, must be ascertained and paid regardless of any speculative advantage to flow from its use. *Ky. Ct. of Appeals*, 1837, *Sutton v. City of Louisville*, 5 *Dana*, 28; 1838, *Rice v. Danville & C. Turnpike Co.* 7 *Dana*, 81; 1839, *Jacob v. City of Louisville*, 9 *Dana*, 114; *Tenn. Supreme Ct.* 1852, *Woodfolk v. Nashville & Chattanooga R. R. Co.* 2 *Swan*, 422.

116. A tenant for years whose lease began before, and who was in possession at the time, an injury was done, is an owner within the provisions of a statute regulating the compensation to be paid to owners of land, &c., and is entitled to recover damages for an injury sustained by him in the building of

the road. The benefit accruing to him from the road, but not that accruing to the landowner, may be deducted from the injury received. *Pa. Supreme Ct.* 1853, Turnpike Road *v.* Brosi, 22 *Pa. St.* 29.

117. What may not be. In assessing damages for land taken by a railroad company, the jury cannot legally take into consideration and make allowance for any such benefits as accrue to the community generally from the construction of the road. *Ohio Supreme Ct.* 1856, Little Miami R. R. Co. *v.* Collett, 6 *Ohio St.* 182. And see Harvey *v.* Lloyd, 3 *Barr*, 381.

118. The "just compensation" secured by constitutional provision to a landowner for injury to his property taken by a railroad, excludes from consideration the general enhancement of the value of his property. The cash value and the actual damage are the true standard by which to determine the compensation to which in such cases the party is entitled. *Miss. Ct. of Errors*, 1857, Brown *v.* Beatty, 84 *Miss.* 227; 1858, Isom *v.* Mississippi Central R. R. Co. 86 *Miss.* 300.

119. In assessing damages caused by a railroad to a landowner, the jury cannot estimate the benefit the road has been to property of the plaintiff situated in another place, and unconnected with the lot for which he claims damages. *Pa. Supreme Ct.* 1839, Railroad Co. *v.* Gilson, 8 *Watts*, 243.

120. On the assessment of damages occasioned by the taking of land for a railroad, evidence that the remaining land of the petitioner would be benefited by the location of a station at that place, is inadmissible in reduction of damages, if no act has been done by the proprietors of the railroad towards establishing such a station. *Mass. Supreme Ct.* 1855, Brown *v.* Providence &c. R. R. Co. 5 *Gray*, 35.

V. REMEDY BY ACTION.

121. The statute remedy, in general, exclusive. Where a mode of obtaining compensation for private property to be taken by a corporation under its charter for its own use, is prescribed by statute, such remedy is not cumulative, but is the only one to which the landowner can resort. *Tenn. Supreme Ct.* 1842, Mitchell *v.* Franklin & Columbia Turnpike Co. 3 *Humph.* 456; *Ind. Supreme Ct.* 1848, Trimble *v.* White Water

Valley Canal Co. 1 *Smith*, 93; 1855, Lafayette & Indianapolis R. R. Co. *v.* Smith, 6 *Ind.* 249; New Albany & Salem R. R. Co. *v.* Connelly, 7 *Ind.* 32; 1857, McCormack *v.* Terre Haute & Richmond R. R. Co. 9 *Ind.* 283; *Ala. Supreme Ct.* 1835, Dyer *v.* Tuscaloosa Bridge Co. 2 *Port.* 296; *Miss. Ct. of Errors*, 1857, Brown *v.* Beatty, 84 *Miss.* 227; *N. H. Superior Ct.* 1850, Aldrich *v.* Cheshire R. R. Co. 1 *Post.* 859; 1 *Am. Railw. Cas.* 206.*

122. The remedy provided in the charter of a railroad company for obtaining compensation for damages occasioned by the taking of land for the use of the road, must be alone pursued. And so long as the company keep within the limits prescribed by their charter, they are not liable to actions at common law, unless it be for injuries inflicted either wantonly or from neglecting to use reasonable diligence and care. *Tenn. Supreme Ct.* 1859, Tennessee & Alabama R. R. Co. *v.* Adams, 3 *Head*, 596.

123. When the legislature, under the right of eminent domain, and for the prosecution of works for public use, authorize an act or series of acts, the natural and necessary consequence of doing which will be damage to the property of another, and provide a mode for the assessment and payment of the damages occasioned by such work, the party authorized, acting within the scope of his authority, is not a wrongdoer; an action will not lie as for a tort; and the remedy is by the statute, and not at common law. [11 *Mass.* 364; 12 *Mass.* 466; 1 *N. H.* 339; 4 *Wend.* 667.] *Mass. Supreme Ct.* 1841, Dodge *v.* County Commissioners of Essex, 3 *Metc.* 380; *Mo. Supreme Ct.* 1850, Mason *v.* Kennebec & Portland R. R. Co. 31 *Mo.* 215.

124. Where a statute provides a mode of estimating damages in taking private prop-

* See also, to nearly the same effect, Mason *v.* Kennebec & Portland R. R. Co. 31 *Mo.* 215; 1 *Am. Railw. Cas.* 63; Knorr *v.* Germantown R. R. Co. 5 *Whart.* 266; Philadelphia &c. R. R. Co. *v.* Williams, 54 *Pa. St.* 108; Kemble *v.* White Water Valley Canal Co. 1 *Cart. (Ind.)*, 288; Boulard *v.* City of St. Louis, 86 *Mo.* 546; Colcough *v.* Nashville &c. R. R. Co. 2 *Head*, 171; East & West India Docks &c. Railway Co. *v.* Gattike, 3 *Eng. L. & Eq.* 59; Watkins *v.* Great Northern Railway Co. 6 *Id.* 179; Regina *v.* Eastern Counties Railway, 15 *Jur.* 261; 3 *Eng. Railw. Cas.* 466. Compare, to the contrary, Crittenden *v.* Wilson, 5 *Cow.* 165; Selden *v.* Delaware & Hudson Canal Co. 24 *Barb.* 363; Bruce *v.* The Same, 19 *Id.* 371; Carr *v.* Georgia Railway & Banking Co. 1 *Kelly*, 524; also cases cited 1 *Am. Railw. Cas.* 166-171, *note*.

erty for public uses, thereby giving a remedy before courts of law, chancery will not assume jurisdiction over the matter. *Ohio Supreme Ct.* 1837, *Walker v. Mad River & Lake Erie R. R. Co.* 8 *Ohio*, 38.

125. *Instances.* The entry, occupation and appropriation of land by a railroad corporation, under the provisions of the statute, and with payment of the full compensation thereby assessed, gives no cause of action at common law to an owner protesting against the taking, and declining the compensation. *Ohio Supreme Ct.* 1855, *Hueston v. Eaton & Hamilton R. R. Co.* 4 *Ohio St.* 685.

126. Where county commissioners, on an application for damages occasioned by the construction of a railroad, direct the company to make and maintain a way for the benefit of the petitioner, as required by statute, with which order they neglect to comply; such neglect is no ground for an allowance of damages, on a hearing before a sheriff's jury, but the petitioner's remedy therefor is the one pointed out in statute. *Mass. Supreme Ct.* 1850, *White v. Boston & Providence Railroad Corporation*, 6 *Cush.* 420.

127. An act incorporating a railroad company required the company to construct a sufficient causeway, whenever it should be necessary to enable the owner of land through which the road might pass, to cross over or under the road; and it was declared that they should be liable in an action for damages to any person aggrieved. The company laid out their road over the land of the plaintiff, so as to prevent his passing from one part of his farm to another; but they did not complete the road. A supplemental act, authorizing a change of route, declared that any person injured by the change might apply for the appointment of men to assess the damages, &c. *Held*, that this supplement repealed the original act so far as respected the remedy by action; and that the plaintiff could not maintain an action of trespass to recover damages, as at common law, but was confined to the remedy given by the supplement. *Pa. Supreme Ct.* 1839, *Knorr v. Germantown &c. R. R. Co.* 5 *Whart.* 256.

128. A clause in the charter of a navigation company provided a certain mode of proceeding to obtain compensation for injury sustained "by means of any dam erected, or the land of any person inundated by swell-

ing of the water in consequence of the erecting of any dam, or any mill or other water works injured by swelling the water into the tail race of any mill or other water works," &c. *Held*, that a person whose land had been injured by being overflowed in consequence of the elevation by the company of an embankment and towpath of a canal, and thereby the contracting of a river adjoining, could resort to compensation as provided by the statute, although the inundation complained of was not caused by the erection of a dam; it being designed by the legislature to include in the remedy provided, whatever common law injuries should be occasioned by the company, in strengthening, enlarging, and altering their works. *Pa. Supreme Ct.* 1852, *Schuylkill Navigation Co. v. Loose*, 19 *Pa. St.* 15.

129. *Presumption that commissioners estimated all injuries.* Any contingent and consequential depreciation of the value of the portion of the land not taken, in consequence of the construction of a railroad, in a proper manner and according to its charter, whether reference be had to its market value or its desirableness as a residence, or for general or any particular use, cannot be made the basis of an action to recover damages beyond, or in addition to, the compensation awarded for taking so much of the land as was properly taken. The presumption is, that every injury which, in judgment of law, would result to the other adjacent property of the owner, from taking a part of his land for the construction of the road, and from the use of it in a proper manner when constructed, was foreseen by the appraisers, and included in their first estimate. *N. Y. Superior Ct.* 1852, *Furniss v. Hudson River R. R. Co.* 5 *Sandf.* 551.

130. The award made in the statutory tribunal is exhaustive; and the landowner cannot maintain an action for damages which should have been but were not assessed and allowed in that proceeding; even though he claimed them there, and they were erroneously disallowed. His remedy for such error is by steps to review the award. *N. J. Supreme Ct.* 1848, *Van Schoick v. Delaware & Raritan Canal Co.* 1 *Spn.* 249.

131. Where the appraisal of land damages was reduced below what it otherwise would have been, by the representations of the agents of the company, that the road

would be constructed in a particular manner, made at the time of the appraisal, to the commissioners, and such representations were not fulfilled in the actual construction of the road, whereby the plaintiff sustained serious loss and injury,—*Held*, that the adjudication of the commissioners was a merger of all previous negotiations upon the subject, and that no action could be maintained for constructing the railway contrary to such representations, provided it was done in a prudent and proper manner. [1 Robinson, 67; 2 Gill, 20.] *Vt. Supreme Ct.* 1854, *Butman v. Vermont Central R. R. Co.* 27 *Vt.* 500.

132. A landowner's buildings were supplied with water from a permanent spring. After an excavation had been made in his land for the purpose of a railroad, water appeared in the excavation about fifteen feet below the surface of the ground, and the spring disappeared. Damages were assessed to him before the excavation was made. *Held*, that an action to recover damages could not be sustained. Unforeseen injuries will be presumed to have been considered by the commissioners. *N. H. Superior Ct.* 1850, *Aldrich v. Cheshire R. R. Co.* 1 *Am. Railway Cas.* 206; 1 *Fost.* 359.

133. How far this presumption extends. Where the water of a river was obstructed in its passage to the plaintiff's factory, and diverted therefrom, so as to produce a substantial injury to him, by the works of a canal company, of which no survey or appraisal under the charter had been had, and for which no damages had been assessed, and no compensation made,—*Held*, that the plaintiff was entitled to redress in an action on the case, although the dams producing such injury were erected with the approbation of the commissioners appointed by the charter, before the plaintiff had any interest in the property to which the injury was done, and had not since been raised. The duty of the commissioners is, to ascertain the injury sustained by individuals by the works of the company, and to assess damages for such injury; but they have no authority to assess damages for injuries arising from time to time. *Conn. Supreme Ct.* 1844, *Denslow v. New Haven & Northampton Co.* 16 *Conn.* 98.

134. In the construction of their road, a railroad company are bound to exercise the rights conferred upon them with a prudent

regard to the rights of others; and if they are guilty of negligence in this respect, whereby a landowner is injured, it is not to be presumed, in the absence of proof, that the damages thus occasioned were taken into consideration by the commissioners in their appraisal. *Vt. Supreme Ct.* 1855, *Clark v. Vermont & Canada R. R. Co.* 28 *Vt.* 103.

135. Commissioners are to assess such damages "as are likely to arise" from a proper construction of the road, with a due regard to the rights of others, and such only will be deemed to have been taken into consideration in the assessment. *Id.*

As to the liability of corporations for Wrongful acts, &c., see *WRONGS*.

136. On the distinction between damages for which compensation may be obtained under the statutory provision, and those for which a common action at law is the proper remedy,—see *Lancashire & Yorkshire Railway Co. v. Evans*, 19 *Eng. L. & Eq.* 295; 15 *Beav.* 322.

137. Where no remedy is given by their charter, a railroad company is liable for an injury resulting from the construction of their works, as at common law. *Ind. Supreme Ct.* 1856, *Tate v. Ohio & Mississippi R. R. Co.* 7 *Ind.* 479; 1857, *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 *Ind.* 438; 1858, *Indiana Central R. R. Co. v. Boden*, 10 *Ind.* 96; 1859, *New Albany & Salem R. R. Co. v. O'Daily*, 12 *Ind.* 551.

138. The remedy provided by statute must be followed so far as it extends; but where a statute authorizes a corporation to do certain acts, and provides a remedy for only a part of the injury arising therefrom, the injured party may have his action at common law for the residue. *N. H. Superior Ct.* 1851, *Town of Troy v. Cheshire R. R. Co.* 3 *Fost.* 83.

139. Where no steps are taken to present a case to commissioners appointed by the charter of a corporation to assess the damages done to individuals by the works of the company, in the manner directed by the charter, the parties are left in the same situation as if no such authority was given; and the rights of one party, and the liability of the other, are the same as at common law. *Conn. Supreme Ct.* 1844, *Denslow v. New Haven & Northampton Co.* 16 *Conn.* 98.

140. Where a railroad corporation enter into possession of the lands of an individual for the use of the road, without his consent, and without first having assessed and tendered the damages, he may maintain an action against the company to recover possession of the land. *Ind. Supreme Ct.* 1866, *Graham v. Columbus &c. R. R. Co.* 27 *Ind.* 260.

141. Where a railroad corporation have taken exclusive possession of land, they are allowed a reasonable time to obtain the title or an easement in it. But where such occupation is under a claim of title in fee-simple as by a deed from the owner, when, in fact, no such right exists, they are entitled to no reasonable time for making the compensation, but are immediately liable to the owner in trespass. *Ms. Supreme Ct.* 1855, *Hall v. Pickering*, 40 *Ms.* 548. See *infra*, 178.

142. *It seems* that a delay to take proper measures to make compensation and obtain title or easement, is evidence of a design not to take those measures; and a continued occupation will be a trespass. *Id.*

143. Where an incorporated company neglect to pay to a land owner the compensation, determined in pursuance of the charter, for injury done to his property by flowage from the erection of a dam, a court of equity will, at the suit of the land-owner, interfere to abate the dam, if the company refuse to pay the award. *Wis. Supreme Ct.* 1862, *Ackerman v. Horicon Iron & Manuf. Co.* 16 *Wis.* 150. S. P. 1863, *Tweig v. Horicon Iron & Manuf. Co.* 17 *Wis.* 362.

144. Injuries to owners of land not taken. Provisions of law calculated to enable a railroad company, in cases where the lands required for the road cannot be obtained by gift or purchase, but must be taken adversely to the owners or without their consent, to have the damages assessed which they are to pay to the owners, are inapplicable to cases of mere consequential damages to the lands and premises of other persons, to which no direct injury or damage is done by the road constructed on other lands, which the company are permitted, by the owners of them, to use for the purpose. *N. Y. Supreme Ct.* 1849, *Drake v. Hudson River R. R. Co.* 7 *Barb.* 508, 542.

145. A corporation empowered by legislature to construct a work of public improvement for private emolument, and for

this purpose to take private property upon making compensation, is not to be deemed exempt from liability for injuries resulting from their acts. The common law remedy for such injuries remains. Thus, where the act complained of was the construction of an embankment, by a railway company, at the mouth of a navigable creek, in which the plaintiff had a prescriptive right of storing, landing, and rafting lumber, for the use of his saw-mill, whereby the free flow of the water was obstructed, and the plaintiff thereby deprived of the full enjoyment of his privilege,—*Held*, that the injury was the direct and immediate consequence of the act of the company; and that they were liable for the damages thereby sustained. *N. J. Supreme Ct.* 1857, *Tinsman v. Belvidere Delaware R. R. Co.* 2 *Dutch.* 148. Compare *Steel v. Southeastern Railway Co.* 32 *Eng. Law & Eq.* 866.

146. Where a street is taken by a railroad company, the remedy of an abutter, for an injury thereby, is not by statute, but the ordinary one at law to recover for a consequential injury. The lot and street adjoining, as to the owner of the former, constitute but one piece of property, and an injury to the latter is an injury to the former, and to the whole property. *Ind. Supreme Ct.* 1857, *Protzman v. Indianapolis & Cincinnati R. R. Co.* 9 *Ind.* 467.

147. Under the statutes of Maine, which do not provide for compensation for incidental injuries occasioned by constructing a railroad, to persons whose property is not taken, where a company transcends the limited powers granted in the construction of a bridge or causeway across navigable waters, the remedy is by action at law, not by an application to the county commissioners. *Ms. Supreme Ct.* 1853, *Rogers v. Kennebec & Portland R. R. Co.* 35 *Ms.* 319.

148. Action to enforce award. An action of debt will lie upon the inquest and assessment of compensation for land. *C. P.* 1843, *Corrigan v. London & Blackwall Railway Co.* 5 *Mann & G.* 219; 6 *Scott N. R.* 241.

149. Limitation. Where neither the general statutes, or the special act of incorporation contain any specific limitation, in regard to claims upon railway companies, for land damages, the general statute of limitation of actions, for claims of a similar character, will apply. Thus where the claim was for an in-

jury to an island, caused by the erection of a railway bridge,—*Held*, that the plea of *actio non accrevit infra sex annos* to the award, was good. *Pa. Supreme Ct.* 1854, *Forster v. Cumberland Valley R. R. Co.* 23 *Pa. St.* 371.

VI. WHEN THE TITLE VESTS.

150. As to the title while the proceedings are pending. The title to land taken by a railroad company under a charter which provides that they "should be deemed to be seized" of lands, on payment or deposit of their appraised value, does not vest in the company by locating their road, or by filing an appraisal of damages, until such payment or deposit. The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purpose of constructing their road. *Vt. Supreme Ct.* 1854, *Stacey v. Vermont Cen. R. R. Co.* 27 *Vt.* 39.

151. The title to land taken for a railroad, does not pass by the filing of a survey in the office of the secretary of state. *N. J. Ct. of Errors*, 1862, *Hetfield v. Central R. R. Co.* 5 *Dutch.* 571.

152. Pending an appeal. Where the charter of a railroad company required the company to pay, or tender, the damages for land taken for their road, to the owner, before they should break ground upon the same, and if such damages could not be agreed upon by the parties, provided for their assessment by commissioners, from whose decision an unconditional right of appeal was given,—*Held*, that the company could not, by tendering the amount of damages found by the commissioners, gain the right to enter upon the land, except for the purposes of survey, pending an appeal from the commissioners' award. *N. J. Chancery*, 1837, *Browning v. Camden & Woodbury R. R. Co.* 3 *Green*, 47.

153. Under an act incorporating a railroad company, which provided, that the company, having paid the sum awarded, into court, where the owner refused to receive it, should be seized of the estate, it was *Held*, that after the award and payment of money by the corporation, they were owners of the land, though a *certiorari* had issued to remove the proceedings to the supreme court. *Pa. Supreme Ct.* 1838, *Schuler v. Northern & C. R. R. Co.* 3 *Whart.* 555. Com-

pare *Burlington & C. R. R. Co. v. Sater*, 1 *Clarke*, (*Iowa*), 421.

154. The damages assessed for land taken for a railroad must be tendered before a right to enter can accrue; but if it is important for the railroad to enter immediately and before an appeal from the assessment can be determined, the tender and acceptance so made will not preclude them from having the damages reduced on the appeal. *Ind. Supreme Ct.* 1859, *Indianapolis & Cincinnati R. R. Co. v. Brower*, 12 *Ind.* 374.

155. The right to withdraw the proceeding. The designation of lands required, the appointment of commissioners, and their report of the compensation to be made, vests no right, either in the company to the lands, or in the owners to the money awarded. Until an order of court is made, confirming the report, and directing the payment of the money, the proceeding may be set aside or abandoned. *N. Y. Superior Ct.* 1850, *Hudson River R. R. Co. v. Outwater*, 3 *Sandf.* 639.

156. A statute enabling a city to supply pure water, and to take land upon valuation by a jury, and compensation to the owners, provided that where "such valuation was paid, or tendered, to the owner or owners" of the property, it should "entitle the city to the use, estate, and interest in the same, thus valued, as fully as if it had been conveyed by the owners." *Held*, that the city was not bound by the mere inquisition and judgment thereon, but could rightfully abandon the location, and that payment, or tender, under the statute, was indispensable to the vesting of the title; but that it could be made liable, in another form of proceeding, to the land-owner, for any loss or damage sustained, by reason of the conduct of its authorities in the premises. *Md. Ct. of Appeals*, 1857, *Graff v. Mayor & C. of Baltimore*, 10 *Md.* 544.

157. When the route of a railroad is, before payment of the damages, shifted, so as to avoid the land, this is an abandonment, and no interest in the land remains to the company, and no damages can be recovered against them under the award. *Vt. Supreme Ct.* 1854, *Stacey v. Vermont Central R. R. Co.* 27 *Vt.* 39.

158. When public officers have proceeded under statutory authority to condemn lands for the public use, and an appraisal of

the value of the lands and damages has been made, but not yet confirmed by the court in pursuance of the statute, such proceedings may be discontinued against the assent of the land-owners. Otherwise when the report of the appraisers has been accepted by the court. *N. J. Supreme Ct.* 1864, *Water Commissioners of Jersey City, Matter of*, 81 *N. J. Law* (2 *Vroom*), 72.

159. Where proceedings of a railroad company in acquiring land, have been in conformity with its charter, its title becomes perfect on the filing and recording of the rule of court made on the certificate of the commissioners, and payment or deposit of the compensation awarded; and an order vacating the proceedings does not divest the title. *N. Y. Supreme Ct.* 1853, *Visscher v. Hudson River R. R. Co.* 15 *Barb.* 37.

160. Effect of repeal of statute. After property has been taken for a public use, a statute repealing the statute under which proceedings to determine the compensation were to be had, and declaring such proceedings void, is unconstitutional. The fact that the proposed public use was abandoned, and the property has been relinquished again to the owners, does not affect their vested right to the compensation; though, perhaps, it might have been competent for the Legislature, in such a case, to direct a reassessment of the compensation. *N. Y. Supreme Ct.* 1848, *People v. Supervisors of Westchester*, 4 *Barb.* 64.

See also LEGISLATION.

161. The charter of a railroad company, provided that damages for land should be assessed by a sheriff's jury, whose inquisition should be confirmed by the county court, if no cause to the contrary should be shown, and that the valuation so assessed, when paid or tendered to the owner of the land, should entitle the company to the estate and interest therein as fully as if it had been conveyed to them by the owner. *Held*, that before payment or tender by the company of damages so assessed, the company were not bound, and could refuse to take the land at the assessment; and hence an act of the legislature passed after the county court had confirmed an assessment, but before tender of the amount, directing the court to set aside the inquisition and order a new one, was not unconstitutional, as impairing the obligation of a contract. *U. S. Supreme Ct.*

1850, *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 *How.* 395.

162. Payment of damages a condition precedent. Under a constitutional provision "that no person's property shall be taken or applied to public use without the consent of the legislature, and without a just compensation first made therefor," an offer of compensation is a condition precedent to the seizure of the land; and, therefore, a provision in the charter of a railroad corporation authorizing the company to take the land of individuals, without providing for such previous compensation, is void. *Miss. Ct. of Errors*, 1839, *Thompson v. Grand Gulf R. R. & Co.* 8 *How.* 240.

163. The title to land appropriated, against the consent of the owner, by a company, under their act of incorporation, for the purposes of its works, does not vest in the corporation until compensation is made or adequate security is given therefor.* *Pa. Supreme Ct.* 1864, *Borough of Easton's Appeal*, 47 *Pa. St.* 255.

164. Where the charter of the company provides, that after the appraisal of land, for their use, "upon the payment of the same," or deposit, (as the case may be,) the company shall be deemed to be seized and possessed of all such lands, they must pay or deposit the money before any such right accrues. The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purposes of construction, and without compliance with it, they may be enjoined by a court of equity, or prosecuted in trespass at law, for so doing. The right of the land-owner to the damages awarded, is a correlative right to that of the company to the land. If the company have no vested right to the land, the land-owner has none to the price to be paid. *Vt. Supreme Ct.* 1854, *Stacy v. Vermont Central R. R. Co.* 27 *Vt.* 39.

165. If the owner of land through which a company wishes to run a railroad, agrees to refer to arbitrators the question of damages to be paid by the company for the right of way, and there is no express agreement

* See also, in support of the general rule above stated, *Carr v. Georgia R. R. & Banking Co.* 1 *Kelly*, 524; *Milwaukee & Mississippi R. R. Co. v. Eble*, 4 *Chandl.* 72; *Ramsden v. Manchester & Co. Railway*, 5 *Eng. Railw. Ct. & S.* 552; and to the contrary, *Bloodgood v. M. & H. R. R. Co.* 14 *Wend.* 51; 18 *Id.* 59.

that time shall be given for the payment of the damages awarded, they must be paid before the right of way can vest in the company. *Miss. Ct. of Errors*, 1846, *Stewart v. Raymond R. R. Co.* 7 *Smed. & M.* 568.

166. Railroad companies in New York have no right to enter upon a turnpike or plank road without the consent of the owners, except upon the condition of first paying the damages sustained by the turnpike or plank road company, after the same shall have been ascertained under the statute. *N. Y. Supreme Ct.* 1855, *Ellicottville &c. Plank Road Co. v. Buffalo &c. R. R. Co.* 20 *Barb.* 644.

167. Under the general railroad law of Missouri, no entry for the purpose of constructing a railroad upon land taken under the right of eminent domain, can be justified until the compensation has been actually paid. But it seems the legislature may authorize the entry upon land without compensation, for the purpose of making the preliminary examinations and surveys before the location of the road. *Mo. Supreme Ct.* 1857, *Walther v. Warner*, 25 *Mo.* 277.

168. That upon payment of the compensation assessed by commissioners, and taking possession afterward, the title of the company is perfected, as against the party to the proceedings,—see *Bath River Navigation Co. v. Willis*, 2 *Eng. Railw. Cas.* 7.

169. Acceptance of damages, not necessary. That where a corporation has pursued the course prescribed by the statute to obtain land, the title of the company to it is perfect, though the proprietor of the land obstinately refuses to accept the money awarded,—see *Montgomery &c. R. R. Co. v. Walton*, 14 *Ala.* 207.

170. Gaining possession of lands taken. A corporation acquiring lands by a statutory proceeding, for its corporate uses, derives its title from the statute, and not from the judgment of the court, and the court in the absence of an express authority cannot give it possession by process. If the owner forcibly prevent the company from taking possession, the remedy is by action. *N. Y. Supreme Ct. Sp. T.* 1853, *Niagara Falls & Lake Ontario R. R. Co. v. Hotchkiss*, 16 *Barb.* 270.

171. Whether, if the former owner threatens resistance, he may be restrained by

injunction,—see *Ib.* *Montgomery R. R. Co. v. Walton*, 14 *Ala.* 207.

172. Enjoining entry before payment. Where a company, under color of law, enter upon land for the purpose of constructing their works, without having complied with the requirements relative to such entry, an injunction will be granted to restrain them. *N. J. Chancery*, 1837, *Browning v. Camden & Woodbury R. R. Co.* 3 *Green. Ch.* 47. Compare *Mercer v. Williams*, *Walk. Ch.* 85.

173. Where a charter requires that before taking and appropriating lands, the company shall pay or tender payment of all damages to the owners of the lands to be taken, unless the owners consent thereto, if the company enter upon lands in violation of this provision, an injunction will issue to restrain them. *N. J. Chancery*, 1841, *Ross v. Elizabeth Town & Somerville R. R. Co.* 1 *Green*, 422.

174. Under the constitution of Maryland, (art. 8, § 46,) it is sufficient ground for an injunction to prevent a company from entering on land, that they have not paid or secured the damages. And an averment in the bill of irreparable injury is not necessary. *Md. Ct. of Appeals*, 1859, *Western Maryland R. R. Co. v. Owings*, 15 *Md.* 199.

175. Where a railroad company neglect to pay a land-owner the damages awarded him for the right of way through his land, and he is exposed to the transit of the cars of the company over his land for an indefinite period, with but little prospect of compensation, an injunction will lie to restrain the further use of the land. *Miss. Ct. of Errors*, 1846, *Stewart v. Raymond R. R. Co.* 7 *Smed. & M.* 568.

176. An injunction properly lies to prevent a corporation from appropriating private property for a turnpike, before just compensation is assessed and tendered. *Ind. Supreme Ct.* 1864, *Sidenar v. Norristown, Hope & St. Louis Turnpike Co.* 23 *Ind.* 623.

177. An English railway company having entered into possession of the plaintiff's land, and constructed a railway thereon, without having paid the whole of the purchase money, a bill was filed by the land-owner against the company and its lessee, another company, praying for the payment of the money or an injunction to restrain them from using the land. *Held*, that the first company should pay the money, and in

default, that both companies should be restrained from using the land. *Chancery*, 1866, *Cosens v. Bognor Railway Co.* 1 *Law Rep. Ch. App.* 594: 12 *Jur. N. S.* 738.

178. Action for entry before payment. An entry for the construction of the road, before an assessment, and payment or tender of damages according to the charter, is a trespass for which the company is liable in a common-law action. *Miss. Ct. of Errors*, 1859, *Memphis & Charleston R. R. Co. v. Payne*, 37 *Miss.* 700.

Compare *supra*, 140-142.

VII. EFFECT OF SPECIAL CONTRACTS.

179. Omitting to proceed for damages. The omission, by a party whose land has been taken by a railroad, to apply to the county commissioners for an estimate of damages, will not waive his right to bring an action of trespass against the company, if it appear that they have taken the land without authority. Nor will such omission by the corporation forfeit their rights under their charter to enter upon the land, and have an exclusive occupation temporarily, as an incipient proceeding to the acquisition of a title, or an easement. *Me. Supreme Ct.* 1855, *Hall v. Pickering*, 40 *Me.* 548.

180. A land-owner who foregoes his right to have the damages occasioned to his land by the construction of a railroad, assessed before the making of the road over his land is begun, and, under an agreement with the company, consents that the work may proceed before the damages are to be ascertained and paid, cannot thereafter interpose and prevent the work in progress, or prevent the use of the road; nor, unless, at least, there is a special and binding contract to that effect, can he assert a lien on the land taken and occupied for the road, in the nature of a mortgage for the purchase money, or value of the land. *Vt. Supreme Ct.* 1867, *Knapp v. McAuley*, 89 *Vt.* 275.

181. One who has waived his right to have commissioners appointed to estimate the value of land prior to its being taken by a corporation, and allowed large sums of money to be expended, and improvements put upon the land by the corporation, cannot recover possession of the land upon paying for the improvements; but may

recover compensation for his land, and remuneration for all damages. *N. J. Chancery*, 1855, *Trenton Water Power Co. v. Chambers*, 1 *Stockt.* 471.

182. For circumstances under which a plaintiff was held not to have so acquiesced in a damage to his lands complained of, as to deprive him of the right to an injunction to restrain such damage,—see *Innocent v. North Midland Railway Co.* 1 *Eng. Railw. Cas.* 256.

183. Verbal license. That when one gives a railroad verbal permission to use his land, he cannot recover damages for such use while the permission remains unrevoked,—see *Miller v. Auburn R. R. Co.* 6 *Hill*, 61.

184. Consent. Where the charter of a railroad company provides that the company may obtain land by the consent of the owner, or without consent, upon payment or tender of compensation, a legal consent is intended; and they can obtain it only in such manner as existing laws provide for acquiring title to real estate. *N. J. Ct. of Errors*, 1862, *Hetfield v. Central R. R. Co.* 5 *Dutch*, 571.

185. Agreement to arbitrate. Where, in pursuance of the arbitration clauses of the 8 & 9 Vict. c. 18, both parties agree to refer a question of disputed compensation for land required by a railway company, and the secretary on behalf of the company, signs the appointment of the arbitrator, an award made under such submission is valid, although all the previous forms imposed by the statute have not been complied with, those forms being necessary only in the case of a compulsory arbitration. *Exch.* 1852, *Collins v. South Staffordshire Railway Co.* 12 *Eng. L. & Eq.* 565, 7 *Exch.* 5; 21 *Law J. N. S.* 147; 16 *Jur.* 848.

186. Agreement to sell. Proof of a written agreement to sell land to a company, for a specified price, within a certain time, and of a tender of the amount within the time, and a refusal to accept it, will not authorize the company to enter upon the land afterwards, and locate their road upon the same, or defeat a petition for the damages sustained by reason of such location. *Mass. Supreme Ct.* 1861, *Whitman v. Boston & Maine R. R. Co.* 3 *Al.* 183.

187. Temporary agreement. A canal company was authorized by its charter to enter and take water-courses, &c., and, in default of purchasing, the courts were authorized to award a *tenure*, on the appli-

cation of the owner, to assess damages. For many years the company diverted the use of water of a stream from an ancient mill, under an agreement with the successive owners of the land and mill-site, for a stipulated hire; but on the expiration of an agreement with the last owner, it was not renewed, the company continuing in the use of the water. On a petition for a jury to assess damages,—*Held*, it appearing that the right in question had never been appropriated *in invitum*, but under a contract only, renewable with each successive owner, that the continued use of the water by the company was such a taking under the power of eminent domain granted by the state, as would entitle the owner to compensation. *Pa. Supreme Ct.* 1865, *Heilman v. Union Canal Co.* 50 *Pa. St.* 268.

188. Agreement by one tenant. A grant to a company by one of several tenants in common of the right of way, as to his interest, over the common estate, although it passes no fee, and confers no right as against the other tenants, is nevertheless valid, and operates, as to the tenant executing it, as a release of his damages. *Mich. Supreme Ct.* 1858, *Draper v. Williams*, 2 *Mich.* 536.

189. Effect of abandonment of undertaking. A railway company covenanted with the plaintiff, "that in the event of the proposed bill passing in the then session of parliament, the company should, before they should enter upon any part of the plaintiff's lands, pay to him 4,900*l.* purchase-money for any portion not exceeding 48 acres, which the company might, under the powers of their act, require and take for the purposes of their undertaking." *Held*, that the company were not liable, unless they entered upon some part of the plaintiff's lands. *Q. B.* 1852, *Gage v. Newmarket Railway Co.* 14 *Eng. L. & Eq.* 57; 21 *Law J. N. S.* 398; 16 *Jur.* 1136.

190. An agreement was entered into on behalf of, and was confirmed by, a railway company, in consideration of withdrawal of a land-owner's opposition to a bill of incorporation, to pay him a certain sum as the purchase-money of land, not exceeding eight acres, to be taken by the company for the formation of their railway, and for consequential damages to the land-owner's property. The railway was abandoned, and the land owner filed a claim for specific per-

formance. *Held*, that the claim must be dismissed, the plaintiff having means of complete redress at law. *Chancery*, 1852, *Webb v. Direct London & Portsmouth Railway Co* 1 *De Gez, M. & G.* 521; 21 *Law J. N. S.* 337.

191. A railway company, in consideration of a land-owner withdrawing his opposition, agreed to purchase his land at a stipulated price, and had a clause to that effect inserted in the act. The company being afterwards desirous of abandoning their line, gave notice to the land-owner of their intention to apply to parliament for an act repealing the section of the previous act which confirmed the agreement, and to abandon the branch which affected the land in question. *Held*, that the court would not restrain the company from making the application. *Chancery*, 1867, *Steele v. North Metropolitan Railway Co.* 2 *Law Rep. Ch. App.* 287; 36 *Law J. N. S.* 540.

CONSOLIDATION.

[The legislative union or merger of two corporate bodies in one new one, is most frequently termed, in the United States, "consolidation," in England "amalgamation." This chapter embraces cases upon the validity and effect of such unions, whichever term is employed.]

1. Necessity of legislative action. That two companies cannot consolidate their funds, or form a partnership, unless authorized by express grant of the legislature, or necessary implication,—see *N. Y. & Sharon Canal Co. v. Fulton Bank*, 7 *Wend.* 412.

2. In the absence of any special power for that purpose in their deeds of settlement an amalgamation between two joint stock companies is *ultra vires* and invalid, and the obligations and liabilities arising out of such attempted amalgamation, and assumed by the directors of the purchasing company, cannot be enforced against the shareholders of such company. *Vice-chancery*, 1860, *Re Era Insurance Soc.* 9 *Week. Rep.* 67; 3 *Law Times, N. S.* 314; 30 *Law J. N. S.* 137; 6 *Jur. N. S.* 1334.

3. A shareholder in a railway company is entitled to restrain the directors from carrying into effect an agreement with another railway company for the amalgamation of their lines, which has not received the sanction of the legislature. *So held* where such agreement contained clauses providing for throwing the receipts into one common fund,

and dividing the profit and loss in certain proportions, and also for handing over the entire management and plant of the one company to the other. *Vice-chancery*, 1850; *Charlton v. Newcastle & Carlisle Railway Co.* 5 *Jur. N. S.* 1096; 7 *Week. Rep.* 731.

4. A railway company in England may apply to the legislature for enlarged powers, even for the power to become amalgamated with other companies, so as to make one consolidated company. And contracts between the different companies for this purpose are there recognized, and enforced, in courts of equity. *Chancery*, 1847; *Mozley v. Alston*, 1 *Phill.* 790.

As to invalidity of contracts involving a Delegation of corporate powers, by one company to another, see **POWERS**.

As to Powers generally, see **POWERS**.

5. —and of consent of stockholders. That in this country the consent of all the shareholders, to the amalgamation of different companies should be obtained,—see *Fisher v. Evansville & Crawfordville R. Co.* 7 *Ind.* 407; *Kean v. Johnson*, 1 *Stockt.* 401; *Chapman v. Mad River, &c. R. R. Co.*

6. What imports such consent. That a subscription to stock of an amalgamated company is a sufficient consent on the part of a shareholder, to the amalgamation,—see *Fisher v. Evansville & Crawfordville R. R. Co.* 7 *Ind.* 407.

7. What constitutes consolidation. A railway company, “associating, allying, and connecting itself” with another, does not thereby become equitably “amalgamated” with it. *Chancery*, 1853, *Shrewsbury & Birmingham Railway Co. v. Stone Valley Railway Co.* 21 *Eng. L. & Eq.* 628; 2 *De Gen, M. & G.* 866.

8. An agreement to amalgamate as from a time past, may possibly, in equity, amount to amalgamation; but an agreement to do so at a future period will not, until that period arrives. *Id.*

9. Pending the progress of a bill through parliament, authorizing the S. V. Company to lease their line to the N. W. Company, the bill was opposed by the S. B. Company, and, upon a compromise, a clause was inserted, securing to the S. B. Company the use of part of the line and the joint use of a station, subject to the cesser of these rights in the event of the S. B. Company being leased to or amalgamated with a fourth com-

pany, viz: the G. W. who were rivals to the N. W. Company. At this time the S. B. Company was under no engagements to the G. W. Company. Subsequently, however, those two companies entered into agreements, giving facilities and preference to each other's traffic, and agreed to amalgamate at a future time, if the sanction of parliament could be obtained. *Held*, that this was not such a change of circumstances, produced by the conduct of the S. B. Company, as to exclude them from equitable relief by injunction, for the enforcement of the rights of user conferred on them by the act. *Id.*

10. Under the Pennsylvania act of March 24, 1865, (Pamph. L. 1849), providing for the consolidation of railroad companies, the filing, in the office of the secretary of the State, the certificate of the consolidation of the several companies, is sufficient to constitute the single company thus created, a legal corporation within the State. *Pa. Supreme Ct.*, 1866. *Commonwealth v. Atlantic & Great Western R. W. Co.* 53 *Pa. St.* 9.

11. In a *quo warranto* against a railroad company formed of several companies by consolidation, and constituted a legal incorporation by filing its certificate of consolidation with the secretary of the State, under the Pennsylvania act of March 24, 1865; “*nul tiel record*” is well replied to a plea that the defendants became a corporation by contract of consolidation under said act. *Id.*

12. Whether a plea designed to set up a consolidation of two companies, must aver the particular steps taken to accomplish the consolidation,—see *Collins v. Chicago &c. R. R. Co.* 14 *Wia.* 492; *Hubbard v. Chappel*, 14 *Ind.* 601.

13. Effect of consolidation on the corporate powers. The powers vested in railroad corporations created with charter authority to amalgamate their respective roads, will, upon their consolidation, be conferred upon and united in the corporation taking the name of the consolidated company. *Ill. Supreme Ct.* 1859, *Robertson v. City of Rockford*, 21 *Ill.* 451.

14. —on the corporate property. That where a new corporation is established in the place of an old one, whose property it purchases, neither such property, excepting so far as it is subject to a prior lien, nor the future earnings of the new company, can be

taken to pay the debts of the old corporation, —see *Bruffet v. Great Western R. R. Co.* 25 *Ill.* 358.

15. —on the corporate liabilities. Where different railways, forming a continuous line, run their cars over the whole line, and sell tickets for the whole route and check baggage through, an action lies against either company for the loss of baggage received at one terminus to be carried over the whole road. *N. Y. Ct. of Appeals*, 1858, *Hart v. Rensselaer & Saratoga R. R. Co.* 8 *N. Y.* (4 *Seld.*) 37; see *Stratton v. N. Y. & N. H. R. R. Co.* 2 *E. D. Smith*, 184.

16. Certain corporations were extinguished, and a new corporation formed of the old members and new members, and the debts of the extinguished corporations were made debts of the new corporation. The directors made a call for payment of one of the liabilities of one of the extinguished corporations. A demurrer, for want of equity, interposed by the company to a bill by some of the shareholders against the directors and the company, disputing the right of the directors so to appropriate the call, was allowed. *Vice-Chancery*, 1849, *Cooper v. Shropshire Union Railway & Co.* 13 *Jur.* 443; 6 *Eng. Railw. Cas.* 136.

17. That in an action against a company formed by consolidation, upon a contract for construction made by one of the consolidated companies, the admission or act of the company making the contract, will bind the aggregate company, by way of estoppel *in pais*, —see *Philadelphia, &c. Railway v. Howard*, 13 *How. (U. S.)* 307.

18. —on the liability of stockholders for calls. Corporations may, with the consent of the legislature, consolidate and form a new corporation, but the stockholders in the old, who do not enter into the new corporation, are entitled to withdraw their stock, and are not liable upon subscription. *Ind. Supreme Ct.* 1857, *McCray v. Junction R. R. Co.* 9 *Ind.* 358; 1861, *State v. Bailey*, 16 *Ind.* 46.

19. *It seems*, that where the provisions for the amalgamation of two railway companies have not been fully carried into effect, no suit for calls in the name of the new company can be sustained. *Midland Great Western Railway v. Leech*, 8 *H. L. Cas.* 372; 22 *Eng. L. & Eq.* 45; 28 *Eng. L. & Eq.* 17.

20. A railroad corporation was organized under the general railroad law of Indiana,

of 1852, which law was by its terms liable to "be amended or repealed at the discretion of the legislature." The defendant subscribed for stock in this company. Subsequently, an act authorizing the consolidation of railroad companies was passed, and in pursuance thereof the corporation in question consolidated with another. It appeared, from its articles of association, that such consolidation was merely carrying out the purpose of its organization. *Held*, that the defendant was not exonerated from his subscription. *Ind. Supreme Ct.* 1863, *Hanna v. Cincinnati & Fort Wayne R. R. Co.*, 20 *Ind.* 30.

21. Where the preliminary contracts, by which two railway companies would necessarily interfere with each other's business were set on foot, each provided, that the managing committees, or directors, might "demise or sell the undertaking, or any part thereof, or amalgamate the same or any part thereof, with any other railway, or railways," and the directors of the two companies made, and carried into effect, an amalgamation of the two companies, —*Held*, that the amalgamation of the two companies came fairly within the preliminary contracts, and that an action for calls might be maintained against any shareholder in either company, who had executed the preliminary contracts. *C. P.* 1856, *Cork & Yonghal Railway Co. v. Paterson*, 18 *C. B.* 414, 27 *Law Times*, 186.

22. Two companies competed for tender of leases of railways in France. Each proposed that half the capital should be subscribed for in England, and English committees were appointed. Neither company complied with the requirements of the French government as to deposits; and they were afterwards united, and it was agreed that the then expenses of each committee should be separately paid by that body. Being still unable to make up the full amount of subscription, a union was negotiated between the united companies and a third company, and subsequently an agreement was formed. The original united company then determined to close their affairs, and meetings were held, at which (although the mode of the appropriation was variously represented) certain shares were appropriated and given to the chairman of one of the English committees, who sold them at a premium. Some members of the English committee of the other of

the two original companies filed their bill, praying an account of the produce of those shares, and for a division among those entitled after payment of all expenses. Several accounts were given of what passed at the meeting at which the appropriation was made. The Court, assuming that the persons present had power to do what they did (there being no fraud proved), dismissed the bill. *Vice Chan. Ct.* 1850, *Rossmore v. Mowatt*, 15 *Jur.* 238.

23. — on individual liability of stockholders. Where a company has been amalgamated with and has handed over its assets to another, and the united company is insolvent, a shareholder, creditor of the first company, will not be restrained from enforcing a judgment against a shareholder in the first company and in the united company. *Vice Chan. Ct.* 1859, *Harding v. Webster*, 1 *Drew S.* 101; 6 *Jur. N. S.* 88; 29 *Law J. N. S.* 161.

24. — on liability of debtor to corporation. The New York & Boston Railroad Company, a corporation chartered by the legislature of Connecticut, became consolidated, under the same name, with a railroad corporation of the State of Rhode Island, the charter of the latter corporation specially authorizing such union, and that of the former authorizing the company "to connect and make joint stock or common interest with any other railroad company." The charter of the Connecticut corporation was subject to amendment by the legislature, which afterwards passed a resolution ratifying and confirming the consolidation. By the articles of union, the property of the original corporations was transferred to and vested in the new corporation, which was to pay the debts of the old corporations. B was an original subscriber to the stock of the Connecticut corporation. A creditor of that corporation, whose claim accrued after the consolidation, factorized B as the debtor of the Connecticut corporation.

Upon a *scire facias* afterwards brought by him against B,—*Held*, 1. that while it was very questionable whether the charter of the Connecticut corporation would have authorized such a consolidation, yet that the transaction was validated by the ratifying act of the legislature, which was to be considered as an amendment of the charter as much as if it had been expressly so declared.

2. That the new corporation, being legally established and having capacity to receive an

assignment of the property of the original corporation, and such assignment having been made on valuable consideration, the indebtedness of B was legally transferred to, and became vested in, the new corporation, and he was, therefore, no longer indebted to the original corporation.

3. That such transfer was not invalid against the claim of the plaintiff as a creditor of the original corporation, since his claim accrued after the transfer, and, even if it had accrued previously, yet the original corporation, in the absence of any fraudulent intent, had a right, for a valid consideration, to dispose of its property.* *Conn. Supreme Ct.* 1859, *Bishop v. Brainerd*, 28 *Conn.* 289.

25. — on liability of surety for corporate officers. A section of an amalgamation act (10 & 11 Vict. c. 174) provided that the conveyances, contracts, bonds, &c., made or entered into by the dissolved railway companies should remain valid in favor of the new company. *Held*, that under this provision, a person who was surety by bond to one of the companies, before amalgamation, for the conduct of an employee, was liable to the new company for breaches of the bond committed after the amalgamation. *Exch.* 1853, *Eastern Union Railway Co. v. Cochrane*, 24 *Eng. L. & Eq.* 495; 17 *Jur.* 1103; 23 *Law J. N. S.* 61.

26. Where a clerk to a railway company had executed a bond, with surety, for the faithful discharge of his duty to one company, which was subsequently amalgamated, by act of parliament, with another company, saving to the consolidated company all remedies upon contracts to either,—*Held*, that an action would lie upon such bond for a breach committed before the amalgamation, notwithstanding the new company formed by the consolidation possessed additional lines of road. *Exch.* 1849, *London & C. Railway Co. v. Goodwin*, 3 *Exch.* 320, 736; 6 *Eng. Railw. Cas.* 177; 18 *Law J. N. S.* 174, 337.

As to Succession and its incidents and effects, in respect to corporations, see SUCCESSION; also CONTRACTS, I. 4.

* Defendant executed a note to a corporation, containing an agreement that "no change in the name, character, or management" of the corporation should affect the liability of the maker. The plaintiff corporation changed its name, before the action which was brought in its new name, and the complaint stated this fact and that the note was the plaintiff's property. *Held*, that a good cause of action was stated, and that a demurrer could not be sustained. *Cumberland College v. Ish*, 23 *Cal.* 641.

CONSTITUTIONS.

[This chapter gives a comparative view of the leading provisions of the State constitutions (to 1867), which bear, practically, upon corporations in distinction from natural persons. So far as constitutional provisions affect natural persons as well as corporations, they are not embraced. And many provisions which are merely declaratory of common law rules relative to corporations, and others which, though new, are peculiar to a single State, and deemed unlikely to be of interest to the general student, are, for economy of space, omitted.*]

1. Definition of "Corporation." "The term corporation as used in this article, shall be construed to include all associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships." *N. Y. Const. of 1846*, art. 8, § 3. *Cal. Const. of 1849*, art. 4, § 33; *Mich. Const. of 1850*, art. 15, § 11; *Kan. Const. of 1859*, art. 12, § 6. *Minn. Const. of 1857-58*, art. 10, § 1.

2. Creation of corporations by general and special acts. Power to alter or repeal. "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." *N. Y. Const. of 1846*, art. 8, § 1.

3. "Corporations not possessing banking powers or privileges may be formed under general laws; but shall not be created by special acts except for municipal purposes, and in cases where, in the judgment of the general assembly, the objects of the corporation cannot be attained under general laws." *Ill. Const. of 1847-48*, art. 10, § 1.

Substantially the same provision, with reservation of a power to alter or repeal. *Wis. Const. of 1848*, art. 11, § 1.

4. "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed." *Mich. Const. of 1850*, art. 15, § 1.

Substantially the same provision, *Cal. Const. of 1849*, art. 4, § 31; *Mo. Const. of 1865*, art. 8, § 4.

5. Corporations, other than banking, shall not be created by special act, but may be under general laws." *Ind. Const. of 1851*, art. 11, § 13.

6. "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; but all such laws may from time to time be altered or repealed." *Ohio Const. of 1851*, art. 13, §§ 1, 2.

Substantially the same provision. *Kan. Const. of 1859*, § 1.

7. "No corporation shall be created by special laws; but the general assembly shall provide, by

general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided." *Iowa Const. of 1857*, art. 8, § 1.

8. "Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the assembly; and no exclusive privileges, except as in this article provided, shall ever be granted." *Id.* § 12.

9. "No corporation shall be formed under special laws, except for municipal purposes." *Minn. Const. of 1857-58*, art. 10, § 2.

10. "Corporations may be formed under general acts, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights." *Or. Const. of 1857*, art. 11, § 2.

11. "Corporations shall not be created in this State by special laws, except for political municipal purposes; but the legislature shall provide by general law for the organization of all other corporations, except corporations with banking or discounting privileges, the creation, renewal, or extension of which is hereby prohibited." *La. Const. of 1864*, tit. 7, art. 121.

12. "The legislature shall pass no special act in any manner relating to corporated powers, except for municipal purposes; but corporations may be formed under general laws, and all such laws may, from time to time be altered or repealed." *Nev. Const. of 1864*, art. 8, § 1.

13. "The general assembly shall pass a general law for the incorporation of towns, religious, literary, scientific, benevolent, military and other associations, not commercial, industrial, or financial; but no special act incorporating any such association shall be passed." *Fla. Const. of 1865*, art. 4, § 20.

14. "The general assembly shall have no power to grant corporate rights and privileges to private companies, except to banking, insurance, railroad, canal, plank-road, navigation, mining, express, lumber, manufacturing, and telegraph companies." *Ga. Const. of 1865*, art. 2, § 6, subd. 1. Compare *Md. Const. of 1864*, art. 3, § 32.

15. "The legislature shall pass no special act conferring corporate powers. Corporations may be formed under general laws." *Neb. Const. of 1867*, art. 8, §§ 1, 2.

16. Two-thirds vote of each house required for act of incorporation. Reserved powers of revocation. Charters (except for purposes of public improvement) limited to 20 years. *Del. Const. of 1831*, art. 2, § 17.

17. Two-thirds vote of each house required, and previous notice for act amending charter of private corporation. Such charters not renewable. *Mich. Const. of 1850*, art. 15, §§ 8, 16.

18. Two-thirds vote in each house, and three months' previous notice in newspapers, required for passage of act of incorporation, or act altering such act. *Fla. Const. of 1865*, art. 13, § 1.

19. Two-thirds vote required for act creating or repealing a private corporation. *Tex. Const. of 1866*, art. 7, § 31.

* Since the text was completed several of the States mentioned (e. g. Ala. Fla. Ga. La. and Md.) have adopted new constitutions, which should be consulted. Our quotations are made from the compilation prepared for the New York Constitutional Convention of 1867: the most recent collection accessible at the time of writing.

20. Relations between the State and corporations. State ownership of stock in any corporation prohibited. *Id.*

21. Pledging the faith or credit of the State to raise funds in aid of any corporation, prohibited. *Ill. Const. of 1847-48, art. 8, § 38; Minn. Const. of 1857-58, art. 9, § 10; Md. Const. of 1864, art. 3, § 32; Fla. Const. of 1865, art. 13, § 10; Neb. Const. of 1867, art. 5, § 2.*

22. State ownership of stock in, or loan of credit to, corporations, prohibited. *Cal. Const. of 1849, art. 11, § 10; Ind. Const. of 1851, art. 11, § 12; Ohio Const. of 1851, art. 8, § 4; Nev. Const. of 1864, art. 8, § 9.*

Nearly the same provision. *Iowa Const. of 1857, art. 8, § 3; Or. Const. of 1857, art. 11, §§ 6, 8.*

23. Legislative aid to corporations, specially restricted. *La. Const. of 1864, tit. 7, art. 112.*

See also *infra*, 54-56.

24. Taxation. Property of corporations declared subject to taxation. *Ohio Const. of 1851, art. 13, § 4; Iowa Const. of 1857, art. 8, § 2; Neb. Const. of 1867, art. 8, § 3.*

Same provision, with proviso that municipal, charitable, religious or educational corporations may be exempted by law. *Nev. Const. of 1864, art. 8, § 2.*

25. No citizen compellable to become stockholder in, or contribute to a railroad, or other internal improvement, except inhabitants of town or city. *Ga. Const. of 1865, art. 2, § 6, subd. 4.*

26. Restrictions on taking property for corporate use.* Corporations not to take private property without compensation. *Mich. Const. of 1850, art. 15, § 9; Or. Const. of 1857, art. 11, § 4.*

27. "No right of way shall be appropriated to the use of any corporation until full compensation be first made or secured therefor." *Nev. Const. of 1864, art. 8, § 7.*

28. "No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury," &c. *Ohio Const. of 1851, art. 13, § 5.*

Same provision, except the requirement of a jury trial. *Kan. Const. of 1859, art. 12, § 4.*

29. Lands may be taken for public way for the purpose of granting to any corporation the franchise of way for public use. In all cases, however, a fair and equitable compensation shall be paid for such land, and the damages arising from the taking of the same; but all corporations being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural, and other productions or manufactures on equal and reasonable terms.** *Minn. Const. of 1857-58, art. 10, § 4.*

* In addition to the provisions stated in the text, as bearing particularly upon corporations, nearly all the State constitutions contain in substance a prohibition that private property shall not be taken for public use without compensation; in combination, in several instances, with special qualifications, directions for mode of ascertaining compensation, &c. &c.

30. Individual liability in corporations generally. "Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law." *N. Y. Const. of 1846, art. 8, § 2.*

Same provision, with an exception of banking corporations. *Ill. Const. of 1847, art. 10, § 2; Cal. Const. of 1849, § 32; Ind. Const. of 1851, art. 11, § 14.*

31. "Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities." *Cal. Const. of 1849, art. 4, § 36.*

32. "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases, each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock." *Ohio Const. of 1851, art. 13, § 3.*

Substantially the same provision. *Mo. Const. of 1865, art. 8, § 6.*

Substantially the same provision, except that railroad, religious, and charitable corporations are exempted from its operation. *Kan. Const. of 1859, art. 12, § 2.*

33. "Each stockholder in any corporation shall be liable to the amount of the stock held or owned by him." *Minn. Const. of 1857-58, art. 10, § 1.*

34. "The stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more." *Or. Const. of 1857, art. 11, § 3.*

35. "Dues from corporations shall be secured by such means as may be prescribed by law: provided, that corporators in corporations formed under the laws of this state shall not be individually liable for the debts or liabilities of such corporations." *Nev. Const. of 1865, art. 8, § 3.*

36. "The stockholders of all corporations and joint stock associations shall be individually liable for all labor performed for such corporation or association." *Mich. Const. of 1850, art. 15, § 7.*

For special liability of bank stockholders, see *infra* 42-46.

37. Banking systems. Creation of banking corporations for the purpose of issuing paper, &c., to circulate as money, wholly prohibited. *Cal. Const. of 1849, art. 4, §§ 34, 35; Or. Const. of 1857, art. 11, § 1; Nev. Const. of 1864, art. 8, § 6; Mo. Const. of 1865, art. 8, § 1; Tex. Const. of 1866, §§ 30, 32.*

38. Banking laws must be submitted to the people for approval. *Mich. Const. of 1850, art. 15, § 2; Ill. Const. of 1847-48, art. 10, § 5; Wis. Const. of 1848, art. 11, §§ 4, 5; Ohio Const. of 1851, art. 13, § 7; Iowa Const. of 1857, art. 8, § 5; Kan. Const. of 1859, art. 13, § 8.*

39. How banks may be formed. "The legislature shall have no power to pass any act granting any special charter for banking pur-

* The banking law of Wisconsin cannot be changed or amended by a mere act of the legislature without a vote of the people. *Van Steenwyck v. Sackett*, 17 Wis. 645; *Brower v. Haight*, 18 Wis. 102.

poses; but corporations or associations may be formed for such purposes under general laws." *N. Y. Const. of 1846*, art. 8, § 5.

Substantially the same provision, *Kan. Const. of 1859*, art. 13, § 1.

Substantially the same provision, with an exception of power to establish a bank with branches. *Ind. Const. of 1851*, art. 11, §§ 1, 2, 4.

40. Specie payments. Laws sanctioning suspension of specie payments by banks, prohibited. *N. Y. Const. of 1846*, art. 8, § 5; *Mich. Const. of 1850*, art. 15, § 6; *Ind. Const. of 1851*, art. 11, § 7; *Iowa Const. of 1857*, art. 8, § 11; *Minn. Const. of 1857-58*, art. 9, § 13, subd. 1.

41. Security for circulation. "The legislature shall provide by law for the registry of all bills or notes issued or put in circulation as money, and shall require ample security for the redemption of the same in specie." *N. Y. Const. of 1846*, art. 8, § 6.

Provisions for the same object, stated in greater detail. *Mich. Const. of 1850*, art. 15, § 4; *Ind. Const. of 1851*, art. 11, § 8; *Iowa Const. of 1857*, art. 8, § 8; *Minn. Const. of 1857-58*, art. 9, § 13, subd. 2; *Kan. Const. of 1859*, art. 13, §§ 2, 8.

42. Individual liability of bank shareholders. "The stockholders in every corporation and joint stock association for banking purposes, issuing bank notes or any kind of paper credits to circulate as money," after Jan. 1, 1850, "shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind," contracted after said Jan. 1, 1850. *N. Y. Const. of 1846*, art. 8, § 7.

Same provision, except the limitation as to time. *Ill. Const. of 1847-48*, art. 10, § 4.

43. "The officers and stockholders of every corporation or association for banking purposes, issuing bank notes or paper credits to circulate as money, shall be individually liable for all debts contracted during the time of their being officers or stockholders of such corporation or association." *Mich. Const. of 1850*, art. 15, § 8.

44. The stockholders in every bank or banking company shall be individually responsible to an amount over and above their stock, equal to their respective shares of stock, for all debts and liabilities of said bank or banking company." *Ind. Const. of 1851*, art. 11, § 6.

Substantially the same provision, *Iowa Const. of 1857*, art. 8, § 9.

45. Bank stockholders individually liable in an amount equal to double the amount of their stock; such liability to continue for one year after transfer or sale of stock. *Minn. Const. of 1857-58*, art. 9, § 13, subd. 3.

46. "Stockholders in a bank, when an act of forfeiture is committed, or when it is dissolved or has expired, shall be individually and severally liable for the redemption of the outstanding circulation, in proportion to the stock owned by each, and no transfer of stock shall exonerate such stockholders from this liability unless such transfer was made at least two years previous to said forfeiture, dissolution or expiration." *Fla. Const. of 1865*, art. 13, § 7.

For more general provisions as to liability of stockholders, see *supra*, 30-36.

47. Preference of bill-holders. "In case of the insolvency of any bank or banking association, the bill-holders thereof shall be entitled to preference in payment over all other creditors of such bank or association." *N. Y. Const. of 1846*, art. 8, § 8; *Mich. Const. of 1850*, art. 15, § 5; *La. Const. of 1864*, art. 122.

Substantially the same provision: *Ind. Const. of 1851*, art. 11, § 8; *Iowa Const. of 1857*, art. 8, § 10; *Minn. Const. of 1857-58*, art. 9, § 13, subd. 4; *Kan. Const. of 1859*, art. 13, § 4.

48. Two-thirds vote of each house required for granting or extending a bank charter, or authorizing suspension of specie payment by any chartered bank. *Ga. Const. of 1865*, art. 2, § 6, subd. 1.

49. Special restrictions on the legislative power to pass bank charters. *Pa. Const. of 1838*, art. 1, § 25.

50. No charter for banking purposes to be granted or renewed except upon condition that stockholders shall be liable to the amount of their respective share or shares of stock, for all its debts and liabilities, and that no officer of such corporation shall borrow money from it, under penalty of fine or imprisonment. Books, &c., of banks to be open for inspection. *Md. Const. of 1864*, art. 3, § 38.

51. A special system of restrictions on the creation of banks, and their operations. *Ala. Const. of 1865*, § 34.

Another such system. *Fla. Const. of 1865*, art. 13, §§ 3, 8.

52. Existence of banks limited to 20 years. *Ind. Const. of 1851*, art. 11; *Fla. Const. of 1865*, art. 13, § 2.

53. Banks must keep office of redemption at convenient places within the State. Must not issue notes less than one dollar. *Kan. Const. of 1859*, art. 13, § 6 and § 7 as amended 1861.

54. State banks. Creation of State banks, and State ownership of stock in banks, prohibited. *Ill. Const. of 1847-48*, art. 10, § 3.

See also *supra*, 20-23.

55. Organization of a single bank with branches; or a State bank with branches, authorized. *Iowa Const. of 1857*, art. 8, §§ 6, 7; *Ind. Const. of 1851*, art. 11, §§ 4, 5.

56. State ownership of stock in banks prohibited. *Kan. Const. of 1859*, art. 13, § 15.

57. Municipal corporations. "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations." *N. Y. Const. of 1846*, art. 8, § 7; *Cal. Const. of 1849*, § 37.

Substantially the same provision. *Wia. Const. of 1848*, art. 11, § 3; *Mich. Const. of 1850*, art. 15, § 13; *Ohio Const. of 1851*, art. 13, § 6; *Or. Const. of 1857*, art. 11, § 5; *Kan. Const. of 1859*, art. 12, § 5; *Nev. Const. of 1864*, art. 8, § 8; *Neb. Const. of 1867*, art. 8, § 4.

58. Cities and towns not to be incorporated by special laws. *Iowa Const. of 1857*, art. 3, § 20.

59. No municipal corporations to be created by special act, except cities of at least 5000 inhabitants;—and those only upon an approving vote of the inhabitants. *Mo. Const. of 1867*, art. 8, § 5.

60. Restrictions upon them. "No municipal corporation shall take private property for public use against the consent of the owner, without the necessity thereof being first established by the verdict of a jury." *Wis. Const. of 1848*, art. 11, § 2.

Substantially the same provision with the addition of a clause requiring compensation to be made. *Mich. Const. of 1850*, art. 14, § 14.

61. Municipal corporations not to be stockholders in banks. *Iowa Const. of 1857*, art. 6, § 4.

62. Municipal corporations not to be stockholders in or loan credit &c. to any corporation. *Or. Const. of 1857*, art. 11, § 9.

Same provision, with an exception in favor of educational or charitable corporations. *Nev. Const. of 1864*, art. 8, § 9.

Same provision, with an exception in favor of railroad corporations. *Nev. Const. of 1864*, art. 10, § 10.

63. Religious corporations. Establishment of religious corporations prohibited; except that by a general law any religious society &c. may become a body corporate for the purpose of holding and managing through a body of trustees, a limited quantity of land, and buildings for a house of worship, chapel, parsonage and burial ground. *Mo. Const. of 1865*, art. 1, § 12.

64. Internal improvement corporations to be encouraged. *Ill. Const. of 1847-48*, art. 10, § 6; *Tex. Const. of 1866*, art. 7, § 36.

CONTRACTS.

[This title embraces the general doctrine of the corporate power to make contracts,—the qualifications of that power when it attempts to contract out of the State by which it was created,—in what mode it may in general exercise that power, and whether writing, seal, resolution, &c., are necessary,—the interpretation of corporate contracts,—the liability of corporations upon their contracts, and the remedy to enforce it,—whether any effect, and what, may be given to a contract exceeding the corporate powers, or to one exceeding the powers of its officers or agents,—whether a given contract binds the corporation, or only the individual officers or agents who entered into it,—and the validity of doubtful contracts. The effect to be given to a corporate contract violating a rule relative to the subject-matter of the contract, is generally placed under the title of such subject-matter:—*c. g.* Invalidity of contracts for excessive interest is under INTEREST. Matters relative to any contract implied in the acceptance of charter, in the employment of agents and officers, or in the issue of stock, are under CHARTERS; AGENTS; OFFICERS; STOCK. In respect to the particular instruments in which contracts are embodied, the law governing each is under its title, so far as there are distinctive titles which are familiar:—*c. g.* ASSIGNMENTS; BILLS AND NOTES; BONDS; DEEDS; GRANTS; LEASES; MORTGAGES; SECURITY; RESCRIPTION. Matters relative to any contracts which have no distinctive names are retained in this chapter.

As this work is confined to the law of *Corporations*, the general law of contracts applicable equally to the engagements of natural persons and to those of corporations, is excluded, or only very briefly indicated. Our pur-

pose in this chapter is limited to a presentation of the law peculiar to agreements and engagements of corporations.]

I. THE POWER TO MAKE THEM.

1. *In general.*
2. *Effect of special restrictions.*
3. *Contracting out of the State of incorporation.*
4. *Contracts in behalf of future corporations.*

II. HOW THEY MAY BE MADE.

1. *In what manner.*
 - A. Necessity of a writing.
 - B. Necessity of a seal.
 - C. Consideration.
 - D. Assent.
 - E. Matters of form.
 - F. Execution.
 - G. Modifications.
2. *By what agencies.*
3. *Effect of irregularities or misconduct.*
4. *Defective contracts, how rendered obligatory.*

III. INTERPRETATION.

1. *Corporate rights and obligations.*
2. *When an agent or officer is personally bound.*
3. *What constitutes performance.*

IV. VALIDITY.

V. REMEDIES.

I. THE POWER TO MAKE THEM.

1. *In general.*

1. What power is implied, generally. Unless restrained by law, every corporation has the incidental power to make any contract, and evidence it by any instrument which may be necessary to advance the objects for which such corporation was created. *Ohio Supreme Ct. 1855*, *Strauss v. Eagle Ins. Co.* 5 *Ohio St.* 59.

2. It is well settled that a corporation, without special authority, may dispose of lands, goods, or chattels, or of any interest in the same, as they deem expedient, and in the course of their legitimate business may make a bond, mortgage, note or draft, and also may make compositions with creditors, or an assignment for their benefit, with preferences, except when restrained by law. [25 *Barb.* 146; 1 *Sandf. Ch.* 280; 14 *Barb.* 358; 5 *W. & S.* 223; 4 *Rob.* 517; 4 *B. M.* 413; 6 *G. & J.* 823; 32 *N. H.* 486.] Hence it may issue

its bonds to secure a loan which it is authorized to obtain, and may therein pledge its property for the payment. *U. S. Supreme Ct.* 1853, *White Water Valley Canal Co. v. Vallette*, 21 *How.* 414.

3. A corporation may make contracts within the scope of the legitimate purposes of its organization, although its charter contains no express provision authorizing it to make contracts. *U. S. Supreme Ct.* 1813, *Bank of Columbia v. Patterson*, 7 *Cranch*, 299. And see *Muir v. Louisville & Portland Canal Co.* 8 *Dana*, 161.

4. When the charter or act of incorporation and valid statutory law, are silent as to what contracts a corporation may make, it has a power, as a general rule, to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created, and none other. *K. B.* 1819, *Broughton v. Manchester Waterworks Co.* 3 *Barn. & Ald.* 1. And see *Old Colony R. R. Co. v. Evans*, 6 *Gray*, 25.

5. Where the State incorporates certain public officers for the time being and their successors, with the ordinary corporate powers, for the purpose of constructing a public work at the public expense, such a corporation is liable upon their contracts like any other corporation, unless there is something in the charter to indicate a contrary intent. *Va. Ct. of Appeals*, 1849, *Dunnington v. Northwestern Turnpike Road*, 6 *Gratt.* 160.

6. A corporation having power to grade streets, has incidental thereto power to make contracts respecting the same, in regard to the work to be done, and the compensation to be paid. *U. S. Circuit Ct. (Ill.)* 1844, *Sturtevant v. City of Alton*, 8 *McLean*, 393.

7. In general, corporations are as much bound by their contracts as individuals, where the seal is affixed in a manner binding on them; and where a corporation is created for particular purposes, with special powers, their contract will bind them, unless it appears from the provisions of the charter, that the contract was *ultra vires*; or that the legislature meant that such a contract should not be made. *Exch.* 1858, *Bateman v. Mayor &c. of Ashton-under-Lyne*, 3 *Hurl. & N.* 323.

8. A corporation, like an individual, is not only bound by, but may take the benefit

of the general laws where it is within the reason of them, unless there be particular modifications in the charter. And the rights and contracts of corporations equally have the protection of the provisions of the constitution regarding the inviolability of the obligation of contracts, for though that instrument may not mention them by name, they are within the operation of it as a general law. *N. C. Supreme Ct.* 1851, *State Bank v. Cape Fear Bank*, 13 *Ired. L.* 75.

9. A public company incorporated under act of parliament, cannot generally contract, except in the mode and upon the conditions specified either in the special act or the general act to which it is subject. *Exch.* 1851, *Homersham v. Wolverhampton Waterworks Co.* 4 *Eng. L. & Eq.* 426; 6 *Exch.* 137; 20 *Law J. N. S.* 193.

10. Its Limits. Corporations are not only incapable of making contracts which are forbidden by their charters, but in general they can make none, which are not necessary, either directly or indirectly to effect the objects of their creation. Thus, where a company was incorporated "for the purpose of establishing and conducting a line or lines of steamboats, vessels and stages, or other carriages, for the conveyance of passengers" *between certain places*,—*Held*, that a contract by such a company for the breaking of ice and towing of vessels through the track broken, to another place, was invalid, and could not be enforced against them. *Md. Ct. of Appeals*, 1836, *Pennsylvania &c. Steam Nav. Co. v. Dandridge*, 8 *Gill & J.* 248; *Md. Chancery*, 1850, *Abbott v. Baltimore &c. Steam Packet Co.* 1 *Md. Ch. Dec.* 542.

11. Corporations possess only *jura minorum*. They have not the power of contracting on all subjects, like persons of full age, and *sui juris*. Having only such powers as are conferred by their acts of incorporation, they cannot be bound by contracts made by those not authorized to represent them.* *La. Supreme Ct.* 1857, *Seibrecht v. City of New Orleans*, 12 *La. Ann.* 496.

12. When it exists. *It seems* that it is no defence to an action by a corporation on a contract which is otherwise valid, that at the time of making it the corporation had

* That a corporation is presumed capable of making every contract which a natural person could make,—see *Feeny v. People's Fire Ins. Co.* 2 *Robertson*, 599.

not complied with the directions of the charter in respect to the organization. *Mass. Supreme Ct.* 1856, *City Hotel v. Dickinson*, 6 *Gray*, 586.

13. A railway company who had projected a line of railway, being opposed by a land-holder on the line, arranged, through a third party, who professed to be the agent of the company, to purchase his land at a certain price. The land-owner withdrew his opposition, and the bill passed authorizing the construction of the new line. No steps, however, were taken to carry out the scheme; the land-holder filed his bill against the company for specific performance of the contract to purchase his land. *Held*, that there was no contract between the plaintiff and the company, for before they obtained their new act they could not enter into a contract. *Bolls Ct.* 1852, *Gooday v. Colchester Stour Valley Railway Co.* 15 *Eng. L. & Eq.* 596; 19 *Law Times*, 884.

14. When it terminates. That a corporation has no power, after a judgment declaring its charter forfeited, to make any contract, unless in pursuance of a power reserved to it by the statute providing for the judgment of forfeiture,—see *Saltmarsh v. Planters & Merchants' Bank*, 14 *Ala.* 668.

15. That after a corporation has, by operation of law, ceased to exist, in consequence of non-compliance with statute requirements, (no judgment of forfeiture being prescribed), it has no power to contract; and a contract made by its officers cannot be the basis of an obligation on its stockholders,—see *Wilson v. Tesson*, 12 *Ind.* 285.

For matters applicable to the power to contract in common with other powers of corporations, see **POWERS**.

16. Contracts with officers and members. There is no legal objection to a contract between a corporation and individual members of it, when the authority of the corporation to contract with its members is within the reason of the powers vested in it, and may be necessary for their execution; although this authority may not be expressly given by any statute. *Mass. Supreme Ct.* 1809, *Worcester Turnpike Co. v. Willard*, 5 *Mass.* 80; 1818, *Middlesex Turnpike Co. v. Swan*, 10 *Id.* 884; 1834, *Revere v. Boston Copper Co.* 15 *Pick.* 351. *S. P. Pa. Supreme Ct.* 1833, *Gordon v. Preston*, 1 *Watts*, 385; *S. C. Ct. of Appeals*, 1844, *Central*

R. R. & Banking Co. v. Claghorn, 1 *Speers' Eq.* 545, 562; *N. Y. V. Chan. Ct.* 1840, *Ely v. Sprague*, 1 *Clarke*, 351, 357.

17. The mere fact that a creditor of a corporation is also a member of the board of directors, does not render the confession of a judgment in his favor fraudulent. The members or directors of a corporation may make contracts with it, like other individuals; and when the contract is completed, the director stands, as to the contract, in the relation of a stranger to the corporation. *N. J. Chancery*, 1863, *Stratton v. Allen*, 16 *N. J. Eq.* 229.

18. A corporator may contract with his corporation, and sue or be sued on his contracts. *U. S. Circ. Ct. Ind.* 1849, *Culbertson v. Wabash Navigation Co.* 4 *McLean*, 544.

See **MEMBERS**.

19. Presumptions in aid of the power to contract. A corporation has power to lend its capital on bond and mortgage, and to take mortgages by way of security for debts. An assignment to it of a mortgage will be presumed to have been made to secure a loan or debt unless the contrary be shown. It will not be presumed, in the absence of all proof to the fact, that this is an illegal transaction. The strict rule which prevails in relation to the powers of corporate bodies is salutary in its influence, and ought not to be relaxed; but there is no principle upon which an act, apparently within the legitimate authority of a corporation, should be presumed to have been done for an illegal purpose. *N. Y. Supreme Ct.* 1836, *Mann v. Eckford*, 15 *Wend.* 502.

See **ASSIGNMENTS**.

20. If the record does not show the nature of the transaction, by which a corporation became the indorsee of a promissory note, it will be presumed that the note was acquired by the corporation, within the provisions of its charter. *Mo. Supreme Ct.* 1851, *Roussin v. St. Louis Perpetual Ins. Co.* 15 *Mo.* 244.

21. Where plaintiffs were a foreign life insurance company, and the note sued on was for premium,—*Held*, that it was to be presumed that the insurance was such as the company were authorized to make, until the contrary was shown. *N. Y. Ct. of Appeals*, 1855, *Mutual Benefit Life Ins. Co. v. Davis*, 12 *N. Y. (2 Kern.)* 569.

22. Banks, insurance companies and similar corporations, may be liable upon con-

tracts which do not strictly conform to their charter. If the charter declares that they shall be liable upon contracts signed by certain officers, and the corporation introduces in the transaction of their business a usage of a different mode of execution, they must be held liable on contracts made according to such usage. To hold otherwise would be to sanction a fraud upon the community, who cannot in general be supposed to have knowledge of the deviation from the charter. A corporate act adopting such deviation is not necessary in all cases. It is sufficient if there be a usage and practice under such circumstances as may be presumed to be within the general knowledge, and by the consent of the company.* *Conn. Supreme Ct.* 1817, *Bulkley v. Derby Fishing Co.* 2 *Conn.* 252; *Witte v. Derby Fishing Co. Id.* 260; 1841, *Kilgore v. Bulkley*, 14 *Id.* 362.

23. Proof of the execution of a bill of exchange drawn upon a corporation, (*e. g.* an Ocean Steamship Company formed under the N. Y. act of 1852) and accepted by its president, is presumptive evidence that it was founded on a sufficient consideration, and was drawn for legitimate purposes within the purview of the charter of the company. The burden of proof is on the opposite party to show that the bill was drawn for a purpose beyond the powers of the company. [9 *Paige*, 470; 4 *Hill*, 442; and see 5 *Den.* 507; 86 *Eng. L. & Eq.* 142.] *N. Y. Superior Ct.* 1857, *Belmont v. Coleman*, 1 *Bow.* 188.†

24. That a contract made by a corporation,—*e. g.* a promissory note,—is presumed to have been made for a sufficient consideration and to be within the corporate powers, see *Lindsley v. Simons*, 2 *Abb. Pr. N. S.* 69.

25. Although a corporation can only enforce such contracts as it is, by its charter, authorized to make, yet where other persons have become interested, having dealt with the company in good faith, believing in their power to contract, every presumption and in-

tendment is made in favor of such power and its appropriate exercise. *N. Y. Superior Ct.* 1864, *Hope Mutual Life Ins. Co. v. Taylor*, 2 *Robertson*, 278.

26. Instances. Power to give notes. That all corporations having power to create liabilities may give their notes promising payment of just debts, and that a note made by such a corporation may be presumed to be given for such purpose, until the contrary is shown,—see *Dubois v. N. Y. & Harlem R. R. Co.* 1 *N. Y. Leg. Obs.* 362.

27. A corporation having power to construct extensive works has an implied power to contract debts therein, and to give its negotiable obligations in payment of such debts. The privileges which a corporation has may be confined to those which are expressly conferred or necessarily incidental; but the power to bear a burden, to pay a debt, or, if unable, to give an obligation payable in future, is rather a duty than a privilege. And any construction which would relieve corporations from such obligations would invert the rule of strict construction, and confer on them privileges injurious to the public. Corporations are bound by all contracts, whether express or implied, whether by bond, bill of exchange, or negotiable note, entered into in the usual and necessary course of their legitimate business, except when there is a statutory prohibition. *Pa. Supreme Ct.* 1854, *McMasters v. Reed*, 1 *Grant's Cas.* 36.

28. Corporations empowered to purchase, hold and convey necessary lands and goods,—*e. g.* manufacturing companies organized under 8 *N. Y. Rev. Stat.* 810—have power to make contracts and give notes; otherwise credit could not be extended to them, and they must pay down, which would be an unreasonable construction of the powers conferred. *N. Y. Supreme Ct.* 1886, *Clark v. Farmers' Woolen Manuf. Co.* 15 *Wend.* 256. *S. P. Ky. Ct. of Appeals*, 1840, *Commercial Bank v. Newport Manuf. Co.* 1 *B. Monr.* 13.

29. The trustees of a society incorporated for the purpose of building a monument, in virtue of their authority to manage the finances and property of the society, are competent to bind the society in the modes ordinary in such management, and may do this by a promissory note made through their treasurer. *Mass. Supreme Ct.* 1838, *Hayward v. Pilgrim Society*, 21 *Pick.* 270.

* In a suit to enforce an obligation against a corporation, if the corporation seeks to avoid it on account of a defect of power on its part to enter into such obligation, it should make such defect manifest by pleading and proof.

Thus, where a turnpike company, created and vested with powers by a private act, gave a note for the purchase of a plank road, and in a suit on the note answered, "that it was not necessary for them to purchase the plank road,"—*Held*, that the answer was bad on demurrer, on the ground that the private act was neither pleaded and proved, nor admitted. *Charleston &c. Turnpike Co. v. Willey*, 16 *Ind.* 34.

† The judgment was affirmed, 21 *N. Y.* 96.

80. The trustees of such a society were authorized by vote to appropriate the funds of the society to the erection of a suitable edifice, and were required by the by-laws to manage the finances and property of the society. The trustees thereupon entered into a contract for the building, and, having exhausted the funds of the society, and there remaining a debt for which they were personally responsible, voted that the treasurer should give a note to one of their number who had paid the debt, without limiting in the vote the time within which the note was to be given. *Held*, that, by virtue of their authority to manage the finances, they had power to authorize the note, creating one debt to pay another, and that under their vote the treasurer might make the note several years afterwards, the claim not being then barred by lapse of time. *Ib.*

81. Where a company was incorporated, not for the purposes of trade, but to supply water, or any purpose so disconnected with trade,—*Held*, that it had no power to issue notes and bills. There must be express authority to enable the body corporate so to do. *K. B.* 1819, *Broughton v. Manchester Waterworks Co.* 3 *Barn. & Ald.* 1.

82. The officers of a corporation have no power to authorize the execution of a note as surety for another in respect to a matter having no relation to the corporate business, and in which the corporation has no interest. Such a transaction is not within the scope of its business; and a party receiving such note, with notice of the circumstances under which it was given, can maintain no action upon it against the corporation. *Cal. Supreme Ct.* 1865, *Hall v. Auburn Turnpike Co.* 27 *Cal.* 255.

83. In an action upon such note, evidence that the note was not given for the debt of the corporation, is admissible under an answer denying the execution of the note. *Ib.*

For a fuller view of the power to make notes and accept bills, see *BILLS AND NOTES*, 1-31.

84. — or accept bills. A corporation, authorized to employ their capital solely in advancing money upon goods to be sold upon commission, may lawfully accept bills drawn upon account of future consignments, and is bound by the acceptance of its general agent. *N. Y. Supreme Ct.* 1818, *Munn v. Commission Co.* 15 *Johns.* 44.

85. — to make indorsements. A bank has by implication the same power that any other holder has to transfer by an indorsement, or by a delivery under a blank indorsement, a negotiable note. In discounting notes and managing its property in legitimate banking business, it must be able to assign or sell those notes when necessary and proper, as, for instance, to procure more specie in an emergency, or return an unusual amount of deposits withdrawn, or pay large debts for its banking house, and for any "goods and effects" connected with banking which it may properly own. [6 *Gill & J.* 219; 5 *Pet.* 560.] Indeed, its right to sell any of its property, when not restricted in the charter or any previous law, is perhaps as unlimited as that of an individual, if not carried into the transaction of another separate and unauthorized branch of business. [*Ang. & A. on Corp.* 104, § 9; 4 *Johns. Ch.* 307; 2 *Kent's Com.* 282; 11 *Serg. & R.* 411.] *U. S. Supreme Ct.* 1847, *Planters' Bank v. Sharp*, 6 *How.* 801.

So held, where the transfer was after maturity. *N. Y. Ct. of Appeals*, 1855, *Marvine v. Hymers*, 12 *N. Y. (3 Kern.)* 223.

86. A bill of exchange was drawn payable "to the order of S—, Cas.," upon the treasurer of a railroad company. S., who was cashier of a bank, indorsed the bill, "pay P., or order; S—, Cas." In a suit subsequently brought against the bank as indorser of the draft, it appeared, that S., as cashier of the bank, procured the bill to be discounted by the plaintiffs; but that the discount was obtained, and the indorsement of the cashier made, for the accommodation of the railroad company. Upon the trial, the judge charged the jury, that if the cashier had special authority to indorse the draft, the bank was bound by the indorsement, although for accommodation. *Held*, that the charge, thus unqualified, was erroneous; though it seems that if the judge had added the qualification that the plaintiff had received and discounted the bill under a representation of the defendant that it was its bill which the cashier forwarded to be discounted for the defendants' benefit, the charge would have been quite correct. *N. Y. Ct. of Appeals*, 1855, *Bank of Genesee v. Patchin Bank*, 13 *N. Y. (3 Kern.)* 809.

87. On a second trial of the same case, the court charged that the bank could not

become a mere accommodation indorser for another, of paper in which it had no interest; that if the plaintiffs had notice the bill was indorsed for the accommodation of the railroad company, they could not recover; but if the cashier was authorized to send the bill, and the plaintiffs received it without notice, and under circumstances indicating it was business paper, and indorsed in the usual course of business, the plaintiffs were entitled to recover. *Held* correct. *N. Y. Ct. of Appeals*, 1859, *Bank of Genesee v. Patchin Bank*, 19 *N. Y.* 312.

38. A manufacturing corporation is not authorized to indorse, for the accommodation of another, paper in which it is not interested; because such a transaction is not within the scope of the business for which it was constituted, and in which alone it is empowered to act. [3 Kern. 309] *N. Y. Supreme Ct.* 1857, *Central Bank v. Empire Stone-Dressing Co.* 26 *Barb.* 23.

39. — to give a guarantee. A bank may guarantee the payment of securities assigned by its debtor directly to a party who makes advances to the bank upon them, in discharge of the debtor's obligations to the bank. And as a guarantee without a formal assignment to and reassignment by the bank is in substance within the rule, and only needs a formality to bring it in all respects within it, the omission of the form should be disregarded, and the substance alone looked to. *N. Y. Supreme Ct.* *Talman v. Rochester City Bank*, 18 *Barb.* 123.

40. Where a corporation, created for the purpose of building a plank road, guaranteed the payment of a loan of money made by another corporation of like character, to enable it to build its road, the completion of which would be advantageous to the former, and on default in the payment of such loan, paid the amount thereof,—*Held*, that, inasmuch as the guaranty was unauthorized, the payment created no legal liability on the part of the corporation for whose benefit it was made. *Wis. Supreme Ct.* 1858, *Madison &c. Plank Road Co. v. Watertown & Portland Plank Road Co.* 7 *Wis.* 59.

41. *Held*, also, that the corporation for whose benefit the guarantee was made, was not estopped to set up the want of power in their guarantor. *Id.*

42. — to lend money. A plank road company is not authorized to loan money

generally, unless there is a clause in the charter to that effect. But, if necessary, it can loan a sum of money to one of its contractors, to enable him to build a section of the road.* *Id.*

43. A railroad corporation which was not authorized to loan money or buy notes, loaned money to the trustees of another company (upon a bill drawn by one trustee, and indorsed by others), which was applied to the payment of a debt of the latter company, upon which the trustees were liable. *Held*, that the railroad company could not maintain an action on the bill of exchange, but that the drawer of the bill was liable to them for money had and received. *Ala. Supreme Ct.* 1859, *Waddill v. Alabama &c. R. R. Co.* 35 *Ala. N. S.* 323.

44. — to borrow money. A corporation has incidental authority, when not specially restricted, to borrow money for any of its lawful purposes.† *N. Y. Supreme Ct.* 1852, *Beers v. Phoenix Glass Co.* 14 *Barb.* 358; 1857, *Partridge v. Badger*, 25 *Id.* 146.

45. A banking association has implied power to borrow money for its legitimate business, and bind itself, by a written obligation, for its repayment. *N. Y. Ct. of Appeals*, 1857, *Curtis v. Leavitt*, 15 *N. Y.* 9; 1859, *Barnes v. Ontario Bank*, 19 *Id.* 152; *N. Y. Supreme Ct.* 1857, *Mead v. Keeler*, 24 *Barb.* 20.

46. A rail road company has power, incident to its general powers, to borrow money or securities for payment of its debts or for its necessary purposes. And an express power in the charter to borrow money for the construction of its road, and secure the same by bond and mortgage, is not a limitation or restriction of the powers of the corporation, but a grant of additional power. *N. J. Supreme Ct.* 1858, *Lucas v. Pitney*, 8 *Dutch.* 221. Compare *Mobile & Cedar Point R. R. Co. v. Talman*, 15 *Ala. N. S.* 472.

47. A company created with power to purchase, hold and convey, such and so much real estate, and to erect such buildings as it may deem necessary or proper for the purpose of a public exchange, has implied authority to borrow money for that purpose,

* That the grand lodge of freemasons of Alabama has no power under the charter, to loan money,—see *Grand Lodge of Alabama v. Waddill*, 36 *Ala.* 313.

† That this power exists only where it is essential to the transaction of its ordinary affairs,—see *Beerys v. Phoenix Glass Co.* 14 *Barb.* 358.

and secure its repayment by the company's bonds, and by mortgages on its real estate. *N. Y. A. V. Chan. Ct.* 1844, *Barry v. Merchants' Exchange Co.* 1 *Sandf. Ch.* 280.

48. A religious corporation empowered by its charter to build and to hold property, has an implied power to borrow money by receiving from subscribers for shares a small percentage in excess of the par value of shares, in consideration of making his shares redeemable. *Mass. Supreme Ct.* 1844, *Davis v. Proprietors of Meeting House in Lowell*, 8 *Metc.* 321.

49. Manufacturing and trading corporations have power to raise money by loan as necessarily incident to their power to purchase stock and materials; and, as incident to the power to purchase, they have power to give security by pledging the property so purchased. And, as corporations can act only by their officers or agents, such officers and agents are not mere factors; but the treasurer and general agent have power together to borrow money for the use of the corporation, give its negotiable note, and pledge its personal property for the same, and execute the necessary documents, notwithstanding the by-laws give such officers certain specific powers, which do not include the foregoing acts. *Mass. Supreme Ct.* 1853, *Fay v. Noble*, 12 *Cush.* 1.

50. Corporations that have the power to borrow money, have also the necessary power to give obligations for its repayment in any form not expressly prohibited by law. *N. Y. Ct. of Appeals*, 1857, *Curtis v. Leavitt*, 15 *N. Y.* 9; 1858, *Leavitt v. Blatchford*, 17 *Id.* 521; 1859, *Barnes v. Ontario Bank*, 19 *Id.* 152.

51. That a power conferred on a corporation to construct a work,—*e. g.* a plank road—confers an implied power to borrow money necessary for the purpose of such construction; and that its bonds, issued for the money borrowed, are valid if the money was actually applied to the object authorized,—see *Smith v. Law*, 21 *N. Y.* 296. But compare *Ketchum v. City of Buffalo*, 14 *Id.* (4 *Kern.*) 356.

52. A contract made by a city to pay a sum of money, with interest, to a person who has assumed the payment of interest on some of the city's debts,—as well interest to become due, as interest already due, is not a "borrowing of money," but is a contract for the payment of a debt; and, as being the latter, will be sustained, when, if it were deemed

the former, it might fall within prohibitions in the charter prohibiting the city's borrowing money except on certain terms. *U. S. Supreme Ct.* 1863, *Gelpcke v. City of Dubuque*, 1 *Wall.* 221.

53. — to covenant to repay money borrowed. Where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of those objects, and to secure the repayment of such money by an instrument which on its face imports a covenant for repayment of money so borrowed and so secured, and not duly repaid, an action may be maintained against the corporation on breach of the covenant, although there are no specific statutory provisions enabling them to bind themselves by such a covenant. *Exch. Ch.* 1852, *Eastern Union Railway Co. v. Hart*, 14 *Eng. L. & Eq.* 535; 17 *Jur.* 89; 8 *Exch.* 110; 22 *Law J. N. S. Exch.* 20.

54. — to buy. A corporation, by the terms of its creation, has the same capacity to buy and sell, that an individual has, who possesses the capacity to contract. [*Co. Litt.* 44, 300, 306; *Sid.* 162; *Com. Dig.* tit. Franchise, 11, 18; 1 *Ves. & B.* 226; 7 *Ohio*, 220.] *Reynolds v. Commissioners of Stark*, 5 *Ohio*, 205.

55. A power to purchase property carries with it as incidental, the power to purchase on credit and give an obligation for the payment. But whether a power to borrow money to purchase can be implied is questionable. *N. Y. Ct. of Appeals*, 1856, *Ketchum v. City of Buffalo*, 19 *N. Y.* (4 *Kern.*) 356.

56. A provision giving a corporation the right to buy in lands mortgaged to it, to secure debts due to it, is not to be construed as authorizing the corporation to buy in other lands under a foreclosure of a prior mortgage covering both tracts of land. *U. S. Circ. Ct. (Ill.)* 1850, *Russel v. Topping*, 5 *McLean*, 194.

57. — to give a bill of sale. It is competent for a trading company to give a bill of sale to secure a debt for work done in the course of the business of the company. *C. P.* 1866, *Shears v. Jacobs*, 1 *Law Rep. C. P.* 513; 35 *Law J. N. S.* 241.

58. — to agree to arbitration. Where there is a capacity to contract and a liability to pay, there is generally a power to arbitrate. Thus a municipal corporation may submit to arbitration, and may do so by resolution of the council, and that not authenticated by seal. *N. Y. Supreme Ct.* 1847, *Brady*

v. Mayor of Brooklyn, 1 *Barb.* 584; and see *Isaacs v. Beth Hamedash Soc.* 1 *Hill*, 489.

2. Effect of special restrictions.

59. Restrictions upon charter powers presumed to be known. Corporations cannot enter into a business other than that which they are authorized by law to do. And persons dealing with the managers must take notice of the limitations imposed upon their authority by the charter. Hence where two railroad companies without authority of law assumed to consolidate into one, and purchased a steamboat to run in connection with their road,—*Held*, that the notes given for the boat were void, and the holder could not recover on them against the corporations. *U. S. Supreme Ct.* 1858, *Pearce v. Madison &c. R. R. Co.* 21 *How.* 441. Compare *Rutland R. R. Co. v. Proctor*, 29 *Vt.* (3 *Wms.*) 93; *Shawmut Bank v. P. & M. R. R. Co.* 31 *Vt.* 491.

See also CHARTER.

60. When the statute under which a corporation acts restricts its action to a particular mode, none of the agents through whom the corporation acts can bind it in any other than the mode prescribed. Those who deal with a corporation, the mode of whose action is thus limited, must take notice of the restriction in its charter, and see to it that the contracts on which they rely are entered into in the manner authorized by the charter. *N. Y. Superior Ct.* 1857, *Brady v. Mayor &c. of N. Y.* 2 *Bow.* 173; 7 *Abbotts' Pr.* 234; 16 *How. Pr.* 432; affirmed, 20 *N. Y.* 312. To similar effect, *N. Y. Supreme Ct. Sp. T.* 1858, *Appleby v. Mayor &c. of N. Y.* 15 *How. Pr.* 428.

61. A party dealing directly with a corporation,—*e. g.* an insurance company,—for a purchase of real estate to be conveyed by it, must be assumed to know the extent of its corporate powers as to such estate. *N. Y. A. V. Chan. Ct.* 1839, *Merritt v. Lambert*, *Hoffm.* 166. Compare *Edwards v. Farmers' Fire Ins. & Loan Co.* 21 *Wend.* 467.

62. The charter of a corporation required that mortgages taken by it should not be made payable in a shorter time than one year. A mortgage taken by it, on making a loan, was made payable in one year from the

date thereof, but the loan was not made until after the date which the instrument bore. *Held*, that the statute was to be regarded as a part of the contract, and that the mortgage was payable in one year from the time the loan was made and the mortgage delivered. *N. Y. A. V. Chan. Ct.* 1846, *Farmers' Loan & Trust Co. v. Perry*, 3 *Sandf. Ch.* 339.

63. A corporation is limited, in the appropriation of its funds, to the purposes authorized in its charter, and the charter, being a public act, is presumed to be known to all. A contract, therefore, by which the corporation agrees to pay money for a purpose not authorized by its charter, is illegal and void, and no action can be maintained thereon. *Exch. Ch.* 1852, *McGregor v. Deal & Dover Railway Co.* 16 *Eng. L. & Eq.* 180; 22 *Laro J. N. S. Q. B.* 69; 17 *Jur.* 21.

64. A person making a contract with a public board of officers,—*e. g.* contracting with the selectmen to build a road,—is bound to know how far the powers of such officers are limited, and in what event they cease, and their work is stayed, and to understand that his contract with them will be subject to such limitations and restrictions as the general public statutes of the State impose upon the subject matter. Hence, in such a case, when an appeal is taken, which by the statute stays all proceedings, the contractor, after notice of the fact, cannot proceed so as to render them chargeable with further expense. *Vt. Supreme Ct.* 1856, *Taft v. Pittsford*, 28 *Vt.* 286.

65. That the law presumes that all persons getting accommodations at a bank are cognizant of all provisions of its charter which fix the law of the contract,—see *Hays v. State Bank*, *Mart. & Y.* 179.

66. Promissory notes, on time and interest, in the similitude of ordinary bank post-notes, made by a corporation without banking powers, payable to the order of one of its officers and indorsed in blank, and not given in its legitimate business,—*Held*, to carry on their face notice of their illegality. *N. Y. Chancery*, 1842, *Attorney General v. Life & Fire Ins. Co.* 9 *Paige*, 470.

67. Where city bonds were issued to a corporation or road company, payable at a particular place, between which and the place of issue the difference in exchange

was important, without express authority of law for making them so payable,—*Held*, that the bonds were not void for this reason, but the exchange was not recoverable. The act under which the bonds were issued was the basis of the contract, and dealers in such bonds are chargeable with notice of the act, it being a public statute. [Citing many cases] *U. S. Dist. Ct. (Wis.) 1859? Mygatt v. City of Green Bay, 8 Am. Law Reg. 271.*

68. Restrictions upon corporations generally. A power granted to a corporation to make contracts of a certain nature "with any persons or corporations," intends only such persons or corporations as have a legal capacity to contract. Females covert, minors, or other persons or corporations, who were before incompetent to enter into a contract of this description, must be considered as still remaining under the same disability. The act does not enlarge their capacity, or confer upon them any new powers. *Me. Supreme Ct. 1824, Bussey v. Gilmore, 3 Me. (8 Greenl.) 191.*

69. A corporation authorized by its charter to boom lumber, and receive toll therefor, cannot recover toll for driving lumber, that business not being within the scope of its authority. But it is not precluded from recovering for booming, because it was done under a special contract for booming and driving. Its right to compensation for what it is authorized to do is not affected by an attempt to connect it with unauthorized acts. *Me. Supreme Ct. 1848, Bangor Boom Corporation v. Whiting, 29 Me. 123.*

Compare POWERS.

70. It is no defence to an action against a corporation by one who has been employed by it in the erection of a building, that the cost of the building has exceeded the amount of the capital stock as limited in the articles of association. Nor does such a limitation necessarily constitute any restriction upon the trustees as to the expense of the house which they are authorized by the corporation to cause to be erected. *Vt. Supreme Ct. 1847, Rogers v. Danby Universalist Society, 19 Vt. 187.*

71. It makes no difference that the contractor was himself a member of the corporation. *Id.*

72. Where, in such case, the association was formed for the purpose of building a

meeting-house, and by one of the articles the capital stock was fixed at \$2,500, and by another the size and style of finishing the house were prescribed,—*Held*, that the article fixing the amount of capital stock could not be regarded as limiting the cost of the house; and that one of the trustees, who had rendered services and made expenditures in constructing the house, on his own account, in pursuance of a contract between him and the other trustees, might recover therefor in action on book account against the association, notwithstanding the whole cost of the house much exceeded the amount of the capital stock. *Id.*

73. If a corporation that has no power to make notes or to take them except for certain purposes, takes them for unauthorized purposes, and transfers them to an innocent purchaser, he may enforce them unless the statute expressly declares them void. *Wis. Supreme Ct. 1860, Blunt v. Walker, 11 Wis. 334; Cornell v. Hichens, 11 Wis. 353.*

74. A corporation is not, by being entitled as of a particular village, and required to organize there, precluded making its investments by loans at a different place. [Distinguishing 5 *Wend.* 211.] *N. Y. Supreme Ct. 1836, Mann v. Eckford, 15 Wend. 502.*

75. So the requirement in a bank charter that its operations of discount and deposit shall be carried on in a specified village, "and not elsewhere," obviously relates to the regular and customary business operations of the bank, and not to a single transaction, such as a discount or loan made by the cashier abroad, in the course of a negotiation, the purpose of which was to secure a debt due to the bank. *N. Y. Ct. of Errors, 1844, Potter v. Bank of Ithaca, 7 Hill, 530.*

76. Restrictions upon banks. A provision in a bank charter that a corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money lent, and not redeemed in due time, or goods which shall be the proceeds of its lands, nor be at liberty to purchase any public debt whatsoever, nor take more than at the rate of six per centum per annum on its loans or discounts,—does not prohibit the bank from purchasing anything whatever but the enumerated articles, for that would defeat the

powers given in other parts of the act. Where the act declares that the bank shall have capacity to purchase, receive, &c., lands, &c., goods, chattels, and effects, and the same to sell, grant, demise, alien, and dispose of, if it means to prohibit purchases of any particular thing, will use the very term. Discounting promissory notes is not a purchase in point of law within the legislative intention of such a prohibition. Banking operations are always carried on in our country by discounting notes. *U. S. Supreme Ct.* 1823, *Fleckner v. Bank of United States*, 8 *Wheat.* 338.

77. Where a bank discounted and held promissory notes, under a charter which gave it power to have goods, chattels, and effects of what kind soever, nature and quality, and the same to grant, demise, alien or dispose of, for the good of the bank, and also to discount bills of exchange and notes, which should be payable and negotiable at such bank, and to make loans, &c.,—*Held*, that the charter gave express power to transfer such notes; and that a law declaring that "it shall not be lawful for any bank in the State to transfer by indorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, on the trial of any action upon such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant," was void as to this bank, as a violation of the contract of the State with the bank in granting its charter. *U. S. Supreme Ct.* 1847, *Planters' Bank v. Sharp*, 6 *How.* 301; *Miss. Ct. of Errors*, 1848, *Montgomery v. Galbraith*, 11 *Smed. & M.* 555; *Ala. Supreme Ct.* 1853, *Jennison v. Planters & Merchants' Bank*, 28 *Ala. N. S.* 168.

78. A provision in a charter of a bank that it shall not be lawful for the directors to lend more than \$2,000 to one person, or advance more than \$5,000 on the purchase of a bill of exchange, is to be deemed directory merely. The object is to protect the bank, and if the provision be disregarded by its officers, no party to the violation can take advantage of it, or avoid his obligation on this ground. *Ala. Supreme Ct.* 1841, *Bates v. Bank of the State of Alabama*, 2 *Ala. N. S.* 451; *Ga. Supreme Ct.* 1847, *Bond v. Central Bank*, 2 *Ga. (Kelly)*, 92.

79. Where a banking corporation took

an assignment, under seal, of a contract for the sale of real estate by a pre-existing debtor of the bank, and the payment of the purchase money by the purchaser as collateral security for the debt,—*Held*, that the transaction could not be avoided on the ground that the bank was prohibited by its charter from dealing in such contracts. *Ind. Supreme Ct.* 1826, *Lagow v. Badollet*, 1 *Blackf.* 416.

80. The charters of both plaintiffs and defendants provided that they should not directly or indirectly deal or trade in buying or selling any goods, &c., unless in selling the same when truly pledged by way of security for debts due to them. Plaintiffs took merchandise in settlement of a debt due them; and defendants desiring to borrow money, agreed to take the merchandise at market price, with a sum of money, and to repay at a future day the price and the sum loaned. *Held*, that such an isolated transaction was not within the restriction of the charters. [5 *Hill*, 490; 6 *Id.* 217.] *N. Y. Supreme Ct.* 1851, *Sackett's Harbor Bank v. Lewis County Bank*, 11 *Barb.* 218.

81. Upon savings banks. Where savings banks are forbidden to loan on personal security (*N. Y. Laws of 1853*, 550, ch. 257,) a loan for which the note of the borrower is taken, payable on demand, together with a pledge of stocks as security for the loan, is not void. It is not a loan on personal security within the act. The note is not a security, but only the evidence of the loan; and the statute was intended to protect depositors, and its object would be defeated by holding the transfer void.* *N. Y. Supreme Ct.* 1855, *United States Trust Co. v. Brady*, 20 *Barb.* 119.

82. Upon insurance &c. companies. A life insurance and trust company, with power to hold property in trust, to grant annuities, and to employ their capital in the business to which they are restricted by their charter, have the implied power to loan money; for this is essential to making their funds productive. *N. Y. Ct. of Appeals*, 1850, *Farmers' Loan & Trust Co. v. Clowes*, 3 *N. Y. (3 Comst.)* 470; 8 *N. Y. Leg. Obs. A. V. Chan. Ct.* 1846; *Farmers' Loan & Trust Co. v. Perry*, 3 *Sandf. Ch.* 339.

83. Plaintiffs were incorporated in New

* In such a case equity will not interfere at the suit of the borrower to cancel the note and surrender the stock. *Mott v. U. S. Trust Co.* 19 *Barb.* 568.

York, in 1822, with power to make loans and grant insurances on lives and annuities. The charter was to expire in fifteen years, except as to insurances and annuities; in which respect it was not limited. In the same year, by another act, containing no limitation of time, they were authorized to increase their capital, and to assume and execute trusts. In 1836, by another act, containing no limit of time, their name and the classification of the directors was changed, and the amount of property which the corporation might hold in trust was limited. *Held*, that under these acts, the charter did not expire at the end of the fifteen years, but continued to exist indefinitely; and though the *express* power to make loans originally granted expired with the fifteen years, yet that power continued after that time as incidental to the other powers of the corporation; and, therefore, a bond and mortgage taken for a loan subsequently made, was valid. *N. Y. Ct. of Appeals*, 1850, *Farmers' Loan & Trust Co. v. Clowes*, 3 *N. Y. (3 Comst.)* 470; 8 *N. Y. Leg. Obs.* 249.

84. Where an insurance and trust company has by its charter power to do all things necessary to promote the objects of its incorporation, but is forbidden to exercise banking privileges, or put in issue any note, draft, check, or change ticket, tending to circulate as change or currency, the prohibitions are to be understood as directed not against particular acts, but against a business or pursuit; and it has power to borrow money, and draw or purchase drafts or checks in its proper business; and any such transaction is valid. [Story on Bills, § 79; 2 Kent. 239; 3 Barn. & Ald. 1; 6 Humph. 525; Ang. & A. ch. 8, § 12.] But dealing in exchange as a business for profit is forbidden, and illegal. *Tenn. Supreme Ct.* 1850, *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.* 11 *Humph* 1.

85. A clause in the charter of an insurance company in Ohio, expressly authorizing the loan of its funds, "for such period of time, and upon such terms, and under such restrictions," as the directors might deem expedient, was *Held* to confer upon the corporation the power to exact and coerce payment of any rate of interest the directors might stipulate for with the borrower. *Ohio Supreme Ct.* 1846, *Corwin v. Urbana & Champaign Mut. Ins. Co.* 14 *Ohio*, 6.

86. An insurance company, having no

power by their incorporating act, to discount notes, and being forbidden to carry on any other trade or business except that of insurance, and having an express power to buy stocks, and to take bonds and mortgages to secure debts due to them, have no power to lend money on promissory notes. And notes taken by them, for money lent, are void. Though it seems that they have power to take notes for premiums due. *N. Y. Supreme Ct.* 1824, *N. Y. Firemen Ins. Co. v. Ely*, 2 *Cow.* 678; *Conn. Supreme Ct.* 1825, *The Same v. The Same*, 5 *Conn.* 560; *The Same v. Bennett*, 5 *Id.* 574.

87. But where such company took notes for premiums of insurance, and, when they fell due, took new notes payable in future, taking interest in advance,—*Held*, that the last notes were valid. The fact that some of the parties to the notes were changed, did not alter the case. *N. Y. Supreme Ct.* 1824, *N. Y. Firemen Ins. Co. v. Sturges*, 2 *Cow.* 664.

88. A corporation authorized to purchase stock for the purpose of investment, but for no other purpose; to loan money on bond and mortgage, but on no other security; and prohibited from discounting notes, and all other banking operations, cannot loan money upon an hypothecation of stock and take a note as collateral security. *N. Y. Supreme Ct.* 1830, *North River Ins. Co. v. Lawrence*, 3 *Wend.* 482.

89. A power contained in a charter, to invest the capital of the corporation or to invest premiums and profits received by the company, and moneys received in trust, does not authorize the company to loan its credit; and bonds given by it payable at a future day, in exchange for the payee's bond and mortgage of the same amount are void. *Ala. Supreme Ct.* 1843, *Smith v. Alabama Life Ins. & Trust Co.* 4 *Ala. N. S.* 558.

90. Under the provision of the New York Revised Statutes, 600, § 4,—that no corporation not expressly incorporated for banking purposes, shall by implication or construction be deemed to possess the power of discounting bills, notes, or other evidences of debt, &c., or of issuing bills, notes, or other evidences of debt, &c., upon loan or for circulation as money,—as well as under the charter of the New York Life Insurance Trust Company, which forbids the company from issuing its "own bills, notes, or other evi-

dences of debt for loan,"—the issuing by that company, of its certificates of deposit, payable at a future day, with interest semi-annually, is illegal. *N. Y. Ct. of Appeals*, 1852, *N. Y. Life Ins. & Trust Co. v. Beebe*, 7 *N. Y. (3 Seld.)* 364.

91. — upon railroad companies. The provisions in the charter of a railroad company which authorize it to grant such evidences of debt incurred by the company, as may by the by-laws thereof be directed, to such an amount as may be deemed necessary for transacting its business, does not authorize the company to issue notes for general circulation, or otherwise exercise banking powers. *Mich. Supreme Ct.* 1864, *People v. River Raisin &c. R. R. Co.* 13 *Mich.* 389.

92. — upon manufacturing companies. A manufacturing company not empowered to trade in goods generally, are not thereby restricted from keeping a store to supply goods to those employed in its factory; and were it otherwise, an employee who has purchased goods at such store, cannot defeat a recovery for the price on the ground that the company were prohibited from trading. *Mass. Supreme Ct.* 1819, *Chester Glass Co. v. Dewey*, 10 *Mass.* 94.

8. Contracting out of the State of incorporation.

93. The power generally. Corporations, legally established under the laws of one of the States of the United States, are legally competent to negotiate and enter into contracts beyond the jurisdiction of the State where they are created. It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means, follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation

of law. Corporations created in this country, have for many years made contracts in England, with never a doubt suggested of their validity; and the rules of comity between foreign nations apply to the States of this Union. *U. S. Supreme Ct.* 1839, *Bank of Augusta v. Earle*, 13 *Pet.* 519; 1845, *Tombigbee R. R. Co. v. Kneeland*, 4 *How.* 16; *S. P. Mass. Supreme Ct.* 1856, *Kennebec Co. v. Augusta Ins. & Banking Co.* 6 *Gray*, 204; *Tenn. Supreme Ct.* 1850, *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.* 11 *Hump.* 1.

94. A corporation may make contracts authorized by its charter in a foreign government, provided such contracts are not prohibited by that government. *Mo. Supreme Ct.* 1847, *Blair v. Perpetual Ins. Co.* 10 *Mo.* 559.

95. A corporation, although prohibited by its charter, within the State of its creation, to take more than six per cent. per annum, on its loans or discounts, is not affected by such prohibition in another State, by whose comity it is permitted to make contracts. *Ala. Supreme Ct.* 1845, *Hitchcock v. Unites States Bank of Pennsylvania*, 7 *Ala. N. S.* 386.

96. Its limits. The general power of a corporation to do business and make contracts, is limited by its charter; and its contracts, wherever made, in order to be valid must be within the proper scope of its corporate powers. The corporation being the creation of a local sovereignty, cannot properly be said to have a corporate existence beyond the limits of the authority that created it, but the existence of such corporation as a legal person, capable of contracting, is recognized in other States. Contracts made by its authorized agents in other States are therefore regarded as valid, and the courts of such States allow actions to be sustained by and against such corporations, as freely as in the case of corporations created by their own legislatures. [13 *Pet.* 521.] *Vt. Supreme Ct.* 1864, *Arms v. Conant*, 36 *Vt.* 744.

97. Where a note, made in one State, is assigned in another State, to an unauthorized banking association in the latter, which by the law of that State is forbidden to take notes, the note cannot be enforced. The validity of the assignment, must be judged by the law of the State where it was made, although the note was made, and the action brought, elsewhere. *U. S. Cir. Ct. (Ind.)* 1843, *McClintick v. Cummins*, 3 *McLean*, 158.

98. How far recognized in New York. The mere fact that a corporation created by another State has transacted business in New York, when it was not prohibited by our laws from doing so, does not make contracts made by or with it void. *N. Y. Chancery*, 1845, *Stoney v. American Life Ins. Co.* 11 *Paige*, 685; *S. P. N. Y. Superior Ct. Sp. T.* 1854, *N. Y. Floating Derrick Co. v. New Jersey Oil Co.* 8 *Duer*, 648.

99. A mutual insurance company, incorporated under the laws of New York, and authorized to insure the property of all persons who become members of the company, may make within the State contracts with residents of a foreign country, insuring them against loss to personal property owned by them and situate there, if such contracts are not against the laws of the foreign country. *N. Y. Ct. of Appeals*, 1855, *Western v. Genesee Mutual Ins. Co.* 12 *N. Y. (3 Kern)* 258.

100. The officers of a foreign corporation came within the State of New York and purchased a mortgage; and, in payment, drew a draft upon New York for a part of the amount, and paid some of their own circulating notes, with an understanding that those notes should be put in circulation. *Held*, that this act, done for the purpose of securing a doubtful debt, was not a violation of the provision of 1 *N. Y. Rev. Stat.* 708, §§ 3, 6,—that no incorporated company, without being authorized by law, shall employ its effects for the purpose of receiving deposits, making discounts, or issuing notes to be put in circulation as money; nor issue bills or other evidences of debt as private bankers. *N. Y. V. Chan. Ct.* 1841, *Western Reserve Bank v. Potter*, *Clarke*, 432. Compare *Taylor v. Bruen*, 2 *Barb. Ch.* 301.

101. Under 2 *N. Y. Rev. Stat.* 378, § 2,—providing that where, by the laws of the State, any act is forbidden to be done by a corporation, without express authority of law, and such act be done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability arising out of it,—a foreign corporation who have kept an office and loaned money in violation of the act restraining unauthorized banking, cannot recover the loan. Not the security alone, but the contract of loan, grows out of the prohibited act. *N. Y. Supreme Ct.* 1841, *New Hope Delaware Bridge Co. v. Pough-*

keepsie Silk Co. 25 *Wend.* 648. And see *American Life Ins. & Trust Co. v. Dobbin*, *Hill & D. Supp.* 252.

102. A foreign corporation advancing money upon a draft issued by a banking institution of New York, in violation of the general act to restrain unauthorized banking, cannot recover on the draft, but may recover the money paid; for they stand in the same situation as if the money had been paid by them under a mistake of material facts. *N. Y. Supreme Ct.* 1850, *Bank of Chillicothe v. Dodge*, 8 *Barb.* 233.

103. Citizens of New York will be protected in the courts of that State in dealings with a foreign corporation which are authorized by its charter, notwithstanding that by the general laws of the State which created the corporation the dealing in question was prohibited. *N. Y. Superior Ct.* 1858, *Hoyt v. Shelden*, 3 *Bow.* 267, 298.

104. Hence a citizen of that State, who takes a transfer of property there from a foreign corporation, is not bound to look beyond the charter of that company to inquire if the general laws of the foreign State, regarding the powers and duties of their corporations, contain anything inconsistent with the power given by charter to transfer such property. *Id.*

105. There is no doubt that all persons dealing with or deriving title from a foreign corporation are bound to take notice of every limitation upon its powers contained in its charter. But other general laws of such foreign State, although tending to abridge or modify those powers, fall within the well-settled rule, that where knowledge of a foreign law is material upon a question of good faith, such knowledge must be shown. *N. Y. Ct. of Appeals*, 1859, *Hoyt v. Thompson*, 19 *N. Y.* 207.

106. That a statute declaring assignments, &c., for the use of a corporation void, unless made directly to the corporation, will be construed to refer only to corporations created by the State; and not to apply to foreign corporations,—see *Wright v. Douglass*, 10 *Barb.* 97.

107. — in Virginia. A foreign bank cannot lawfully make contracts in Virginia by establishing an agency there; but they may lawfully discount within their own State a note made in Virginia, and may recover in the courts of Virginia thereon. And the

court will, in the absence of averment and proof, presume, in support of the action, that the contract of discount was made in the other State rather than in Virginia.* *Va. Ct. of Appeals*, 1824, *Bank of Marietta v. Pindall*, 2 *Rand.* 465. And see *Rees v. Conococheague Bank*, 5 *Id.* 826; compare, however, *Slaughter v. Commonwealth*, 18 *Gratt.* 767.

108. A corporation of another State may maintain an action against its debtors in Virginia, provided such action is not based upon a primary contract made by the foreign corporation, as by discounting notes or otherwise. Thus in an action upon a promissory note brought in Virginia, where the declaration averred that the note was made in Boston, and on the same day and year was endorsed and delivered to the plaintiff, a corporation existing under the laws of Massachusetts,—*Held*, on demurrer, that the assignment would be considered as having been made in Massachusetts, where it could lawfully be made, for the purposes of this action. *Va. Ct. of Appeals*, 1860, *Freeman's Bank v. Ruckman*, 16 *Gratt.* 126.

109. —in Wisconsin. An action cannot be maintained in the courts of one State by an insurance company incorporated by another State, upon a contract made with the company, unless the corporation has complied with the requirements of the statute regulating the conduct of such corporations, before entering into the contract. *Wis. Supreme Ct.* 1860, *Ætna Ins. Co. v. Harvey*, 11 *Wis.* 394; *S. P. Ind. Supreme Ct.* 1863, *Rising Sun Ins. Co. v. Slaughter*, 20 *Ind.* 520.

110. How far aided by presumption. It may be presumed that a foreign banking corporation has power to make a contract with a borrower of its notes to keep them in circulation, by redeeming them as they were offered for redemption, from time to time. *N. Y. Supreme Ct.* 1857, *Central Bank v. Empire Stone-Dressing Co.* 26 *Barb.* 28.

111. A promissory note of a corporation, though made out of the State by which the corporation was created, will be deemed valid, unless its invalidity is shown. *N. Y.*

Superior Ct. Sp. T. 1854, *N. Y. Floating Derrick Co. v. New Jersey Oil Co.* 3 *Duer*, 648.

112. Parol evidence that a railroad corporation established by law in another State has held itself out, through its agents, as a common carrier over a railroad in this commonwealth, is sufficient *prima facie* evidence of its capacity to contract for such carriage, to maintain an action against it for the loss of merchandise intrusted to it. *Mass. Supreme Ct.* 1859, *McCluer v. Manchester & Lawrence R. R.* 13 *Gray*, 124.

113. Effect of subsequent alteration of State boundaries. Where a corporation is by law limited to the bounds of the State creating it, in the performance of its functions,—*e. g.* in respect to the place of residence of those who may become members,—a subsequent separation of a district from the State, though it would prevent new contracts of membership from being made with persons residing in the separated district, can have no effect upon existing contracts. Such divisions of territory are entirely political; a separation of jurisdiction takes place, but private interests and private contracts remain unaffected, and every individual relation continues the same, except that of being associated under the same government. *U. S. Supreme Ct.* 1810, *Korn v. Mutual Assurance Society*, 6 *Cranch*, 1:2.

4. Contracts in behalf of future corporations.

114. For services. Where services are rendered for a corporation, prior to its organization, which are necessary to complete that organization, and, after it has been perfected, the corporation elects to take the benefit of such services, knowing that they were rendered with the understanding that compensation was to be made, the organized corporation is liable to pay for such services, on the ground that it must take the burden with the benefit. *N. H. Supreme Ct.* 1864, *Low v. Connecticut &c. Railroad*, 45 *N. H.* 370; 1865, *Same v. Same*, 46 *Id.* 284.

115. Hence a suit at law may be maintained to recover of a corporation the value of services rendered prior to its organization, and necessary to such end. But no promise to pay will be implied from the fact that such services were rendered at the request of any number of the grantees less than a majority. To bind the corporation by an acceptance of its charter, or other act, the

* As to the power of a foreign corporation not engaged in business of banking, to make loans,—see *Connecticut Mutual Life Ins. Co. v. Albert*, 39 *No.* 181.

concurrence of at least a majority of the grantees or members is necessary. This rule is applicable to corporations aggregate, both before and after associates are admitted. It follows therefore that no single member or grantee has power to bind the corporation, either before or after a full organization is effected, unless he is in some way duly authorized to act as its agent by a majority of the members. The duty to take the necessary steps to organize the corporation rests, not upon individual members, but on the body of the grantees, which, in its corporate capacity, has the sole power to determine what measures, and by what agents, it shall be effected. *N. H. Supreme Ct.* 1864, *Low v. Connecticut & Passumpsic Rivers Railroad*, 45 *N. H.* 370.

116. In an action by the plaintiff to recover compensation for services rendered a corporation prior to its organization, evidence that it was understood and talked of among the directors, of whom plaintiff was one, that such services were to be rendered without compensation, is inadmissible, without showing the plaintiff to have been present at such conversations. *Id.*

117. A corporation is not bound to pay for services rendered before its organization was perfected, in procuring subscriptions to its capital stock. Such acts, done before the corporation has an existence, cannot be regarded as done in its behalf. And it is not competent for the directors, without a vote of the corporation, to assume to pay for services in getting up the organization. *Conn. Supreme Ct.* 1838, *New York & New Haven R. R. Co. v. Ketchum*, 27 *Conn.* 170.

118. Bond. A corporation without a legal existence, but authorized to be constituted under an act of assembly, cannot take a bond payable to it, until the pre-requisites have been performed, necessary to confer upon it corporate existence. *N. C. Supreme Ct.* 1853, *Wilmington & Manchester R. R. Co. v. Wright*, 5 *Jones, Law*, 304.

119. An incorporated company cannot sustain an action, at law, upon a bond executed to a preliminary association, by the name of the individuals and their successors, as the governors of a society, for the faithful accounting of their collector, to them and their successors, governors, &c., the company being subsequently incorpo-

rated. *C. P.* 1804, *Dance v. Girdler*, 4 *Bos. & P.* 34.

120. Subscription. A subscription made for the benefit of a corporation subsequently formed,—*a. g.* to pay a share of the expense of erecting a church edifice by a proposed religious corporation, inures to the benefit of the corporation when organized. *N. Y. Supreme Ct.* 1859, *Reformed Protestant Dutch Church v. Brown*, 17 *How. Pr.* 287.

For the power of corporations to enforce Subscriptions to their stock, see SUBSCRIPTIONS.

121. — of land. An agreement to convey a lot for the purpose of erecting a church, the church being afterwards erected thereon, and the society afterwards incorporated, may be enforced, in equity, by the corporation; for it represents the rights of the original associates. *N. Y. Chancery*, 1830, *Canajoharie & Palatine Church v. Leiber*, 2 *Paige*, 43. And see *Beatty v. Kurtz*, 2 *Pet.* 566.

122. Where associates subscribe a fund for the purpose of erecting and maintaining an academy, and subsequently become incorporated, and the property is conveyed absolute to the corporation, an understanding between the original subscribers at the time of the subscription, that their advances should be repaid when the funds are sufficient, is not binding on the corporation, unless expressed by a reservation in the conveyance, or by an express contract with the corporation. *So held*, although the corporation had divided a part of the fund among the subscribers. *Me. Supreme Ct.* 1836, *Bluehill Academy v. Witham*, 13 *Me.* 403.

123. Bank notes. Where a bank was incorporated by the same name as a pre-existing bank, and appointed the same president and cashier, and the officers of the new bank received and issued the notes of the former company, and declared that there was no difference between the notes thus issued and those of the new company; but there was no proof that the new company ever authorized these proceedings,—*Held*, that the new company were not liable on notes of the old company, without at least proof that the identical notes sued on were so represented and issued by the officers. And it seems that even then it must be proved that the officers were authorized by

the company to do so. The directors of a bank are not authorized to pay money for a bank which it does not owe; and, therefore, no acts of theirs, tending to create an obligation to that effect, can be operative. *Mass. Supreme Ct.* 1817, *Wyman v. Hallowell & Augusta Bank*, 14 *Mass.* 58. S. P. 1820, *Salem Bank v. Gloucester Bank*, 17 *Id.* 29. And see *Bellows v. Hallowell & Augusta Bank*, 2 *Mass.* 81.

124. A loan made by a corporation newly organized, cannot be avoided by the debtor on the ground that one of the promoters of the company before its organization, and who was afterwards the president, exacted from the borrower a subscription for stock as a condition of his obtaining the loan after organization. Any improper condition imposed by one of the projectors of a company, before its organization, in respect to a loan, to be made by it, will not invalidate the transaction consummated after the company is organized; unless the company has adopted and ratified the act of its agent. *N. Y. Supreme Ct.* 1864, *Central Park Fire Ins. Co. v. Callaghan*, 41 *Barb.* 448.

125. Assignment. Where the two partners composing one firm were also partners with other persons in a distinct firm, and both firms being insolvent, the members of the larger firm became incorporated and transferred all the assets of that firm to the corporation, which assumed its debts,—*Held*, that the corporation, being a distinct entity from the members composing it, could claim under an assignment made by the smaller firm for the benefit of their creditors, notwithstanding the fact that such assignors were also members of the corporation; especially as they had included in their assignment all their shares of the stock, and there was reason to infer that the corporation was also insolvent, so that whatever it should receive under the assignment would go not to the shareholders, but to its own creditors. *Mass. Supreme Ct.* 1848, *Scudder v. Crocker*, 1 *Cush.* 323.

126. English rule. A contract made between the projector and the directors of a joint-stock company provisionally registered, but not in terms made conditional on the completion of the company, is not binding upon the subsequently completely registered company, although ratified and con-

firmed by the deed of settlement. *C. P.* 1862, *Gunn v. London & C. Ins. Co.* 12 *C. B. N. S.* 694. To nearly same effect, 1851, *Hutchinson v. Surrey Consumers Gas Light & C. Association*, 7 *Eng. L. & Eq.* 474; 21 *Law J. N. S.* 1.

127. That wherever a third party enters into a contract with the promoters of a company, which is intended to inure to the benefit of the company when organized, and they take the benefit of the contract, they will be bound to perform it; upon the familiar principle that one, who adopts the benefit of an act, which another volunteers to perform in his name, and on his behalf, is bound to take the burden with the benefit,—see *Edwards v. Grand Junction Railway Co.* 1 *Mylne & C.* 650; 7 *Sim.* 337; 6 *Law J. N. S.* 47; 1 *Eng. Railw. Cas.* 173; *Preston v. Liverpool & C. Railway Co.* 7 *Eng. L. & Eq.* 124; 1 *S'm. N. S.* 586; *Gooday v. Colchester & C. Railway Co.* 15 *Eng. L. & Eq.* 590; 19 *Law Times*, 334; *Sowerby v. Pontop Railway Co.* 10 *Jur.* 942.

128. Such contract, to be valid, must be one which might lawfully be made by the company after incorporation. Thus a corporation cannot bind itself by assuming a contract of its projectors to pay a certain sum to a person, on condition that he will not oppose the passage of a bill of theirs in parliament. *House of Lords*, 1856, *Preston v. Liverpool & C. Railway*, 5 *H. L. Cas.* 605.

129. So an agreement between the promoters of a railway bill and a land owner through whose land the railway would pass, that, in consideration of his withdrawing his opposition in Parliament, they would, when the bill had passed, pay him a sum of money, "that sum to be independent of the ordinary payment for land severance or other usual compensation," is *ultra vires* the promoters, and not binding upon the company when incorporated, although adopted and confirmed by the directors after the bill had passed. *Vice-Chan. Ct.* 1865, *Earl of Shrewsbury v. North Staffordshire Railway Co.* 85 *Law J. N. S.* 156.

130. A stipulation in the articles of association of a company that a certain sum shall be paid to the promoters is valid, and will be binding on persons taking shares, if all the facts are fully disclosed, but not if there is a sub-agreement concealed, by which the directors are to receive back part of the

money for their own benefit. *Rolls Ct.* 1866, *Re Madrid Bank*, *Exp.* Williams, 85 *Law J. N. S. Ch.* 474.

II. HOW THEY MAY BE MADE.

1. In what manner.

A. Necessity of a writing.

131. The general rule. It is not true, as a general proposition, that the acts of a corporation in all other respects rightly transacted, are invalid merely from the omission to have them reduced to writing, unless the statute creating such corporation makes such writing indispensable as evidence, or to give them an obligatory form. If, however, the statute imposes such a restriction, it must be obeyed. *U. S. Supreme Ct.* 1827, *Bank of the United States v. Dandridge*, 12 *Wheat.* 64.

132. A corporation, like an individual, may be bound by an implied contract, provided it is within the scope of its corporate authority.* *N. Y. Com. Pl. Sp. T.* 1858, *N. Y. & Harlem R. R. Co. v. Mayor, &c. of N. Y.* 1 *Hill.* 562.

133. Corporations may be bound on implied contracts, to be deduced by inference from their corporate acts. *Ill. Supreme Ct.* *Maher v. City of Chicago*, 88 *Ill.* 266; *S. P.* 1851, *Seagraves v. City of Alton*, 13 *Ill.* 366.

134. Unless specially restricted by its charter as to the mode of contracting, a corporation may be bound by a parol contract, or a vote of the trustees provable only by parol, or by an implied assumpsit. *Miss. Ct. of Errors*, 1858, *Abby v. Billups*, 35 *Miss.* 618.

135. That where the statute requires the company to contract in writing, it is not competent to show title in any other mode, unless by formal conveyance,—see *Harborough v. Shordlow*, 2 *Eng. Railw. Cas.* 253; 7 *Mess. & W.* 87.

* There is nothing in the general banking law of New York which requires a contract of a banking association for a loan of money to be made in writing. *Bolsgerard v. N. Y. Banking Co.* 2 *Sandf. Ch.* 23; see *infra*, 182-190.

It is held in England that a corporation is liable in *assumpsit* for use and occupation by permission of plaintiff, under *Stat. 8 Vict. c. 16, § 97*, which provides that any contract, which, if made between private persons, would be valid, although made by parol only, may be made by parol in behalf the company by the directors and shall be binding on the company. So, it seems, the corporation would be liable, independent of the provisions of that statute. *Lowe v. London & Northwestern Railway Co.* 14 *Eng. L. & Eq.* 18; 21 *Law J. N. S.* 361.

136. Contracts may be implied from acts of agents. A corporation is bound by the express or implied contracts of its agents or officers, made in the ordinary discharge of their official duty, though not authorized or executed under its corporate seal. *U. S. Supreme Ct.* 1813, *Bank of Columbia v. Patterson*, 7 *Cranch*, 299; 1820, *Mechanics Bank of Alexandria v. Bank of Columbia*, 5 *Wheat.* 326; 1823, *Fleckner v. Bank of the United States*, 8 *Id.* 338; 1840, *Bank of the Metropolis v. Gutschlick*, 14 *Pet.* 19; 1853, *Fanning v. Gregoire*, 16 *How.* 524. And see *Baptist Church v. Mulford*, 3 *Halst.* 182; *Smith v. Congregational Meeting House &c.* 3 *Pick.* 188.

137. A promise may be implied, on the part of a corporation, from the acts of its accredited agent, whose powers are of a general character; as in the case of directors of a bank, selectmen, overseers of the poor, &c. *Me. Supreme Ct.* 1830, *Abbot v. Hermon*, 7 *Me. (7 Greenl.)* 118.

138. Corporations may be bound by express promises made by their authorized agents, or promises implied from their acts and the acts of their agents. *Ky. Ct. of Appeals*, 1857, *Frankfort Bridge Co. v. City of Frankfort*, 18 *B. Monr.* 41.

139. It is well established that the contracts of corporations rest upon the same footing as those of natural persons, and may be valid without seal, whether expressly made by the corporation, or arising by implication from the general relations of the agent to the corporation, or from ratification of acts done on behalf of the corporation, by parties assuming to act as agents, although without sufficient authority. [Story on Ag. § 52; 5 *Blackf.* 146.] *Ind. Supreme Ct.* 1848.

140. Limits of the rule. The general doctrine, that a corporation can in ordinary cases be made liable on an implied as well as on an express assumpsit or promise, does not reach the case of a corporation which is deprived by statute of all capacity to contract, except in certain designated or prescribed forms. *N. Y. Superior Ct.* 1861, *McSpedon v. Mayor &c. of N. Y.* 7 *Bow.* 601; 20 *How. Pr.* 395.

For the operation of the rules of Estoppel and Ratification upon corporations, see ESTOPPEL; RATIFICATION.

B. Necessity of a seal.

141. The modern rule.* A corporation is not incapable of contracting except under

* The well-known rule of the early English law required that the contract of a corporation should, in all cases, be attested by the corporate seal. Exceptions to this rule have gradually, though unwillingly, been admitted by the English courts, until, at length, simple contracts, particularly those of trading and business corporations, are to a very great extent allowed and sustained. This relaxation of the rule has not, however, been carried so far in England as in this country, and the English cases on the subject have only a limited application here. Throughout the United States, the doctrine stated in the text is generally accepted.

For illustrations and examples of the extent to which, in the various United States the capacity of corporations to act without seal is recognized, see subd. II, 4, and subd. IV, in the text; also the titles *AGENTS, OFFICERS, ESTOPPEL, POWERS, and RATIFICATION*.

For adjudications following and applying the decisions of the Supreme Court, cited in the text, see *Maine Stage Co. v. Langley*, 14 *Me.* 444; *Badger v. Bank of Cumberland*, 26 *Me.* 428; *Savings Bank v. Davis*, 8 *Conn.* 191; *Poultney v. Wells*, 1 *Atk.* 180; *Milledge v. Boston Iron Co.* 5 *Cush.* 158; *Danforth v. Schoharie Turnpike Co.* 12 *Johns.* 227; *Dunn v. Rector of St. Andrews*, 14 *Johns.* 118; *Mott v. Hicks*, 1 *Cov.* 518; *Brady v. Mayor & Co. of Brooklyn*, 1 *Barb.* 584; *St. Mary's Church v. Cagger*, 6 *Barb.* 576; *Peterson v. Mayor & Co. of New York*, 17 *N. Y.* 449; *North Whitehall v. South Whitehall*, 3 *Serg. & R.* 117; *Chestnut Hill Turnpike Company v. Rutter*, 4 *Serg. & R.* 16; *Hamilton v. Looming Mutual Insurance Company*, 5 *Burr.* 344; *Union Bank of Maryland v. Ridgely*, 1 *Harr. & G.* 329, 418; *Elysville Manufacturing Co. v. Okisco Co.* 1 *Md. Ch. Dec.* 892; *Petrie v. Wright*, 6 *Smed. & M.* 647; *Baptist Church v. Mulford*, 3 *Halst.* 182; *Commercial Bank v. Newport Manufacturing Co.* 1 *R. Monr.* 13; *Garvey v. Colooke*, 1 *Nott & McC.* 231; *Union Bank v. Jacobs*, 6 *Humph.* 515; *Hamilton v. Newcastle R. R. Co.* 9 *Ind.* 359; *Smith v. Congregational Meeting House*, 8 *Pick.* 178; *Abbot v. Hermon*, 7 *Me. (1 Greenl.)* 118; *Watson v. Bennett*, 12 *Barb.* 196; *American Ins. Co. v. Oakley*, 9 *Paige*, 496; *Stone v. Berkshire Congregational Society*, 14 *Vt.* 86; *Gasset v. Andover*, 21 *Vt. (6 Washb.)* 842; *Sheldon v. Fairfax*, *Id.* 102; *State v. Morris & Essex R. R. Co.* 8 *Zabr.* 860; *Palm v. Medina Ins. Co.* 20 *Ohio*, 529; *Muir v. Louisville & Portland Canal Co.* 8 *Dana*, 161.

The general current of *English* decisions at the present day, on the necessity of a seal, is indicated by the following cases:

It is a general rule that corporations must contract under their corporate seal, that being the only way by which the governing body of a corporation can properly express the mind of the corporation. But to this rule there are some exceptions, all of which may be classed under two heads: First, when the acts done are such as the corporation by its very constitution is appointed to do; as in the case of trading corporations, part of whose duty by their very appointment being to draw bills of exchange, they may do it without affixing the common seal. Second, when the acts are required for convenient management and comfort—where either the acts are trivial in their nature and of frequent occurrence, so that the doing them in the usual way would be inconvenient and absurd, or such that an overruling necessity requires them to be done at once or not at all. In these cases the corporation may proceed by parol, instead of affixing the seal according to the proper and regular course; they are, however, cases of necessity, and present exceptions to the general rule. *Diggie v. London & Blackwall Railway Co.* 6 *Eng. Railw. Cas.* 590; 14 *Jur.* 937; 19 *Law J. N. S.* 808.

the corporate seal. The ancient rule requiring a deed has been gradually relaxed. [Plowd. 91, b; 2 Sandf. 305; Bro. Corp. 51;

A trading corporation may make a binding contract not under seal relating to matters necessarily incident to the purposes and objects for which the corporation was created. Where, therefore, a company incorporated for the purpose of conveying mails, passengers and cargo between Great Britain and the Cape of Good Hope and Australia, and for that purpose to construct and maintain steam and other vessels, and to do all such matters as might be incidental to such undertaking, entered into a contract with the plaintiff to go out to Sidney, and bring home a ship belonging to the company, which was unseaworthy.—*Held*, that the plaintiff might maintain an action against the company upon the contract, though not under seal. *Henderson v. Australian Royal Mail Steam Nav. Co.* 83 *Eng. L. & Eq.* 167; 24 *Law J. N. S.* 839.

Thus, a contract between an incorporated gas company and a customer for the supply of gas, though not under seal, may be enforced by action on behalf of the company for the contract price. *London Gas Light & Co. v. Nichols*, 2 *Carr. & P.* 865; *Church v. Imperial Gas Light & Coke Co.* 8 *Nev. & P.* 35; 6 *Ad. & E.* 846; 1 *W. W. & H.* 187.

The contract, however, of a trading corporation must be incident to its corporate purpose, as such: to dispense with a seal. In *assumpsit* for non-delivery of sections of railways which the defendants agreed to furnish the plaintiffs, in consideration that the plaintiffs would sell them iron rails, it appeared that plaintiffs were incorporated to carry on the business of copper miners; and the contract in question was not under seal. *Held*, that the action could not be maintained by the corporation, as the contract did not fall within any of the exceptions to the general rule that a corporation can only bind itself by deed. The contract was not incidental or ancillary to carrying on the business of copper mining, and was therefore not binding on the corporation. And as the corporation could not be sued upon the contract, and as the alleged promise by them formed the consideration for the defendant's promise, the corporation could not sue upon it. *Copper Miners Co. v. Fox*, 20 *Law J. N. S. Q. R.* 174; 15 *Jur.* 708; 8 *Eng. L. & Eq.* 490.

An incorporated railway company is not liable to be sued on a contract not under seal, in respect of work done by a party, in substituting a new line of railway for the old one, the contract stipulating for the maintenance by the party of all the works for two months after their entire completion. Such case does not fall within the excepted cases, where the affixing of the corporate seal may be dispensed with. *Diggie v. London & Blackwall Railway Co.* 6 *Eng. Railw. Cas.* 590; 14 *Jur.* 937; 19 *Law J. N. S.* 808.

The East India Company is deemed a corporation established partly for the purposes of trade, and partly for the purposes of government. But a grant of a pension by the company to a retired military officer is—*Held* not to be a contract made by a company in their trading character, and consequently not to fall within the rule that a trading company may make parol contracts in matters relating to their trade.

Therefore the grant of such pension, not being under seal, gives no right of action to the officer, nor any in case of his bankruptcy to his assignees. *Gibson v. East India Co.* 1 *Arn.* 493; 5 *Bingh. N. C.* 262; 7 *Scott*, 74; 3 *Jur.* 56.

In an action by a dock company whose charter contained no express provisions as to the manner in which the corporation might be bound by contract, upon an agreement to execute a contract under seal for scavenging the docks for a year. *Held*, that, though a corporation incorporated for trading purposes, has impliedly power to contract by parol for purposes necessary to carry on the trade, the subject

3 Salk. 191; 3 Lev. 107; Moore, 512.] And now, though they cannot contract directly, except under their corporate seal, yet they may, by mere vote or other corporate act, not under their corporate seal, appoint an agent whose acts and contracts, within the scope of his authority, will be binding on the corporation. And a contract so made by him, whether in the name of the corporation, or in his own name, and ratified by the corporation, is binding on the corporation. Whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. [3 Bro. Ch. 262; Doug. 524; 3 Mass. 864; 5 Id. 80, 491; 6 Id. 40.] *U. S. Supreme Ct.* 1818, *Bank of Columbia v. Patterson*, 7 *Cranch*, 299; 1828, *Fleckner v. Bank of the United States*, 8 *Wheat*, 388.

C. Consideration.

142. **Necessity of.** A vote to reimburse a minister for repairs made upon the parsonage by him, after the refusal of the parish to make them, the vote having been passed after the dissolution of his connection, is not binding upon the parish, a parish having no right to incur debts founded upon no beneficial equivalent. *Mass. Supreme Ct.* 1830, *Greene v. First Parish in Malden*, 10 *Pick.* 500.

143. After a company has entered into a written contract for the performance of certain work, the promise of its president to

of this contract was not of that nature; and that the corporation therefore was not bound. *London Dock Co. v. Sinnett*, 8 *Ell. & B.* 347.

Upon the other hand, eleemosynary and ecclesiastical corporations are not bound by anything in the shape of an agreement regarding their lands, unless it is evidenced by a deed or writing with their corporate seal affixed to it. Hence an entry in the books of such a corporation, of the terms of an agreement entered into by them, does not bind them, although it is signed by a majority of the members. *Carter v. Dean &c. of Ely*, 7 *Sim.* 211; 4 *Law J. N. S.* 241.

So the signing of a contract for a lease by the masters and fellows of the college, unless under the college seal, is held not binding on the college. *Taylor v. Dullidge Hospital*, 1 *P. Wms.* 655. And a resolution passed by the municipal authorities of a town, on the re-appointment of a town clerk to increase his salary, is held not binding, unless under the common seal. *Regina v. Mayor &c. of Stamford*, 6 *Q. B.* 433; 8 *Jur.* 909. See also *Clark v. Guardians of Cuckfield Union*, 11 *Eng. L. & Eq.* 442, and *Henderson v. Australian &c. Nav. Co.* 83 *Eng. L. & Eq.* 167, wherein the English cases down to a recent date, are elaborately reviewed.

allow additional compensation to the contractors, for the same work, is without consideration and not binding upon the company. *S. C. Ct. of Appeals*, 1847, *Colcock v. Louisville &c. R. R. Co.* 1 *Strobh.* 329.

144. **When presumed.** That the rule that an instrument under seal imports a consideration, applies as strongly to one made by a corporation acting within its powers as to a natural person. *U. S. Circ. Ct. (Ill.)* 1844, *Sturtevant v. City of Alton*, 8 *McLean*, 393.

145. Where it is made to appear that a note received by a corporation was given as part of a premium for insurance then payable, and that the business of the corporation was to insure lives, the note will be presumed to have been given upon a life-insurance effected within the powers of the corporation. *N. Y. Ct. of Appeals*, 1855, *Mutual Benefit Life Ins. Co. v. Davis*, 12 *N. Y. (2 Kern.)* 569.

146. **What is sufficient.** A promise to convey land to a trustee for the benefit of a religious society, if such trustee and society will erect thereon a house for public worship, is founded on a good consideration. *Tenn. Supreme Ct.* 1841, *Macon v. Sheppard*, 2 *Humph.* 335.

147. A lessor conveyed the rents reserved on the lease to the officers of a church for the benefit and support of the church, &c. *Held*, valid. The support of the gospel in a Christian country is a sufficient consideration. *N. Y. Supreme Ct.* 1830, *Reformed Dutch Church v. Veeder*, 4 *Wend.* 494.

148. An agreement made with the trustees of a religious society, by which the subscribers engage to pay every year to the trustees, certain sums respectively, for the support of S., a minister of the gospel, so long as he shall administer the gospel in the said society, and so long as the subscribers shall reside within a certain distance, &c., is valid; the consideration is the preaching of the gospel, and until the agreement is dissolved by mutual consent, or S. ceases to render the service, it is obligatory. *N. Y. Supreme Ct.* 1810, *Religious Society in Whitestown v. Stone*, 7 *Johns.* 112.

149. **Recovering the consideration.** If an agent of a corporation procures funds for its use, by a contract which he has no authority to make, and the corporation repudiates the contract, the other parties to the contract who advanced the funds may reclaim them

or their proceeds so far as the same can be traced. *Vt. Supreme Ct.* 1848, *Whitwell v. Warner*, 20 *Vt.* 425.

150. Where a corporation advanced money on a purchase of real estate at a sale on execution, and then, perceiving that by their charter they could not hold land, relinquished the purchase to a third person, who agreed to take the bid and repay the money, *Held*, that the corporation could recover from such person the amount advanced. *Miss. Ct. of Errors*, 1847, *Crutcher v. Nashville Bridge Co.* 8 *Humph.* 408.

151. Where a contract for a loan of money is lawful in its nature and objects, the fact that the instrument executed is invalid by reason of not having been executed in the manner provided by its charter, furnishes no objection to a recovery by the lender of the money loaned. *N. Y. A. V. Chan. Ct.* 1844, *Boisagerard v. N. Y. Banking Co.* 2 *Sandf. Ch.* 23.

152. Where, after receiving a lawful loan or deposit on interest, the corporation gives to the dealer an illegal security or engagement for its repayment in a form forbidden by law, he may nevertheless maintain an action on the original contract. The security is but one form of evidence. Thus, in New York, it is lawful for a bank to receive deposits, and to agree to pay interest on them; and the fact that the bank gave a certificate of deposit, payable, with interest at five per cent. on demand, or at six per cent. if not called for in a year, merely as the more convenient evidence of the deposit, does not (within *N. Y. Laws* of 1840, ch. 363, § 4) prevent the depositor from recovering the money. *So held*, in an action on the loan, where the plaintiff brought into court the certificate for the purpose of its being canceled. *N. Y. Supreme Ct.* 1853, *Pelham v. Adams*, 17 *Barb.* 384.

D. Assent.

153. When presumed. Where the charter requires an officer to give bond with sureties to be approved by the directors, a bond given by him, and found in the possession of the bank, he having acted in his office, may be presumed to have been accepted and approved, although no vote of acceptance by the directors is found on the records of the corporation. The same presumption, that a

beneficial grant, &c., has been accepted, applies to corporations as to natural persons; and unless the charter requires approval in writing, it is not essential. *U. S. Supreme Ct.* 1827, *Bank of the United States v. Dandridge*, 12 *Wheat.* 64. To the same effect see *Union Bank of Maryland v. Ridgely*, 1 *Harr. & G.* 324; *Mass. Supreme Ct.* 1849, *Melledge v. Boston Iron Co.* 5 *Cush.* 158.

154. What is sufficient. Where officers are directed to make a contract and report at the next meeting, a formal acceptance, on the part of the company, of the contract, is not necessary. *Ms. Supreme Ct.* 1833, *Davenport v. Hallowell*, 10 *Ms.* (1 *Fairf.*) 317.

155. Commencing operations upon land desired for a railway track, under notice from the land owner that he would expect a certain compensation,—*Held*, an acceptance of his terms, constituting a contract. See *New York & New Haven R. R. Co. v. Pixley*, 19 *Barb.* 428.

156. — In case of arbitration. The president and two of the trustees of a corporation signed a bond of submission of a controversy, on the part of the corporation; and all the trustees attended before the arbitrators, and took part in the trial. *Held*, a sufficient submission to bind the corporation by the award. The assent of a corporation to a submission may be inferred from circumstances. *N. Y. Com. Pl.* 1857, *Isaacs v. Beth Hamedash Society*, 1 *Hill.* 469.

157. The charter of defendants authorized them to purchase necessary lands of the owners of the same, at a price to be mutually agreed upon, directing that in case of the owner's disability to convey, or of disagreement as to price, they should proceed to acquire them by appraisement, on petition in the county court. *Held*, that after disagreement with an owner, and the commencement of proceedings against him for appraisement, it was competent for the company to agree with him to submit the question of value and damages to arbitration. An award under such a submission, performed, would be a purchase within the statute. *N. Y. Ct. of Appeals*, 1853, *Wood v. Auburn & Rochester R. R. Co.* 8 *N. Y.* (4 *Seld.*) 160.

158. Mutuality. The plaintiffs, who were incorporated by a charter for the purpose of carrying on the business of copper miners, entered into a written contract not under

seal, by which, in consideration that they would sell to defendant iron rails, the defendant agreed to furnish to them sections of the rails. Some of the sections were delivered by the defendant. In an action for not delivering the residue,—*Held*, that as the corporation could not be sued upon their promise, because it was not under seal and was not within any of the exceptions to the rule requiring a seal, their promise formed no consideration for that of the defendant, and they could not maintain an action against him. *Q. B.* 1851, *Governor & Company of Copper Miners v. Fox*, 15 *Jur.* 708; 20 *Law J. N. S.* 174; 3 *Eng. L. & Eq.* 420.

159. A corporation proposed to certain of its creditors that, if they would subscribe for stock, the corporation would pay them their debts in bonds of the State, provided they would take the bonds at not less than 80 cents on the dollar. The creditors subscribed for stock; but no order for the transfer of the bonds was made by the directors, and it did not appear that the creditors consented to take them at 80 cents on the dollar. *Held*, that the bonds remained the property of the corporation, and were subject to attachment by other creditors of the corporation. *Tenn. Supreme Ct.* 1848, *Hopkins v. Gallatin Turnpike Co.* 4 *Humph.* 408.

E. Matters of Form.

160. What strictness is necessary. Although a corporation is authorized to contract in a certain way by charter, by-laws or general usage, it may nevertheless bind itself by contracts executed or authenticated in a different manner. *Tenn. Supreme Ct.* 1858, *Neiffer v. Bank of Knoxville*, 1 *Head*, (Tenn.) 162. And see *Hayden v. Middlesex Corporation*, 10 *Mass.* 401.

161. When the charter of the corporation requires a particular form of authenticating their contracts, it cannot be dispensed with. As, where by the charter of a railway company, the directors were authorized to use the common seal, and all contracts in writing, relating to the affairs of the company, and signed by any three of the directors, were to be binding on the company; and the company entered into a contract not under seal, by their secretary, to complete certain works, and, after part performance, the contractor

was dismissed by the company,—*Held*, he could not recover the value of the work done. *Exch.* 1850, *Diggle v. London & Blackwall Railway Co.* 6 *Eng. Railw. Cas.* 590. 14 *Jur.* 987; 5 *Exch.* 442; *S. P. Exch.* 1851, *Homersham v. Wolverhampton Waterworks Co.* 4 *Eng. Law & Eq.* 426; 20 *Law J. N. S.* 198; 6 *Eng. Railw. Cas.* 790.

162. It is not necessary for the existence of the right, that the charter of a corporation should confer the power of contracting by an agent or committee; but when the charter prescribes any mode in which the officers or agents of a corporation must act, that mode must be strictly pursued, to render their acts or contracts obligatory on the corporation. *Fla. Supreme Ct.* 1851, *St. Andrew's Bay Land Co. v. Mitchell*, 4 *Fla.* 192.

163. A note and mortgage, appearing on their face to be executed to a bank in its corporate name, will be presumed to have been taken in conformity with the charter of the bank, until the contrary is shown. *Ind. Supreme Ct.* 1845, *Sparks v. State Bank*, 7 *Blackf.* 409.

164. —In naming the corporation. If a corporation contracts by a style which is usual in creating corporations, and which discloses no individuals, a corporate existence will be implied, and a special averment is unnecessary. *Ind. Supreme Ct.* 1862, *Stein v. Indianapolis Association*, 18 *Ind.* 287.

165. But in a contract made with a joint stock company, the mere designation of it by a name which is appropriate to a corporate body, does not dispense with proof that the company is a body corporate, unless it be distinctly stated that the company is an incorporated company. *N. Y. Ct. of Errors*, 1831, *Williams v. Bank of Michigan*, 7 *Wend.* 540; *N. Y. Supreme Ct.* 1832, *Welland Canal Co. v. Hathaway*, 8 *Id.* 480; 1836, *United States Bank v. Stearns*, 15 *Wend.* 814.

166. Where a contract is made giving the whole corporate name, with the unnecessary prefix of the title of the officers and company, the fact that the corporation was intended as the promisee may be shown by extrinsic evidence [3 *N. H.* 810]; and the contract may be regarded as a promise to the corporation itself. In general the name of a corporation, by which it is to sue and be sued and do all legal acts, designates the corporation in the same manner as the name of an individual designates the person. There is

this difference, however, that the alteration of a letter or the transposition of a word makes another name, in the case of a natural person, while the name of a corporation frequently consists of several *descriptive* words, and the transposition of them, or an interpolation, or omission of some of them, may make no essential difference in their sense. Therefore where a note was given to "The President, Directors and Company, of the Newport Mechanics Manufacturing Company," instead of to "The Newport Mechanics' Manufacturing Company," which was the true name of the corporation,—*Held*, that the variance was not such as to preclude recovery in the name of the corporation. *N. H. Superior Ct.* 1839, *Newport Manuf. Co. v. Starbird*, 10 *N. H.* 128.

167. In contracts with a corporation, it is sufficient if its name be so given as to distinguish it from other corporations. And less strictness is required in *contracts* with corporations, than in *actions* by or against them. Therefore, where the form prescribed by the charter of a turnpike company for taking subscriptions, was, "We, whose names are hereunto subscribed, do promise to pay to the *President*, Managers, and Company of the Hagerstown Turnpike Road Company, the sum of — dollars, for every share of the stock in said company set opposite to our respective names,"—*Held*, that the form actually used, though it omitted the word "President," was sufficient and binding on subscribers. *Md. Ct. of Appeals*, 1820, *Hagerstown Turnp. Co. v. Creeger*, 5 *Har. & J.* 122.

For the effect of Errors in the name of a corporation, occurring in its contracts, see MISNOMER.

168. Contracts running to directors. A bond running to the directors of a corporation, instead of to the corporation by the name of the directors, conditioned to pay them and their successors, and given for the performance of duty as agent of the corporation, is a bond to the corporation, and may be declared on accordingly. [3 *Bos. & P.* 147; 5 *Mass* 491; 10 *Id* 327.] *N. Y. Supreme Ct.* 1844, *Bayley v. Onondaga Co. Mutual Ins. Co.* 6 *Hill*, 476.

169. — to president. Section 16, of the New York banking associations act of 1838—requiring the name to be used in the association's dealings to be specified in the cer-

tificate—does not invalidate a contract, for a variance in the name. And a contract, under seal, in the name of the president of the association, as such president, is valid as the contract of the association. *N. Y. A. V. Chan. Ct.* 1844, *Boisgerard v. N. Y. Banking Co.* 2 *Sandf. Ch.* 23.

170. — to cashier. Where a note was made payable to "A. A., Cashier,"—*Held*, that the bank could sue in its own name thereon, by averring that the note was made to the corporation by the name and description of "A. A., Cashier." *Ala. Supreme Ct.* 1841, *McWalker v. Branch Bank at Mobile*, 3 *Ala. N. S.* 153; 1843, *Smith v. Branch Bank at Mobile*, 5 *Ala. N. S.* 26; *Fla. Supreme Ct.* 1850, *Southern Life Ins. & Trust Co. v. Gray*, 8 *Fla.* 262.

171. Without such an averment, or an indorsement by the cashier, the bank cannot, in the absence of some enabling statute, maintain an action upon such note. *Ala. Supreme Ct.* 1841, *McWalker v. Branch Bank at Mobile*, 3 *Ala. N. S.* 153.

172. In Alabama, since the act of December, 1841 [Clay's Dig. 112, § 47] which declares that notes drawn payable to the cashier of a bank may be sued and collected in the name of the several banks, in the same manner as if they had been made payable directly to the said bank, or branch banks, by which the paper has been taken or discounted—a note payable to the cashier of a bank may be sued on in the name of the corporation. *Ala. Supreme Ct.* 1845, *Crawford v. Branch Bank at Mobile*, 7 *Ala. N. S.* 383; 1847, *Caldwell v. Branch Bank at Mobile*, 11 *Ala. N. S.* 549.

173. That a bill of exchange directed to "A. B., Cashier of F. & M. Bank," and accepted by writing across the face thereof, "Accepted, A. B., Cashier," is drawn upon and accepted by the bank, and not upon and by the cashier in his individual capacity,—see *Farmers & Mechanics Bank v. Troy City Bank*, 1 *Dougl. (Mich.)* 457; *Jenkins v. Morris*, 16 *Mees. & W.* 880.

174. A check dated at a bank and signed by the person who is cashier thereof, with his name only, and no description, may be shown by parol evidence of the intent of the parties and the course of business, to be the check of the bank, and not of the individual signing it. *U. S. Supreme Ct.* 1820, *Mechanics Bank of Alexandria v. Bank of Co-*

lumbia, 5 *Wheat*. 826; *N. Y. Supreme Ct.* 1820, *Bank of Utica v. Magher*, 18 *Johns*. 341; *Ga. Supreme Ct.* 1846, *Merchants Bank v. Central Bank*, 1 *Kelly*, 418.

175. A draft signed "F., Cashier," dated at a bank of which F. is cashier, and requesting the drawee to charge the bank,—*Held*, the draft of the bank. *N. Y. Supreme Ct.* 1842, *Safford v. Wyckoff*, 1 *Hill*, 11; *S. C. in error*, 4 *Id.* 442.

176. A bill of exchange drawn in favor of the cashier of a bank, as such, but discounted by the bank, is in law drawn in favor of the bank, and an action may be maintained thereon in the name of the bank. *N. Y. Supreme Ct.* 1848, *Wright v. Boyd*, 8 *Barb.* 523.

177. An indorsement of a note in the words, "Pay to E. O., Cashier, or order," made upon the purchase of the note by the bank, is a legal transfer of the note to the bank. *N. Y. Supreme Ct.* 1845, *Watervliet Bank v. White*, 1 *Den.* 608. *S. P. Circ. Ct. D. C.* 1835, *Bank of United States v. Davis*, 4 *Oranch C. Ct.* 533.

See BANKS.

178. A draft by the secretary on the treasurer of a corporation, is but an order of the corporation upon itself, and need not be presented for acceptance, nor need any notice of non-payment be given. *Cal. Supreme Ct.* 1855, *Dennis v. Table Mountain Water Co.* 10 *Cal.* 369.

179. A mayor of a municipal corporation, in pursuance of a resolution of the board of aldermen authorizing him to borrow money from a certain bank, and to execute the note of the corporation therefor, borrowed the money, but executed a bond therefor, under the seal of the corporation. *Held*, that he did not pursue his authority, and that his act was not binding on the corporation. *Ark. Supreme Ct.* 1847, *Mayor &c. of Little Rock v. State Bank*, 8 *Ark.* (8 *Engl.*) 227.

F. Execution.

180. General rule. Contracts which a corporation has the power to make, may be made in the same manner that a natural person would make them, in the absence of any special restriction.* *Wis. Supreme Ct.* 1800, *Blunt v. Walker*, 11 *Wis.* 334.

* In England it is held that persons dealing with public companies should always bear in mind that such companies

181. A corporation to whom a general power to make contracts of a certain class is expressly given by its charter, without special restraints, have an implied power to make such contracts in any mode in which a natural person can. And an additional provision in the charter that such contracts, "though not under seal, if subscribed by the president, * * * and countersigned by the secretary, shall be binding and obligatory upon the said corporation," &c., does not have the effect of excluding the corporation from all other modes by which natural persons could bind themselves in such contracts. Conceding that corporations must act within the powers conferred by the organic laws under which they are created; and even that they can perhaps disaffirm the most solemn and meritorious engagements entered into by them in excess of those powers; these rules are not inconsistent with another, which is, that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of execution which a natural person may adopt in the exercise of similar powers; unless the power of thus contracting is plainly denied to it by its organic law. The object of such a provision is to foreclose all question and doubt, and relieve the parties with whom contracts are thus executed from the burden of proving that the agents with whom they deal have acted by due authority. *N. Y. Ct. of Appeals*, 1859, *First Baptist Church v. Brooklyn Fire Ins. Co.* 19 *N. Y.* 305.

182. An executory contract by a corporation, to convey or lease land, may be binding though not executed with the same formality as is required by law for an actual lease or conveyance. [19 *Vt.* 230; 24 *Id.* 560.] Accordingly, where an agent of the corporation had made an agreement to lease, under which the plaintiff had entered with the knowledge of the company, and had paid rent to them,—*Held*, that they were bound to give him a

are essentially different from an ordinary partnership or firm, for all purposes of contracts, and especially in respect of evidence against them on legal trials; and should insist upon all contracts with them being by deed under the seal of the company, or signed by deed under the seal of the company, or signed by directors, or otherwise executed in the manner prescribed by the charter regulating the company. There is no safety or security for any one dealing with such a body upon any other footing. The same observation also applies in respect of any variation or alteration in a contract which has been made. *Williams v. Chester & Holyhead Railway Co.* 15 *Jur.* 623; 5 *Eng. L. & Eq.* 497.

lease; and this, notwithstanding the agent had made the agreement in the name of the corporation, but without authority, it appearing that the contract had been ratified by the corporation. *Vt. Supreme Ct.* 1857, *Conant v. Bellows Falls Canal Co.* 29 *Vt.* 268.

183. Directions as to mode of execution, in bank charters. A provision in the charter of a bank, "that all bills, bonds, notes, and every other contract or engagement, on behalf of the corporation, shall be signed by the president, and countersigned by the cashier, and the funds of the corporation shall in no case be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid," does not apply to contracts and undertakings implied in law, such as the obligation to repay deposits. *U. S. Supreme Ct.* 1820, *Mechanics Bank of Alexandria v. Bank of Columbia*, 5 *Wheat* 326.

184. A clause in a bank charter, that the funds of the company should in no case be liable for any contract or engagement whatever, unless the same shall be signed by the president, and countersigned by the cashier, does not apply to such contracts as occur in the ordinary business of the corporation, usually performed by the cashier, or some other officer or agent. It does not restrict the power of the cashier to draw and indorse bills of exchange, drafts, and checks, in the ordinary discharge of his duty as cashier. Any other construction would defeat the banking powers given by the charter. *Ga. Supreme Ct.* 1846, *Merchants Bank v. Central Bank*, 1 *Kelly* 418; 1849, *Carey v. McDougald*, 7 *Ga.* 84.

185. The effect of a statutory provision, that contracts made by banks, and notes and bills issued as money, "shall be signed by the president and cashier of the bank," is not to restrict the power to contract to these agents only, but is simply to render the signature necessary evidence to be produced on behalf of the party seeking to enforce the contract. *Minn. Supreme Ct.* 1860, *Dana v. Bank of St. Paul*, 4 *Minn.* 385.

186. — In general banking law. Under a general banking law, providing that contracts made by banks, and all bills and notes by them issued and put in circulation as money, shall be signed by the president or vice-president and cashier thereof, the ordi-

nary, or what may be termed the daily business of banking, such as drawing, indorsing and accepting bills of exchange, giving certificates of deposit, &c., may be carried on by the president or cashier, either being authorized to bind the institution, in the absence of any specified manner of transacting such business provided for in the articles of association. Therefore, a bill of exchange is binding on a bank organized under this law, although the signature of the president only is attached. *Ind. Supreme Ct.* 1861, *Jones v. Hawkins*, 17 *Ind.* 550; *Allison v. Hubbell*, 17 *Ind.* 559.

187. A requirement in a general banking law, that all contracts made by banks, and all notes and bills issued as money shall be signed by the president and cashier, extends only to paper intended to circulate as money, and a draft signed by the president only constitutes a valid claim against the bank. *Conn. Supreme Ct.* 1866, *Paine v. Stewart*, 33 *Conn.* 516. And see *Kilgore v. Bulkley*, 14 *Conn.* 362.

188. Section 21 of the general banking law of New York,—which declares in express terms, that contracts made by banking associations, and all notes and bills by them issued and put in circulation as money, shall be signed by the president or vice-president and the cashier thereof,—was not intended to apply to drafts or bills not intended for circulation as money, drawn in the ordinary course of banking business for transferring the funds of the bank. Notes and bills, where only one party is bound, though technically, "contracts," are not so designated in ordinary legal phraseology. And such instruments, signed by the cashier alone, are valid. The same rule, *it seems*, would apply to indorsements and to certificates of deposit. *N. Y. Ct. of Errors*, 1842, *Safford v. Wyckoff*, 4 *Hill*, 442.

189. Such a provision must be construed reasonably, and with reference to the objects in view, of which the principal one was the circulation of bank notes. There are many implied contracts which necessarily arise in the transaction of banking business, which, of course, need not be evidenced by the signature of any officer of the bank. *N. Y. A. V. Chan. Ct.* 1844, *Boisagerard v. N. Y. Banking Co.* 2 *Sandf. Ch.* 23.

190. Contracts, such as certificates of deposit, bills of exchange, &c., certificates of

checks, which by usage or express authority of the association, a cashier or teller has power to execute, do not require the signature of the president or vice-president, in addition to that of the cashier, in order to bind the bank. [16 N. Y. 125.] *N. Y. Ct. of Appeals*, 1859, *Barnes v. Ontario Bank*, 19 N. Y. 152.

191. A banking association are liable for payments made upon their request, if the instrument on which such payment is made is executed pursuant to authority granted by them, although it is not signed by the president or vice-president, and cashier, as contracts are required, by section 21 above mentioned, to be signed. *N. Y. Supreme Ct.* 1848, *Leavitt v. Blatchford*, 5 Barb. 9.

As to what is a Corporate seal, and how it is to be affixed to a contract, see SEAL.

As to what form of execution may render the Agent or officer executing the contract personally liable, see *infra* III, 2.

192. — in railway charter. A railway company was incorporated by an act of Parliament, one section of which enacted, that the directors should have power to use the common seal on behalf of the company, and that all contracts relating to the affairs of the company, signed by three directors, in pursuance of a resolution of a court of directors, should be binding on the company. A following section enacted, that the directors should have full power to employ all such managers, officers, agents, clerks, workmen, and servants, as they should think proper. By a resolution of the board of directors, signed by their chairman, the plaintiff was appointed agent to negotiate with another railway for the lease of the line. *Held*, that the contract was not binding on the company, it not having been sealed or executed with the required formalities. *Each.* 1849, *Cope v. Thames Haven Dock &c. Co.* 3 *Each.* 841; 18 *Law J. N. S.* 345.

193. — in English joint stock companies act. The joint stock companies act (Stat. 7 & 8 Vict. ch. 110, § 44) enacts, among other things, that every contract made in behalf of a joint stock company registered under that act, "shall be in writing, and signed by two, at least, of the directors of the company," "and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the partic-

ular case; and that in the absence of such requisites, or any of them, any such contract shall be void and ineffectual (except as against the company on behalf of whom the same shall have been made)," &c. In an action by such a company, upon an unilateral covenant to pay money advanced by it, for the repayment of which an annuity was granted, with a condition that certain property was to be sold to pay the arrears of the annuity,—*Held*, that the contract, if it had the general legal requisites, need not be in the particular form required by the statute; that, being a contract on the part of the covenantor only, it was not a contract "on behalf of the company," within the meaning of the act; but that to bring a contract within the act, it must be one in which the company contracts to do something in consideration of something else to be done. *C. P.* 1852, *British Mut. Life Ass. Co. v. Browne*, 12 C. B. 728; 14 *Eng. L. & Eq.* 285; 22 *Law J. N. S.* 51; 16 *Jur.* 1158.

194. The contract was between L. and his wife, of the first part; the defendant, of the second; the plaintiffs, a joint stock company, of the third; and the trustees of the company, of the fourth; in consideration of £200 advanced to L. by the company on the execution. L. and the defendant covenanted to pay an annuity to the plaintiffs, and that L. should keep on foot a policy on his own life, and one upon his wife's. L. and his wife further granted to the trustees their interest in a certain freehold property, upon trust to pay therefrom, by sale or otherwise, the arrears of the annuity, and pay over the surplus moneys received, to the parties entitled thereto. The action was covenant by the company against the defendant for the non-payment of the annuity, and for not keeping on foot the policies; and defendant pleaded that it was a contract made on behalf of a completely registered joint stock company, under the Stat. 7 & 8 Vict. ch. 110, § 44, and that it was void because it was not executed with the formalities thereby required. *Held*, that the plea was bad, the contract not being one made on behalf of the company, and being an unilateral one, on which the covenantees might sue without executing it. *Id.*

195. Where a check on a company's bankers, for payment to a third party of the company's money, was drawn by three directors, in the name of the company, but the document was signed by them in their own

names, and countersigned by the secretary of the company, adding to his name "Secretary," and a stamp bearing the name of the company was affixed, but the three directors did not appear on the face of the check to be directors, or to sign as such,—*Held*, that it did not purport to be the check of the company, and was not binding on them. *C. P.* 1850, *Serrell v. Derbyshire &c. Railway*, 19 *Law J. N. S.* 371; 9 *C. B.* 811.

G. Modifications.

196. **Alteration.** Where a joint note, signed by the directors of a joint stock company, was afterwards altered by the secretary into a joint and several note, without the knowledge or authority of the directors, of whom the defendant was one, and in answer to a letter from the holders, informing the defendant of the dishonor of the joint and separate note of himself and the other directors who were parties to it, he said that their letter should have his earliest attention,—*Held*, that this did not amount to an assent to the alteration of the note, by the defendant, and that he was not bound thereby. *C. P.* 1826, *Perring v. Hone*, 4 *Bingh.* 28; 8 *Carr. & P.* 401; 12 *Moore*, 185.

197. **Extension.** A sealed contract to build a railroad within a certain time may be extended by a parol agreement, and a recovery had for services upon it, if accepted, subject to the deduction of the loss arising from such extension. *Vt. Supreme Ct.* 1855, *Barker v. Troy & Rutland R. R. Co.* 27 *Vt.* 766.

198. **Release.** Where a railroad contractor was released from the completion of the work under the contract, by the consent of the company,—*Held*, that he could recover for the work in an action of *assumpsit*. *Md. Ct. of Appeals*, 1850, *Rodemer v. Hazelhurst*, 9 *Gill*, 288; 1854, *Baltimore & Ohio R. R. Co. v. Resley*, 7 *Md.* 297.

199. **Rescission.** A contract to build and set up engines for a corporation was made with them through their agent, who became insolvent before the engines were completed; the contractor, thereupon, supposing the corporation to be involved in their agent's insolvency, stopped his work, carried away parts of the engines already set up, and gave notice that he should not complete the engines without further security, and the corporation told him that they

did not consider themselves bound by the contract. *Held*, that the contract was discharged. *Mass. Supreme Ct.* 1858, *Adams v. Boston Iron Co.* 10 *Gray*, 495.

200. A contract made by authority of a vote of a town cannot be rescinded by a subsequent vote, without notice to, or the consent of, the other party. *Mass. Supreme Ct.* 1887, *Allen v. Inhabitants of Taunton*, 19 *Pick.* 485.

2. By what agencies.

201. **By agents and officers generally.** A vote of the corporation is not necessary to be shewn, in order to authorize a contract made on its behalf, by an agent or officer, in the scope of his usual authority. *N. H. Superior Ct.* 1817, *Eastman v. Coos Bank*, 1 *N. H.* 23; *Me. Supreme Ct.* 1849, *Lime Rock Bank v. Macomber*, 29 *Me.* 564. And see *Consociated Presbyterian Society of Green's Farms v. Staples*, 23 *Conn.* 544.

As to **Implying corporate contracts** from acts of agents, &c., see *supra*, 136–140.

202. **Persons dealing with a manufacturing and trading corporation** are not bound by the specifically enumerated powers of the officers as contained in the by-laws, but as against third persons, such officers shall be taken to have the authority which their designations ordinarily imply; the treasurer to do acts relating to their finances, the secretary to keep records, the general agent to manage the business for which the corporation is chartered; and such acts are binding upon the corporation without express authority; and are not invalid merely because certain special and enumerated powers are conferred upon such officers by the by-laws, but which do not exclude other powers. Thus where the by-laws of a manufacturing and trading company enumerate the powers of their general agent as being to purchase stock, contract for work and materials, and to superintend the business, he is not by such enumeration to be restricted from the exercise of the ordinary powers which his designation ordinarily implies. *Mass. Supreme Ct.* 1853, *Fay v. Noble*, 12 *Cush.* 1.

203. **By directors.** Joint stock companies, under Stat. 7 & 8 Vict. ch. 110, are held bound by contracts made, by a competent board of directors, though not under

seal, and not made in strict compliance with the acts. But those who seek to bind such companies, on contracts made with the directors, must show their authority to bind the company, either by the terms of the deed of settlement, or that the body of the shareholders authorized these persons to act on their behalf. *Esch.* 1848, *Ridley v. Plymouth & Co.* 2 *Esch.* 711; *Ridley v. Plymouth & Co. Grinding Co.* 12 *Jur.* 542; 17 *Law J. N. S.* 252.

204. A contract, under the seal of a joint stock company, cannot be avoided merely by showing an excess of authority on the part of the directors by whom the contract was made. To affect the right of the other contracting parties to enforce the contract, some prejudice to the shareholders to the knowledge of such parties should be shown. *Q. B.* 1855, *Royal British Bank v. Turquand*, 32 *Eng. L. & Eq.* 273; 24 *Law J. N. S.* 327.

205. A private agreement made by the directors in their private capacity,—*Held*, not binding on the corporation. *Hughes v. Bank of Somerset*, 5 *Litt.* 45.

206. By a committee. A corporation, unless expressly restrained by its charter, may contract through the agency of a select committee of its members. *Pa. Supreme Ct.* 1820, *Berks & Dauphin Turnpike Co. v. Myers*, 6 *Serg. & R.* 12.

207. A vote giving to a committee authority to superintend the building of a house, includes the power to make the necessary contracts, if it does not appear that any other committee or agent was entrusted with this power, since the making of contracts is essential to the building of the house; and although such power does not extend to the making a contract by deed, yet the contract under the seals of the committee, connected with the vote of the town, is admissible and sufficient evidence of a contract by the town. Where the agent of a corporation contracts for their use, under his own seal, though he does not bind the corporation in a deed, yet if he had authority to make the contract, it will be binding upon them as evidence of such contract. [19 *Johns.* 65; 7 *Cranch*, 305.] *Mass. Supreme Ct.* 1824, *Damon v. Granby*, 2 *Pick.* 345.

208. A committee of a corporation appointed to erect or repair a building, have power to employ others to do the work, or to parcel out the job to themselves, employ-

ing each for a portion of the work, if no indication of bad faith appears; and where they do so, each may maintain a separate action against the corporation for the value of his services, &c. *Vt. Supreme Ct.* 1834, *Geer v. School District in Richmond*, 6 *Vt.* 76. To the same effect, 1846, *Sawyer v. Methodist Epis. Soc.* 18 *Vt.* 405; 1847, *Rogers v. Danby Universalist Soc.* 19 *Vt.* 187; *Me. Supreme Ct.* 1855, *Junkins v. Union School District*,* 39 *Me.* 220.

209. A committee of a corporation, authorized to make a purchase and to give obligations in the name of the company for their notes, signed by the president, &c., given in payment of the purchase money, are restricted to that form of obligation. They have no power to give a note for the purchase money. And a note given by them with a proviso that it is to be exchanged for one duly executed by the president, &c., is not valid. But the seller may recover the purchase money, on the common counts. *Conn. Supreme Ct.* 1840, *Chestnut Hill Reservoir Co. v. Chase*, 14 *Conn.* 123.

See also COMMITTEES.

210. A contract, on behalf of a corporation, entered into by a minority of a committee appointed for that purpose, and not ratified by a majority, nor by the corporation, does not bind the latter. *Me. Supreme Ct.* 1834, *Trott v. Warren*, 11 *Me.* (2 *Fairf.*) 227.

211. Where a corporation by vote, without any restriction or condition, authorize a committee to make a contract, if the committee go on immediately to do so, acting within the powers given, the contract will be binding, although the meeting adjourn over, and at the adjourned day, after the making of the contract, vote to rescind their action. To affect the powers of the committee by an adjournment, the subject should have been suspended, or the committee directed not to proceed till the meeting was dissolved. *Mass. Supreme Ct.* 1845, *Hunne-man v. Inhabitants of Grafton*, 10 *Metc.* 454.

212. By president and secretary. A note and mortgage made by the president and

* In this case the decision is rested in part upon the principle that under the statute a majority of the officers might exercise the power; but the case in 19 *Vt.* sustains the view that whether a majority or the whole act in contracting with one of their own number, is immaterial, the principle being the same as that which sanctions a contract between a corporation and a member.

secretary, and signed by them as such, binds the corporation. *Cal. Supreme Ct.* 1858, *Rowe v. Table Mountain Water Co.* 10 *Cal.* 441.

213. By president and cashier. Under a direction in a banking law that the president and cashier shall *sign* the contracts of the association, their official signatures to a contract on behalf of their association, furnish presumptive, if not conclusive evidence, that it was made by the association. *N. Y. Supreme Ct.* 1845, *Gillett v. Campbell*, 1 *Den.* 520.

214. By president. A corporation is not bound by an express or implied contract made by the president, unless he has power to bind it by the charter, or by acts of the corporation authorizing or ratifying the contract. *Ky. Ct. of Appeals*, 1858, *Mt. Sterling & Co. Turnp. Co. v. Looney*, 1 *Metc.* 550.

215. An agreement of the president of a private corporation will not be evidence against the corporation, without something from which it may be inferred to have been within the scope of his authority. *Pa. Supreme Ct.* 1845, *Farmers Bank of Bucks County v. McKee*, 3 *Pa. St.* 318.

216. A charter giving the president and directors conjointly power to bind the corporation by contracts, does not give the president alone such power, and a contract signed by him without the seal of the corporation will not support an action against them. *Ky. Ct. of Appeals*, 1815, *Macbean v. Irvine*, 4 *Bibb*, 17.

217. If a corporation hold out their president as authorized to make contracts of a certain character, a secret limitation of his authority does not affect third persons dealing with him in good faith, and without notice of such limitation. And although it will be incumbent on such parties in an action on the contract to offer competent and sufficient evidence of the authority of the president to bind the company, less evidence may be reasonably sufficient when no issue concerning it is made on the record. In such a case evidence of the usage of such companies generally to make contracts through their presidents, in such a manner, may be regarded as sufficient. [8 *Wheat.* 360; 1 *Pet.* 46.] *U. S. Supreme Ct.* 1856, *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.* 19 *How.* 818.

218. By secretary. The plaintiff, a share-

holder in a joint stock company, sued the directors on two bills drawn by him for goods supplied to the company, and accepted by their secretary. It appeared that the secretary was authorized by the directors to accept in their names bills drawn by the plaintiff's brother. *Held*, that this did not authorize the secretary to accept bills drawn by the plaintiff; and that the plaintiff, being a member of the company, and consequently a partner with the defendant and the rest of the shareholders, could not maintain the action.* *C. P.* 1827, *Neale v. Turton*, 4 *Bingh.* 149; 12 *Moore*, 365.

219. The cost of repairs expended upon property belonging to a benefit building society, upon the direction of the secretary to the society,—*Held*, recoverable against the trustees of the society, where there was no rule precluding the secretary from giving such orders. *C. P.* 1863, *Allard v. Bourne*, 15 *C. B. N. S.* 468.

220. By treasurer. A vote of the directors authorizing the treasurer of the corporation to hire money, on such terms and conditions as he might think most conducive to the interests of the company, empowers him to draw to his own order, and indorse, as treasurer, bills of exchange; and the company are liable upon such bills. *Me. Supreme Ct.* 1841, *Belknap v. Davis*, 19 *Me.* 455.

221. A corporation, having recovered judgment and issued execution against their debtors, voted to leave the whole matter to the directors with power to compromise, and the directors passed a vote that they would receive notes for a less sum than the amount of the judgment, and let the execution stand as security for the payment of the notes. The treasurer received the notes, giving the makers thereof a receipt by which it was stipulated that the execution should be canceled when the notes were paid. *Held*, that as against the latter, the contract was to be deemed that embodied in the treasurer's receipt, and, upon default in the payment of the notes, execution might be issued for the

* In action against one of the directors of a joint stock company which had ceased working, for salary due to the plaintiff as its clerk, it was *held*, that the fact of the defendant's having paid the demands of another person against the company, for work done on the order of the secretary of the company, was admissible evidence to show that he had authorized the work in respect of which the plaintiff sued. *Elmes v. Ogil*, 2 *Eng. L. & Eq.* 579; 15 *Jur.* 180.

full amount of the judgment. Although the vote of the corporation and the directors is to be looked to as the source of authority, yet it was only in the nature of a proposition, and not binding until acted upon by the other party; and it was competent for the treasurer, if he could, to make an arrangement more favorable to the corporation, and for them to ratify it. *Mass. Supreme Ct.* 1845, *Richardson v. Boston Chemical Library*, 9 *Mass.* 42.

222. By cashier. An assignment of a certificate of sale on execution, executed by the cashier of a bank, at the bank in business hours, as the act of the bank, and under the seal of the bank, to a redeeming creditor, is presumed to have been duly authorized. [22 *Wend.* 348, 6 *Paige*, 54.] And it seems that proof that there was no vote of the directors would not be enough to repel the presumption. A creditor, having the right to purchase from a corporation, must of necessity have the right to deal with the principal officer or agent of the company who may be found at its place of business. *N. Y. Supreme Ct.* 1845, *Bank of Vergennes v. Warren*, 7 *Hill*, 91.

As to the obligation of contracts made by agents and officers of corporations considered as depending upon the scope of business of Particular kinds of corporations, see the titles of the various corporations;—*e. g.* BANKS; INSURANCE COMPANIES; MANUFACTURING COMPANIES; RAILROAD COMPANIES; RELIGIOUS CORPORATIONS.

So far as the obligation of contracts turns on the functions and powers appertaining to a Particular officer, see, also, OFFICERS; DIRECTOR; PRESIDENT; SECRETARY.

223. By agents. That a corporation is not bound by acts of its agents which are not within the limits of the authority conferred on them,—see *Hartford Bank v. Hart*, 3 *Day*, 493; *Wyman v. Hallowell & Augusta Bank*, 14 *Mass.* 62; *Bellows v. The Same*, 3 *Mass.* 31; *Salem v. Gloucester Bank*, 17 *Mass.* 1.

224. A corporation may, by its officers or agents, make a promissory note; but the authority of the officers or agents,—*e. g.* the president and secretary, the latter being also general managing agent,—and the fact that the note was given in the legitimate business of the company, must be proved. A corporation cannot be bound by its agents for acts not within the powers conferred upon it by

its charter. Contracts based on such acts are void, and a subsequent ratification by the directors will not render them valid. *N. Y. Ct. of Errors*, 1846, *McCullough v. Moss*, 5 *Den.* 567; * *N. Y. Supreme Ct.* 1848, *Benedict v. Lansing*, *Id.* 284. But see *Dubois v. N. Y. & Harlem R. R. Co.* 1 *N. Y. Leg. Obs.* 362.

225. An agent who undertakes to bind a corporation, by the execution of a promissory note, must show that he had authority for that purpose, and that it had the faculty of becoming bound for the payment of money. *Ala. Supreme Ct.* 1846, *Harwood v. Humes*, 9 *Ala. N. S.* 659.

226. In order to hold a corporation liable for money borrowed in their name by their clerk or agent, and by him converted to his own use, it must be shown either that he had a general authority to borrow on the company's credit, or a particular authority to obtain the loan in question, or that the conduct of the corporation was such as to create a well-founded belief in the lender that he had such a general or special power. It is not enough to show that in two or three previous instances he had borrowed money of other persons in the name of the corporation, in which cases, the loans having been applied to the use of the corporation were repaid by another clerk. It should be shown either that he was in the habit of borrowing of the plaintiff, and that such loans had been thus ratified by the corporation, or that his custom of borrowing of other persons, with such ratification by the corporation, was known to the plaintiff when he made the loan. *N. H. Superior Ct.* 1837, *Martin v. Great Falls Manuf. Co.* 9 *N. H.* 51.

227. Action on a note, purporting to be that of a manufacturing corporation. Proof, that the note running in the name of the corporation was signed by a clerk of the corporation, in the name of the agent as agent, and by his direction; that the same form of execution had been recognized and approved by the company as binding them; and that the money for which the note was given was used by the corporation in its business. *Held*, that this was sufficient evidence to go to the jury of the execution of the note by the company. *N. Y. Supreme Ct.* 1857, *Mead v. Keeler*, 24 *Barb.* 20.

* But as to how far this case is to be followed in respect to the application of the principle, see *Moss v. McCullough*, 7 *Barb.* 279.

228. That in an action against a corporation on a contract made by its agent, it makes no difference whether the agent who made the contract was appointed under seal or by vote,—see *Finlay v. Bristol & Exeter Railway Co.* 7 *Each.* 409; 9 *Eng. L. & Eq.* 483.

229. By a “general agent.” Where a corporation have a board of directors, under whose general supervision and control the business of the corporation is transacted, an agent, who attends to the daily routine of business, and its management under all ordinary circumstances, has no authority, by virtue merely of his agency, to make a contract creating a general lien upon the personal property of the company, to secure money borrowed, but such contract must receive the approval of the board of directors. A general agent might be deemed vested with power to make such contracts, when necessary, in the intervals of corporate meetings, if the corporation had no other board of control but the agent; but if they have such a board, under whose control the agent was acting, such a contract by the agent without their sanction is not binding. *Vt. Supreme Ct.* 1848, *Whitwell v. Warner*, 20 *Vt.* 425.

Compare AGENTS, 59–75.

230. A general power given to the business manager of a corporation, does not authorize him to bind the corporation as maker of a promissory note. *La. Supreme Ct.* 1867, *Culver v. Leovy*, 19 *La. Ann.* 202.

231. Or as the drawer or acceptor of a bill of exchange. *Each.* 1847, *Brown v. Byers*, 16 *Law J. N. S.* 112; 16 *Mees. & W.* 252.

232. Where a corporation have adopted, for the purpose of signing their notes, the name of a mercantile firm, their general agents, such notes so made on their behalf, will bind the corporation; and such adoption may be inferred from corporate acts, or from the acts and statements of the agents and the silent acquiescence of the corporation, no vote appearing on their records to limit the powers of their agents in this respect. When a corporation consists of a small number of persons, like a partnership, they may conduct all their business by conversation without formal votes. And when general and very large powers are exercised by an agent or firm apparently entrusted with the whole business of the corporation, and no vote appears, on the production of their records, prescribing or limiting their

powers, the corporation are as well bound by the declarations and statements of such agents upon the subject of the dealings of the corporation, and whilst acting therein, as by their acts and contracts. *Mass. Supreme Ct.* 1849, *Melledge v. Boston Iron Co.* 5 *Cush.* 158.

233. The acceptance of bills, by a general agent of an incorporated company, to avoid the suspension of work of great importance to the corporation, does not fall within that class of cases of extraordinary emergency, or overruling necessity, in which an agent, from the very necessities of the case, is justified in deviating from the authority conferred on him. *Pa. Supreme Ct.* 1859, *Sewanee Mining Co. v. McCall*, 3 *Head*, 619.

234. The notes of an association or partnership company, given by their general agent, bind the company, if within the scope of its business, and given for a consideration going to their use; and the authority of the agent may be inferred by the jury from the fact that the notes were made with the knowledge and concurrence of some of the members of the company, unless the articles of association restrict the management to a board; in which case such concurrence on the part of a member of the board should be shown. *Mass. Supreme Ct.* 1816, *Odiorne v. Maxey*, 18 *Mass.* 178; and a further decision in *S. C.* 1818, 15 *Id.* 39.

235. The general agent of a corporation, clothed with certain powers by the charter, or the lawful act of the corporation, may use that power for an unauthorized, or even a prohibited, purpose, in his dealings with an innocent third party, and yet the corporation will be held liable for his acts. *Ind. Supreme Ct.* 1865, *Madison & Indianapolis R. R. Co. v. Norwich Saving Society*, 24 *Ind.* 457.

236. Where a corporation have a general agent, who is employed by them for the express purpose of receiving and transporting merchandise for hire, and is held out to the world as invested with authority for this purpose, if goods are delivered to him to be transported in the way of his duty, the corporation will be liable for the manner in which that duty is performed, and the contract of bailment may be regarded as made with them. Instructions to, or arrangements with, such agent, as to receiving such goods, not made known to the public, or to the

party contracting with them, cannot affect the liability of the corporation. *N. H. Superior Ct.* 1848, *Mayall v. Boston & Maine R. R.* 19 *N. H.* 122. *S. P. Vt. Supreme Ct.* 1851, *Farmers & Mechanics Bank v. Champlain Transportation Co.* 23 *Vt.* 186. Compare *Elkins v. Boston & Maine R. R.* 8 *Post.* 275.

237. An individual who is held out as the agent of a transportation company; whose duties consist in receiving goods and freight; and whose name appears on the face of the company's printed bills of lading, can make a contract for carrying goods which any authority of the company can make, within the scope of their business. *Pa. Supreme Ct.* 1867, *Baltimore & Philadelphia Steamboat Co. v. Brown*, 54 *Pa. St.* 77.

238. The general agent of a company is not responsible for bad debts, or for the negligence or faithlessness of agents necessarily employed by him; he is discharged if he exercised reasonable diligence to see that they performed their duties. *S. C. Ct. of Appeals*, 1848, *Williams v. Gregg*, 2 *Strobh. Eq.* 297, 309.

239. By members. Individual members of a corporation cannot, unless authorized, bind the body by express promises, nor can any corporate engagements be implied from their unsanctioned conduct or declarations. *Me. Supreme Ct.* 1839, *Ruby v. Abyssinian Society*, 15 *Me.* 806; *Md. Ct. of Appeals*, 1838, *Regents of University of Maryland v. Williams*, 9 *Gill & J.* 385; *N. Y. Supreme Ct.* 1855, *Soper v. Buffalo & Rochester R. R. Co.* 19 *Barb.* 310.

240. The acts, doings and declarations of individual members of a corporation, unsanctioned by the body, are not binding upon it. But inferences may be drawn from corporate acts, tending to prove a contract or promise, as well as in the case of an individual; and a vote is not always necessary to establish such contract or promise. *U. S. Supreme Ct.* 1827, *Bank of United States v. Dandridge*, 12 *Wheat.* 64, 72; *Me. Supreme Ct.* 1830, *Abbot v. Hermon*, 7 *Me.* (7 *Greenl.*) 118. *N. Y. Supreme Ct.* 1817, *Dunn v. Rector &c. of St. Andrews Church*, 14 *Johns.* 118; *Mass. Supreme Ct.* 1823, *Proprietors of Canal Bridge v. Gordon*, 1 *Pick.* 297.

241. Thus, where the same persons composed two corporations, and passed a vote as members of one of them, proposing to enter into a contract with the other; and the con-

ditions of such proposal were partially executed by both corporations, without any corporate vote on the subject,—*Held*, that an acceptance of the proposal might be inferred from such corporate acts only. *Mass. Supreme Ct.* 1823, *Proprietors of Canal Bridge v. Gordon*, 1 *Pick.* 297.

For rules relative to Members common to all corporations, see MEMBERS; for those peculiar to stock companies, see STOCKHOLDERS.

3. Effect of irregularities or misconduct.

242. Incompetency of officer. A contract made on behalf of a corporation, by its officers, will not be canceled in equity on the ground that the officers who made it were not residents of the State in which the charter was granted, and therefore not lawfully eligible as such officers. It is sufficient for third persons that they have dealt in good faith with officers *de facto*. *Pa. Supreme Ct.* 1853, *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.* 21 *Pa. St.* 18.

243. The debtors of a corporation cannot avoid their liabilities on contracts made by them with one of its officers, on the ground that his appointment was illegal by reason of irregularities in it, and in the choice of the directors who assumed to make it. *Me. Supreme Ct.* 1849, *Cooper v. Curtis*, 30 *Me.* 488.

244. Lack of quorum. Under a charter which requires five managers to constitute a quorum with power to make certain contracts, a contract under the corporate seal may be deemed valid, notwithstanding it is signed by less than five. In the absence of evidence to the contrary, it is to be presumed that a due quorum authorized the signing and sealing. *Pa. Supreme Ct.* 1820, *Berks & Dauphin Turnpike Co. v. Myers*, 6 *Serg. & R.* 12. Compare *Van Hook v. Somerville Manuf. Co.* 1 *Halst. Ch.* 137.

245. A debtor cannot avoid payment of his obligations to a bank, on the ground that the discounts were not made by a quorum of directors, as required by the charter. Such provisions are directory merely. *Ind. Supreme Ct.* 1862, *Smith v. State Bank*, 18 *Ind.* 327.

246. A mortgage authorized by vote of four directors of an incorporated company, when the charter requires that five should constitute a quorum, is null and void, if there is no evidence that any other manager gave his sanction, either formally, or other-

wise, at any other time. *N. J. Chancery* 1853, *Holcomb v. Managers of Bridge Co.* 1 *Stockt.* 457.

247. By the by-laws of the defendant corporation, the executive committee which was empowered to hire rooms, required for a quorum to transact business, two directors and the president, and if the latter were absent a president *pro tem.* must be chosen. Two of this committee met informally, in absence of the president and without electing any *pro tem.* and notified the agent of the plaintiff corporation, who was a third member of such committee, that they would hire the rooms to be let by the plaintiff corporation. The defendants never occupied the rooms. *Held*, on suit brought for rent, that there was no contract made which was binding on the defendants and no ratification of the informal action, by the subsequent acts of the corporation. *N. Y. Superior Ct.* 1857, *Corn Exchange Bank v. Cumberland Coal Co.* 1 *Bow.* 436.

As to What is and what is not a quorum, see QUORUM.

248. Effect of omitting prescribed formalities. A departure from formalities required by the deed of settlement of an English joint stock company, to be observed in making contracts on behalf of the company,—such as the omission to pass a resolution authorizing the contract at a general meeting of shareholders, where such resolution is made a pre-requisite,—does not necessarily impair the validity of the contract. *C. P.* 1858, *Agar v. Athensum &c.* *Ass. Soc.* 8 *C. B. N. S.* 725.

249. Mere excess of authority on the part of the directors of a joint stock company, is between them and the shareholders, and will not avoid a contract under seal, as against innocent third parties. *Q. B.* 1855, *Royal British Bank v. Turquand*, 24 *Law J. N. S.* 327; 5 *Ell. & B.* 248; 32 *Eng. L. & Eq.* 273.

250. By the deed of settlement of a joint stock company, the directors were authorized to borrow, under the common seal of the company, such sum or sums of money as they should be authorized to borrow at a general meeting. At such meeting they were authorized to borrow, not a specific sum, but such sums as they might deem expedient, in accordance with the provisions of the deed of settlement and act of Parliament. The directors borrowed £1,000 on

bond, under the common seal. *Held*, that the company were liable, whether the resolution was, or was not, a sufficient authority for the directors to borrow. Where the directors of such companies have a right to borrow, lenders have a right to presume that the company, which put forward their directors as authorized to borrow, have taken the requisite steps to empower them to do so. *Exch. Ch.* 1856, *Royal British Bank v. Turquand*, 36 *Eng. L. & Eq.* 142; 6 *Ell. & B.* 327.

251. Although a company may have made rules for the control of their business, and the appointment of agents to transact it, yet an act done on behalf of the company not according to these rules, if assented to by all the members, will be, as to that particular act, a waiver of the rules, and the company will be bound by and responsible for it; and therefore a company which had allowed one G. to run their boat, were *Held* responsible for all acts which, as master, he might legitimately perform, although their articles provided that the company business should be transacted by a board of directors. *Minn. Supreme Ct.* 1860, *Pennsylvania Ins. Co. v. Murphy*, 5 *Minn.* 36.

252. A railway company, having under their act the usual power to sell surplus lands, with a direction to offer them, in the first instance, to the adjoining land-owners, entered into a contract for sale to a stranger, without having previously made any offer to sell to the owner of the adjoining premises. The purchaser refused to complete his contract, and the company then made the offer to the parties entitled to the right of pre-emption, which was declined. The company filed a bill to compel specific performance. *Held*, that the objection was one of conveyance and not of title, and that the company were not incapacitated from contracting to sell prior to the offer of pre-emption, but only from conveying; and that their neglect to make the offer prior to the contract was not such a misfeasance as to prevent them from enforcing the contract. *Vice Chan. Ct.* 1844, *London & Greenwich Railway Co. v. Goodchild*, 13 *Law J. N. S.* 224; 8 *Jur.* 455.

253. The charter of a turnpike company required the corporation to contribute to the road money received from the stockholders to the amount which the State should subscribe in bonds, dollar for dollar. The bonds

of the State depreciated to an extent not expected by them, and the company let out the making of the road to the lowest bidder, payable one half in the bonds of the State and the other half in stock. *Held*, that this was unauthorized, as it lessened the obligations of the company; but that, if done without intentional fraud, and affirmed by the proper agents of the State, it was binding on her. *Miss. Ct. of Errors*, 1842, *State v. Jefferson Turnpike Co.* 8 *Humph.* 805.

254. A note made payable to a certain bank or order, and signed by sureties, without being discounted at that bank, was sold to an individual, who deposited it in the bank. *Held*, that the sureties were liable to pay it. *Ky. Ct. of Appeals*, 1853, *Ward v. Northern Bank*, 14 *B. Monr.* 351.

255. A banking company, which was authorized to sell surrendered stock for cash, and invest the amount in bonds and mortgages, received the bond and mortgage of an individual directly, as a consideration for the stock issued to him. *Held*, that the stockholder could not avail himself of this conduct of the company to avoid the bond so given. A party cannot avoid his contract with a corporation, and thereby diminish the fund which was designed as a security for the benefit of the public, upon the pretence of abuse of the corporate powers, or mismanagement on the part of the board of directors, in making the contract. *Fla. Supreme Ct.* 1853, *Southern Life Ins. & Trust Co. v. Lanier*, 5 *Fla.* 110, 164. And see *Moreland v. State Bank*, 1 *Breese*, 208; *Bond v. Bank of Georgia*, 2 *Kelly*, 92.

256. Error in recital. The fact that a contract made by an officer, by authority of a vote of the trustees, erroneously recites that it was by a vote of the society, is not material. *Mass. Supreme Ct.* 1838, *Hayward v. Pilgrim Society*, 21 *Pick.* 270.

4. Defective contracts, how rendered obligatory.

257. Corporation bound by receiving the consideration. Though the contract is one which originally was unauthorized, yet if it has been executed by the other party, if the corporation have received the consideration for their promise, they are not at liberty to repudiate their obligation, but the other party may enforce it. *N. Y. Ct. of Appeals*, 1860, *Bissell v. Southern & Northern Indiana*

R. R. Co. 22 *N. Y.* 258; *N. Y. Supreme Ct.* 1855, *De Groff v. American Linen Thread Co.* 24 *Barb.* 375.

258. When a contract is executory, a corporation cannot be held bound by it unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation have enjoyed the benefit of the consideration, an implied assumpsit arises against them, as well as an implied ratification of the authority of the agent who contracted. *Cal. Supreme Ct.* 1858, *San Francisco Gas Co. v. City of San Francisco*, 9 *Cal.* 453.

259. Whenever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect, and such work is done, or such goods are furnished, and accepted by the corporation, and the whole consideration is executed, the corporation cannot refuse payment upon the ground that the contract was not under seal. *Bail Ct.* 1852, *Clark v. Cuckfield Union*, 16 *Jur.* 686; 21 *Law J. N. S. Q. B.* 349; 11 *Eng. L. & Eq.* 442.

260. To enforce an executory contract against a corporation, it may be necessary to show that it was by deed; but where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. *Q. B.* 1849, *Pennington v. Taniere*, 13 *Jur.* 119; 18 *Law J. N. S.* 49; 12 *Q. B.* 1011.

261. Where the complaint in an action by a municipal corporation on a penal bond alleges a loan of its bonds to a private corporation, it is not necessary to aver that the corporation received the proceeds of said bonds. If the bonds were in such condition that they could not be made available, this is matter of defence, to be presented by a proper plea. *Ala. Supreme Ct.* 1857, *City Council of Montgomery v. M. & W. Plank Road Co.* 31 *Ala. N. S.* 76.

262. An insurance company who have had the chance of a contract of life insurance turning out in their favor, cannot afterwards be permitted, on the ground of the inconsistency of the contract with their rules, to escape from it. *Vice Chan. Ct.* 1851, *Collett*

v. Morrison, 12 *Eng. L. & Eq.* 171; 9 *Hare*, 162.

263. One registered insurance company agreed to sell its business to another registered insurance company, and a deed of assignment was accordingly executed, whereby the latter company covenanted to indemnify the former against all claims. After the business had been carried on for some time by the purchasing company, that company failed, and both companies were wound up under the Winding-up Acts. On the official manager of the selling company tendering a proof against the purchasing company, in respect of claims satisfied by the selling company, one part of the deed of assignment was produced, having affixed to it the seal of the purchasing company, but another part, alleged to have been executed by the selling company, was not forthcoming.

Held, 1. That after what had taken place, it was unnecessary to determine whether the selling company had executed the purchase-deed, or whether its directors had exceeded their powers in making the sale.

2. That where a purchaser has enjoyed the subject-matter of a contract, every presumption must be made in favor of its validity.

3. That if all the proceedings on the part of the directors of the purchasing company, with reference to the purchase, had not been in strict accordance with their own deed of settlement, still, if the contract with the other company was the means of the purchasing company coming into existence, they could not act in contravention of that contract. *Chancery*, 1854, *Port of London Ass. Co.'s Case*, 35 *Eng. L. & Eq.* 178.

264. Cases of money borrowed. A corporation who have received the benefit of a loan, cannot avoid liability upon a mortgage given to secure its payment, by denying the authority of those who contracted the loan on their behalf. *Ill. Supreme Ct.* 1854, *Ottawa Plank Road Co. v. Murray*, 15 *Ill.* 336.

265. Where the plaintiff supplied coals from time to time to the defendants, the guardians of a poor-law union, for the use of their workhouse, under articles of agreement between them, executed by the plaintiff, but not under the seal of the defendants, and the defendants received and consumed some of the coals,—*Held*, in an action for goods sold and delivered, that as the goods had been accepted by the defendants, and were such

as must necessarily have from time to time been supplied for the very purposes for which the body was incorporated, the defendants were liable to pay for the coals, although the contract was not under seal. *Q. B.* 1866, *Nicholson v. Guardians of Bradfield Union*, 1 *Law Rep. Q. B.* 620; 85 *Law J. N. S.* 176; 12 *Jur. N. S.* 686; 14 *Law Times, N. S.* 830.

266. A lender who honestly advances money to a corporation upon bonds duly issued for proper purposes, is not bound to see that the money is not applied to other purposes. *Wis. Supreme Ct.* 1860, *Mills v. Gleason*, 11 *Wis.* 470.

267. Cases of goods bought. A corporation cannot avoid an obligation on the ground that it was given for property which the corporation were not authorized to purchase. And the corporation being bound, its sureties upon the obligation are equally bound. *N. Y. Supreme Ct.* 1843, *State of Indiana v. Woram*, 6 *Hill*, 38.

268. If a manufacturing corporation purchase property, which they may or may not be competent to purchase by the charter, they cannot, in an action for the price, set up that it was bought for a purpose not authorized by the charter. Thus where a company chartered to raise and smelt ore, after raising ore and having it smelted by contract for some time, purchased the smelting works and premises, which included a school house and a threshing machine,—*Held*, in an action upon one of several notes given for the purchase money, that the purchase was not necessarily in excess of the power granted by the charter, and that the plaintiff was therefore entitled to recover. *N. Y. Supreme Ct.* 1843, *Moss v. Rossie Lead Co.** 5 *Hill*, 137; 1849, *Moss v. McCullough*, 7 *Barb.* 279. And see *Farmers & Mechanics Bank v. Champlain Transportation Co.* 18 *Vt.* 131.

269. A member of a corporation should not be permitted to repudiate its liability on a contract of purchase, as not falling within the scope of the charter, where the mass of the property purchased does fall within the general scope of the charter, and the only objection is that some articles apparently unnecessary are included. In such case, the

* A contrary view was expressed in the prevailing opinions in the Court of Errors, in *McCullough v. Moss*, 5 *Den.* 567; but the subsequent decision of the Supreme Court reasserts the doctrine.

question of good faith in the purchaser is a question of fact for a jury. *N. Y. Ct. of Appeals*, 1853, *Moss v. Averell*, 10 *N. Y. (6 Seld.)* 449.

270. A corporation will be liable on a contract, though not under seal, where the goods have actually been supplied to and accepted by the corporation, and are such as must of necessity be from time to time supplied to the corporation for the purposes for which it was incorporated. *Q. B.* 1866, *Nicholson v. Bradford Union*, 1 *Law Rep.* 620; 35 *Law J. N. S.* 176.

271. By a private act of Parliament three railway companies were consolidated into one, but the provisions of the act of incorporation were not to take effect until the commissioners of railways should certify that a certain portion of the capital was paid up and expended on the roads. The plaintiff supplied the company with goods for the use of the road, under orders not under the common seal. *Held*, that he could recover against the company in an action for goods sold, without proof that the commissioners had certified, and although the company had not contracted by instrument under their common seal. *Q. B.* 1850, *Denton v. East Anglian Railway Co.* 3 *Carr. & K.* 16.

272. The agent of an incorporated railway company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers, upon certain terms. The sleepers were received and used by the company. *Held*, that there was evidence from which the jury might find a contract by the company; the directors having power (by Stat 8 & 9 Vict. c. 16) to contract by parol, on behalf of the company, where private persons may make a valid parol contract. *Exch.* 1853, *Pauling v. London & Northwestern Railway Co.* 22 *Eng. L. & Eq.* 560; 8 *Exch.* 868; 23 *Law J. N. S.* 105; 21 *Law Times*, 157.

273. In an action against a registered joint stock company for the price of goods supplied for the purposes of the company, used on their premises, and ordered by their officers, it is unnecessary to give any evidence that those officers were authorized to make the contract, or that it was made pursuant to the provisions of the deed of settlement and the by-laws of the company. *C. P.* 1849, *Smith v. Hull Glass Co.* 8 *C. B.* 668; 19 *Law J. N. S.* 128.

274. A joint stock manufacturing company, having a board of directors authorized to appoint officers, and delegate their authority, purchased goods, some through the general manager of the company, some through his deputy, some through the secretary, and others through the chairman of the directors, all of whom were duly appointed. The goods were delivered on the company's premises and used for their purposes. *Held*, that the company was liable, on the ground as to those bought by the manager, that he had authority to give such orders in the absence of any express provision to the contrary; and as to those bought by the others, that the directors must be taken to have known that the goods had been purchased and used, and the company was therefore liable to pay for them. *C. P.* 1852, *Smith v. Hull Glass Co.* 9 *Eng. L. & Eq.* 442; 21 *Law J. N. S.* 106.

275. A joint stock company was formed to work a mine, in which the defendant became a shareholder, and took part in its proceedings. The prospectuses issued on the formation of the company, stated that all supplies for the mines were to be purchased at cash prices, and no debt was to be incurred; and the scrip certificates bore an indorsement to the same effect. The plaintiff supplied goods for the necessary working of the mine, on the order of a resident agent, appointed by the directors to manage the mine, which was the customary course in such concerns. *Held*, that the defendant was liable to the plaintiff for the price of such goods, notwithstanding the statements in the prospectus and certificate, unless it were shown that the agent had in fact no authority from the defendant, and that the plaintiff had notice thereof. *Exch.* 1841, *Hawken v. Bourne*, 8 *Mees. & W.* 703.

276. A quantity of prospectuses of a registered public company were ordered by its secretary of a printer who had been before employed by the company; they were delivered at his office, and never returned. No proof that they were used was offered. *Held*, that the company was liable for their price. *C. P.* 1854, *Levy v. Metropolitan Cab Co.* 25 *Eng. L. & Eq.* 263.

277. Where a municipal corporation have power to purchase materials for public works, the provisions of law regulating the mode of proceeding with such work to make the owners of lots liable for assessments, cannot affect the validity of a purchase of such materials.

The right of the creditor to recover for materials furnished can in no wise depend upon the use to which they are applied, or upon the compliance by the city with the requirements of the charter in the mode of using them. *N. J. Supreme Ct.* 1855, *Bigelow v. City of Perth Amboy*, 1 *Dutch*. 297.

278. Cases of services received. It is not necessary, in order to charge a corporation for services rendered, that the directors, at a formal meeting, should either have formally authorized or ratified the employment. For many purposes, the officers and agents of the corporation may employ persons to perform services for it, and such employment, being within the scope of the agent's or officer's duty, binds the corporation. In other cases, if an officer employs a person to perform a service for the corporation, and it is performed with the knowledge of the directors, and they receive the benefit of such service without objection, the corporation is liable upon an implied assumpsit. [12 Johns. 227; 14 Id. 118; 6 N. Y. Leg. Obs. 160; 15 Barb. 323; 7 Cow. 540; 9 Paige, 496; 17 N. Y. 449; 22 Wend. 348; 20 Id. 91; 4 Cow. 645; Angel & Ames on Corp. §§ 7, 8.] *N. Y. Ct. of Appeals*, 1864, *Hooker v. Eagle Bank of Rochester*, 30 N. Y. 83.

279. Although a corporation has no banking powers, and is prohibited from issuing notes and checks under a penalty, it is bound to pay for labor and expenses in engraving a steel plate for notes and checks, and in printing therefrom under an order from its officers and agents, even though it should be presumed that they were intended to be used for an unlawful purpose. *Ky. Ct. of Appeals*, 1844, *Underwood & Co. v. Newport Lyceum*, 5 B. Monr. 129.

280. If work be done for a corporation, for purposes connected with the corporation, under a verbal order, and accepted and adopted by them, they cannot, in an action to recover the price, object that no order was given under seal. *Q. B.* 1846, *Sanders v. Guardians of St. Neot's Union*, 8 Q. B. 810; 10 Jur. 566; 15 Law J. N. S. M. C. 104.

281. Thus where the guardians of a union gave a verbal order to their officer for iron gates for the union workhouse. The gates were supplied accordingly, and adopted by them,—*Held*, that this was a contract incident to the purposes for which they were incorporated, and, therefore, within the excep-

tions to the general rule, requiring contracts by corporations to be under seal. *Id.*

282. Cases of lands occupied. A corporation is liable for the use and occupation of real estate leased by it, under agreement express or implied; and in an action against it in such case, it is not material whether it was a foreign or domestic corporation, or whether its charter gave it power to hold real estate. *Pa. Supreme Ct.* 1850, *Steamboat Co. v. McCutcheon*, 13 Pa. St. 13.

283. In a suit against a railway company for specific performance of a contract for the purchase of land, entered into by their agent, the fact that it did not appear that the agent was authorized under the corporate seal, is unavailing, where the company have, before the bill was filed, not only acted on the contract by entering into possession of the land, but have actually made a railroad over it. *Chancery*, 1840, *London & Birmingham Railway Co. v. Winter*, 1 *Craig & Ph.* 57.

284. A corporation may be liable for use and occupation. It is not invariably necessary to show a hiring under seal. And when a corporation have actually enjoyed the use of lands, an engagement on the part of the directors to pay therefor, may, if such an engagement would be necessary, and sufficient to charge the corporation, be presumed, in aid of an action for the use and occupation. *Q. B.* 1852, *Lowe v. London & Northwestern Railway Co.* 14 *Eng. L. & Eq.* 18; 21 *Law J. N. S. Q. B.* 361; 17 Jur. 375; 7 *Eng. Railw. Cas.* 524.

285. Although a corporation may be liable in an action for use and occupation of premises, it cannot be so for the period of actual occupation; and a continuous occupation for several years will not render the corporation tenants from year to year; nor will a payment of rent, inasmuch as they cannot contract except under seal. *Exch.* 1852, *Finlay v. Bristol & Co. Railway Co.* 7 *Exch.* 409; 21 *Law J. N. S.* 117; 9 *Eng. L. & Eq.* 483.

286. Where a railroad company is authorized to purchase lands for certain purposes, a person who agrees to sell his land to the company is not bound to see that it is strictly required for such purposes; and if he is ignorant of any intention to misapply the funds of the company and acts *bona fide* in the matter, he may enforce performance of the contract. *H. of L.* 1855, *Eastern Coun-*

ties Railway Co. v. Hawkes, 35 Eng. L. & Eq. 8; 5 H. L. Cas. 381.

287. Corporations bound by representations. Corporations, like individuals, are bound in good faith by their representations or silence, upon the strength of which others assume obligations. *U. S. Supreme Ct.* 1859, *Zabriskie v. Cleveland & C. R. R. Co.* 23 How. 381.

288. If a loan, although in form made to the president individually, who gives his own note for the amount indorsed by the corporation, is in fact, made for the benefit of the corporation, the form being assumed merely to evade a provision of law governing the lender; or if the lender is induced by the representations of the agent of the corporation to believe that the transaction is with the corporation, and for a purpose within the scope of its business, the corporation is liable upon its indorsement. *N. Y. Supreme Ct.* 1857, *Central Bank v. Empire Stone-Dressing Co.* 26 Barb. 23.

289. Corporation bound to bona fide holder. Where a corporation is authorized to take or give notes generally in the execution of the powers conferred upon it, a note taken by it in excess of those powers is valid in the hands of one to whom it is transferred before maturity, without notice, and for value. *N. Y. Supreme Ct.* 1833, *Willmarth v. Crawford*, 10 Wend. 341. See to the same effect, *White v. How*, 3 McLean, 291; *Stoney v. American Life Ins. Co.* 11 Paige, 635; *Leavitt v. Yates*, 4 Edw. 134; *Georgia Lumber Co. v. Strong*, 3 Ch. Sent. 3; *Curtis v. Leavitt*, 15 N. Y. 9, 94; *Barnes v. Ontario Bank*, 19 N. Y. 152. But compare *Pearce v. Madison & Indianapolis R. R. Co.* 21 How. (U. S.) 441.

290. Holders who have discounted negotiable paper in good faith and for value before maturity, in the ordinary form of commercial paper, indorsed by a corporation having authority in their legitimate business to indorse commercial paper,—and where no facts to induce a suspicion that the paper is not business paper appear,—are not bound explicitly to inquire and ascertain whether the indorsement was a mere accommodation indorsement, in which case the corporation would have no right to make the same. *N. Y. Supreme Ct.* 1860, *Mechanics Banking Association v. N. Y. & Saugerties Lead Co.* 23 How. Pr. 74.

291. Where the president of a bank, by fraud and collusion between himself and the payee of a bill or draft, drawn on a bank, raised money on it to be applied to the payee's use,—*Held*, that a bona fide indorsee, who had received the bill in the usual course of business, might recover thereon from the bank. *Pa. Supreme Ct.* 1824, *Ridgway v. Farmers Bank*, 12 Serg. & R. 256.

Compare BILLS and NOTES.

292. Bonds of a municipality,—e. g. a county,—issued under a statute authorizing them to be issued, in case, upon an election duly notified, the vote of the people duly sanction it, are valid in the hands of bona fide holders, if the bonds on their face import a compliance with the law under which they were issued. The officers issuing them are to determine the regularity of the notice of election; and the purchaser of the bond is not bound to look further for evidence of a compliance with the condition to the grant of the power. *U. S. Supreme Ct.* 1858, *Commissioners of Knox County v. Aspinwall*, 21 How. 539.

293. Power in a municipal corporation to issue bonds being shown, the corporation, as against bona fide holders of them for value, is estopped to deny that the power was properly executed. *U. S. Supreme Ct.* 1865, *Rogers v. Burlington*, 3 Wall. 654. *S. P. Cincinnati City v. Morgan*, *Id.* 275. And see *Moran v. Commissioners of Miami County*, 2 Black. 722; *Mercer County v. Hackett*, 1 Wall. 83.

294. Although bonds issued by a county in payment for stock in a railroad company are not binding upon the county, if issued without authority of law, yet a purchaser of such bonds need not look beyond the county records to ascertain whether or not they were issued by legal authority. Thus when it appeared from the county records, that a proposition to subscribe for stock in a railroad company was ordered to be submitted to a vote of the people of the county,—what the proposition was,—and the time when the vote was to be taken; that a majority of the votes were in favor of it; and that an order was made declaring the result, and to carry it into effect,—*Held*, that the records showed sufficient authority for the issuing of the bonds, and that the purchaser of such a bond might presume from the record that the notice required by law was

duly published. *Iowa Supreme Ct.* 1857, Clapp v. County of Cedar, 5 *Clarke*, 15.

295. Where the coupon bonds issued by a municipal corporation have passed into the hands of *bona fide* purchasers for value, it is not in the power of the city to defeat an action on the coupons, on the ground of irregularities in the election authorizing their issue. *Wis. Supreme Ct.* 1859, Clark v. City of Janesville, 10 *Wis.* 136.

296. A statute authorizing a municipal corporation to issue bonds is a public law, which a purchaser of them is required to know, so far as to see that the authority to make the issue exists; but when the exercise of the power is made to depend upon an election, he is not bound to inquire into its regularity. He may presume that the preliminary steps have been taken according to law, but of the existence and regularity of the steps he is not bound to make inquiry. The rule that parties dealing with officers of municipal corporations are bound to know that they have authority to act, though proper for the protection of those whom the officers represent, should not be carried so far as to destroy the safety and rights of those who, with good faith and due diligence, deal with such corporations. *Id.* But compare *People ex rel Fiedler v. Mead*, 34 *How. Pr.* 294.

297. Where a corporation has no general power in its charter to issue negotiable paper (the charter being a public act), a note or bill issued by it, out of the course of its legitimate business, is void, even in the hands of a *bona fide* holder without notice. The corporation having no general power, either express or implied, to issue negotiable paper, it is a condition precedent to the validity of such paper, that the debt which forms its consideration should be contracted in the course of their proper, legitimate business. Every person who takes their paper is bound to know the extent of their powers, and is presumed to receive it with a full knowledge that they have only a limited and conditional power to issue it. He is thus put on inquiry, and takes at his peril. *N. Y. Supreme Ct.* 1849, Halstead v. Mayor &c. of New York, 5 *Barb.* 218.

298. One who purchases bonds from a railroad company at a discount, with knowledge that they were irregularly issued by the obligors (a municipal corporation), in ex-

change for stock of the company, instead of being issued for money borrowed, to be used in building the company's road, as prescribed by the statute authorizing them, is not a *bona fide* holder; but takes such bonds, subject to any defence which the town might have against the company. *N. Y. Ct. of Appeals*, 1861, Starin v. Town of Genoa, 23 *N. Y.* 489; Gould v. Town of Sterling, *Id.* 456.

299. Corporation bound by usual course of business. It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. Where a series of contracts have been openly made, by the officers of a corporation, within the knowledge of the corporators, who have acquiesced in and received the value of them, the contracts are binding upon the corporation, although not expressly authorized in its charter. The public have a right to presume that the acts are within the scope of the authority granted. Although the corporators are in general protected from unauthorized acts of their agents, a rule of equal force requires that they should not deceive the public, or lead them to trust in unauthorized acts of their agents. If they receive the avails, it is implicit evidence that they consented. If the corporation be a municipal corporation, it is bound to pay whatever may be due thereon, by the assessment of taxes if it has no other means. *Pa. Supreme Ct.* 1850, Alleghany City v. McClurkan, 14 *Pa. St.* 81. Compare *Zabriskie v. Cleveland &c. R. R. Co.* 23 *How. (U. S.)* 381.

300. Authority from the directors to an agent to execute a bond to bind the corporation may be given without an assembly or meeting of the directors unless that is the usual mode of their doing such acts. If they adopt the practice of giving a separate assent to the execution of contracts by their agents, it is of the same force as if done at a regular meeting of the board. If this were not so, it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks and similar corporations in this country is without any formal meetings or votes of the board. Hence, there follows a necessity of giving effect to the acts of such corporations according to the mode in which they choose to allow them to be transacted. A corporation

is bound by the action of a majority of the board of directors, expressed in the usual mode which they adopt in the transaction of the business of the board. *Vt. Supreme Ct.* 1858, *Bank of Middlebury v. Rutland & Washington R. R. Co.* 30 *Vt.* 159.

301. The court will assume that authority actually existed, where the agents have repeatedly pursued a particular course of conduct, and the company as often have ratified their acts by treating them just as if authority actually existed. [12 *Wheat.* 69.] Thus, where certain agents of a railroad company were employed by the company to purchase land, and had frequently, without express authority, submitted the question of price to arbitrators, and the price awarded had been paid by the financial officers of the company, —*Held*, that the company were bound by the award of arbitrators to whom these agents had submitted a question of price. *N. Y. Ct. of Appeals*, 1853, *Wood v. Auburn & Rochester R. R. Co.* 8 *N. Y.* (4 *Seld.*) 160.

302. It is not requisite, that the contract of submission should be under the seal of the company, in such case, nor will it be avoided by the agent attaching a seal to its execution, by himself. *Id.*

303. If an officer of a company, who usually transacts its financial business, borrows money in the name of the company, having been theretofore suffered to do so repeatedly by the directors, he binds the company, unless the company prove it was borrowed for an illegal purpose, or was misapplied. *N. Y. Supreme Ct.* 1852, *Beers v. Phoenix Glass Co.* 14 *Barb.* 358.

304. Proof that the agent of a corporation was in the habit of giving notes for the company, is inadmissible to show the validity of a note given by him as against the corporation, unless accompanied by proof that the company had some knowledge that the agent was in the practice of giving notes in its name. *N. Y. Supreme Ct.* 1864, *Lawrence v. Gebhard*, 41 *Barb.* 575.

305. When the other party to the contract is bound. In an action brought by a corporation to recover a sum of money loaned to the defendant, the latter, having had the benefit of the contract of loan, cannot be permitted to avail himself of the defence that the corporation plaintiff had no authority, express or implied, by the terms of its charter to make the loan. [4 *Johns. Ch.* 370; 6

Hill, 37; 5 *Id.* 137, 490, 491, n.; 16 *Mass.* 102; 13 *Pa.* 13; 3 *Sandf.* 170; 11 *Barb.* 213.] When it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of powers conferred by the charter, a party who has had the benefit of the contract, cannot be permitted to question its validity, in an action founded upon it. Even where there has been a general restriction in the charter, an isolated case of excess beyond the limit prescribed, has been protected, and the contract held binding, when the general practice of the corporation had been in strict conformity with its charter. [5 *Hill*, 490, 491, n.; 6 *Id.* 217; 11 *Barb.* 213.] *N. Y. Supreme Ct.* 1853, *Steam Navigation Co. v. Weed*, 17 *Barb.* 378. To the same effect is, 1855, *Mott v. United States Trust Co.* 19 *Id.* 568.

306. One who has received property from a corporation by way of mortgage, and has sold it under the power contained in the mortgage, cannot refuse to credit the company with the proceeds, on the ground that their dealings with him exceeded their corporate powers. *N. Y. Ct. of Appeals*, 1860, *Parish v. Wheeler*, 22 *N. Y.* 494.

307. A corporation cannot enforce a mortgage which it has obtained by a transfer taken contrary to the express provision of its charter; and the objection may be taken by the mortgagor. This objection is not an attempt to set up collaterally a forfeiture of the charter, but only that the title to the mortgage was obtained by a positively illegal act. *N. Y. A. V. Chan. Ct.* 1846, *Green v. Seymour*, 3 *Sandf. Ch.* 285.

308. One who contracts with a corporation to pay money for land obtained from them, and held by him, not having notice not to pay, and there being no adverse claimant who could again recover the money, cannot defend an action of assumpsit by the corporation to recover the money, by setting up that the land was previously conveyed to trustees, in trust for an academy, which was afterwards incorporated by a statute directing the property to vest in the corporation, but without any conveyance from the trustees to the corporation. *Pa. Supreme Ct.* 1837, *Fox v. Union Academy*, 6 *Watts & S.* 353.

309. A contract by a corporation for the sale of property which they have previously

bought, is not void, so as to preclude them from enforcing it against the purchaser, because the property in question is such as the corporation were not empowered (although not expressly forbidden) to purchase and hold. If the directors exceeded their powers in making a purchase of such property, and therefore the title did not vest in the company, the title to the property may be regarded as vested in the directors as natural persons. In such a state of the title the directors might dispose of the property, and collect the avails, as a legitimate mode of restoring the funds misapplied, to the company. And for this purpose they may unquestionably take the securities upon sale of the property, payable to the company, or stipulate that the purchaser shall pay the company. And this, so far from being a continuance of the perversion of the charter powers, is the surest and only obvious mode of restoring the funds to their proper channel. *Vt. Supreme Ct.* 1856, *Rutland & Burlington R. R. Co. v. Proctor*, 29 *Vt.* 98.

810. If a person enter and occupy premises under a corporation, though without their having demised under the common seal, the absence of such demise does not relieve him from payment of a just equivalent for the use of the property, and he will be liable in debt or assumpsit for use and occupation. *C. P.* 1826, *Southwark Bridge Co. v. Sills*, 2 *Carr. & P.* 371; 1827, *Mayor &c. of Stafford v. Till*, 4 *Bingh.* 75.

811. Where a contract has been entered into with a corporation, which is executed before action brought, and under which the defendant has received the whole benefit of the consideration for which he bargained, it is no answer to an action of assumpsit by the corporation, that the corporation itself was not originally bound by the contract, by reason of its not having been made under their common seal. *C. P.* 1843, *Fishmongers' Company v. Robertson*, 12 *Law J. N. S.* 185; 5 *Mann. & G.* 131; 6 *Scott N. R.* 56.

812. The plaintiffs, who were a corporation by charter, bought, by parol contract of the defendants, a quantity of ale for the use of the passengers on board the plaintiffs' steam vessel, and paid the defendants for the same. The ale proved unfit for use. *Held*, that the defendants were liable to the plaintiffs in damages, it appearing that the

contract, though not under seal, had been executed. *Exch.* 1855, *Australian Royal Mail Steam Nav. Co. v. Marzetti*, 32 *Eng. L. & Eq.* 572; 24 *Law J. N. S.* 278.

III. INTERPRETATION.

1. Corporate rights and obligations.

813. Effect of corporate contracts generally. Whenever a corporation makes a contract, it is the contract of the legal entity,—of the artificial being created by the charter,—and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State. *U. S. Supreme Ct.* 1839, *Bank of Augusta v. Earle*, 13 *Pet.* 519.

814. A promise to pay to a company or their treasurer for the time being, is not a promise to two distinct parties in the alternative, but a promise to the company. [3 *Bos. & P.* 147.] *N. H. Supreme Ct.* 1859, *Atlantic Mut. Fire Ins. Co. v. Young*, 38 *N. H.* 451.

815. A promise "to pay the commissioners of" the corporation, naming it, but not naming the commissioners as individuals, is not a mere promise to the individuals appointed commissioners, but to the corporation; and an action lies thereon in the corporate name, though it might be otherwise if the promise named the commissioners individually. [13 *Johns.* 38; 6 *Hill*, 476; 21 *Pick.* 486; 1 *D. Ch.* 481; 13 *Vt.* 334.] *Vt. Supreme Ct.* 1848, *Vt. Central R. R. Co. v. Claves*, 21 *Vt.* 30.

816. Continuance of corporate contracts. The obligation of a contract of a corporation survives the dissolution of the corporation. The consequences of a forfeiture of the charter do not enter into and form a part of the contract in such sense that if the State enforce a forfeiture and do not remit a dissolution, that is, continue the corporate existence, the contract becomes extinguished. [8 *Pet.* 281; 17 *Serg. & R.* 65; 6 *Mo.* 364]. *Miss. Ct. of Errors*, 1846, *Nevitt v. Bank of Port Gibson*, 6 *Smedes & M.* 513, 522, 558.

817. Where the charter of the corporation is in its nature perpetual, but subject to repeal, a contract by the corporation to continue during the time for which the corporation was established, is a contract for

an indefinite time, and a stipulation by the corporation to pay so long as the other party shall perform, with a proviso, that, by the death of the party contracting to perform services, the corporation shall be discharged, is, in legal effect, a contract for life. *Mass. Supreme Ct.* 1824, *Revere v. Boston Copper Co.* 15 *Pick.* 351.

318. Influence of usage. The usages of a bank, at which the parties are accustomed to transact business, may be shown, not as forming rules for the decision of the court, but as evidence of the assent of the parties to such usage, and of their waiving the legal claims. *Mass. Supreme Ct.* 1808, *Jones v. Fales*, 4 *Mass.* 245; 1810, *Widgery v. Munroe*, 6 *Id.* 449; 1812, *Lincoln & Kennebec Bank v. Page*, 9 *Id.* 155; *The Same v. Hammett*, 9 *Id.* 159; 1814, *Blanchard v. Hilliard*, 11 *Id.* 85; 1815, *Smith v. Whiting*, 13 *Id.* 6; 1821, *Whitwell v. Johnson*, 17 *Id.* 449; 1826, *City Bank v. Cutter*, 3 *Pick.* 414; *U. S. Supreme Ct.* 1809, *Yeaton v. Bank of Alexandria*, 5 *Cranch.* 49; 1824, *Renner v. Bank of Columbia*, 9 *Wheat.* 581; 1828, *Pearson v. Bank of the Metropolis*, 1 *Pet.* 89; *Bank of Metropolis v. New England Bank*, 1 *How.* 284; 1847, *The Same v. The Same*, 6 *Id.* 213; *Conn. Supreme Ct.* 1821, *Hartford Bank v. Stedman*, 3 *Conn.* 489; *Md. Ct. of Appeals*, 1824, *Bank of Columbia v. Magruder*, 6 *Harr. & J.* 172.

319. But to give the usage of it such effect, a knowledge, express or implied, of the usage, must be brought home to the party who is to be affected by it. *Mass. Supreme Ct.* 1817, *Pierce v. Butler*, 14 *Mass.* 303; *N. Y. Superior Ct.* 1853, *Holford v. Adams*, 2 *Duer*, 471.

320. — of rules of company. A borrowed a sum of money from a loan society, and the defendant joined him in a joint and several promissory note for the amount. At the time of the loan, a printed book of the society's rules was given to the defendant. By these rules it was stated, that after default by the principal, notice would be given to the surety, and that if the money was not then paid, legal proceedings would be taken. The book was not signed. *Held*, that these rules did not constitute an agreement contemporaneous with the note, so as to be admissible to vary the contract on the note. *C. P.* 1842, *Brown v. Langley*, 4 *Mann. & G.* 466.

321. Conditions. Where a corporation have accepted an annuity granted upon a condition, and the condition has been acted on, they cannot afterwards renounce it at pleasure, although the gift was directed by the donor to be applied to another purpose specified, in case the corporation at any time should refuse or neglect to perform the condition. *Rolls Ct.* 1830, *Attorney-General v. Christ's Hospital*, 1 *Russ. & M.* 626.

322. Agreement for construction of canal. Under an agreement made between a canal company and a contractor, for the construction of a lock, providing that the work should be done with such changes and alterations as might thereafter be adopted by the company, they paying all the additional expense for increase of work or materials caused by such change or alterations, the company may change the location and materials of the lock, without incurring any other liability than that prescribed in the contract itself. *Va. Ct. of Appeals*, 1867, *James River & Kanawha Co. v. Adams*, 17 *Gratt.* 428.

323. Where, in such a case, the contractor, notwithstanding any modification, change, or alteration in the plan, continued the work, and his work was estimated and paid for according to the terms of the contract,—*Held*, that the contractor could not recover for any such work done beyond the estimates, or for loss of time, or consequence thereof, unless the company acted in bad faith. *Id.*

324. An agreement entered into between a canal company and a contractor, for building a dam, provided that the company should furnish the cement necessary for the purposes of construction, upon the written order of the contractor; but that if from any cause they should not be able to supply it as required, they should not be responsible for damages arising to the contractor from the want of the same. *Held*, that it was not a sufficient excuse for failing to furnish the cement, that the company had not a sufficient quantity on hand to supply it as required, it being their duty to use due and reasonable diligence to obtain and keep on hand a sufficient supply for such purpose; and that a failure in this regard was a breach of the covenant, for which the contractor might recover damages. *Id.*

325. Agreements for interest. The char-

ter of a corporation required the interest on mortgages taken by them to be made payable annually. A mortgage was dated in August, 1887, and the interest was payable yearly on November 1, in each year. *Held*, that as the word "yearly" must be rejected in order to make the interest payable on the first day of August, 1888, the first November next after the date must be disregarded as a day of paying interest, making the first interest payable in November, 1889. *N. Y. Ct. of Appeals*, 1850, *Clowes v. Farmers Loan & Trust Co.* 3 *N. Y. (3 Comst.)* 470; *S. C.* 8 *N. Y. Leg. Obs.* 249; *A. V. Chan. Ct.* 1846, *Farmers Loan & Trust Co. v. Perry*, 3 *Sandf. Ch.* 339.

826. The stockholders of a railroad corporation voted to pay interest on subscriptions for stock until the completion of the road, but finding themselves unable, after the road was finished, to pay one dividend then in arrears, authorized the issue of certificates therefor, payable at a future day named, "with the express understanding and agreement that if there is not sufficient money in the treasury on the day that it falls due," the holders of such scrip should recover *pro rata* according to the ability of the treasurer to pay, and that he should give notice when he should become able to pay the balance. *Held*, that so long as the treasurer had no funds, the holders of scrip could maintain no action. *Mass. Supreme Ct.* *Cunningham v. Vermont & Massachusetts R. R. Co.* 13 *Gray*, 411.

827. Agreement to pay in stock. A contract of a corporation to pay for labor at a fixed time, in its own stock, no place of payment being fixed, is to be performed at the office of the company. They are not bound to seek the other party, and make a tender. This is not an agreement to pay a certain sum in specific articles, but rather an agreement to receive payment in a particular currency. *N. Y. Supreme Ct.* 1851, *Moore v. Hudson River R. R. Co.* 12 *Barb.* 156.

828. Under an agreement to pay a portion of the amount earned under a contract, in the capital stock of a corporation, without specifying any method of valuation, if the debtor in the agreement neglects to pay until the stock has become worthless, the right to pay in stock is forfeited, and the amount is recoverable in money. *N. Y. Supreme Ct.* 1859, *Hart v. Lauman*, 29 *Barb.* 410.

829. It was agreed between defendants, a corporation, and the subscribers to their capital stock, that application should be made to the legislature for power to issue additional shares of stock, to be applied to the payment of interest on the installments paid in by the subscribers on the capital stock subscribed for by them respectively, until income should be realized from the road. The legislature passed an act authorizing the company to issue additional shares "to enable the company to provide for and pay interest on the installments paid in for the construction of the road, until it should be completed and put in operation."

Held, that the reasonable construction of the agreement, as confirmed by the statute, was, 1. That the additional shares to be issued by the company were to be applied by converting them into money, and paying the proceeds.

2. That interest continued to accrue to the subscribers until an income exceeding expenses should be realized, after the completion of the whole road. *N. Y. Superior Ct.* 1854, *Manice v. Hudson River R. R. Co.* 3 *Duer*, 426.

830. A contract with a company to do certain work at a fixed price, stipulated that the contractor should, if and when required by the company, accept payment of two-thirds of the amount in fully paid-up shares (at par). *Held*, that the contractor, he having completed the work, and the company being subsequently ordered to be wound up, was not bound to accept the depreciated shares in payment, but might prove for the whole amount of his claim. *Rolls Ct.* 1866, *Re Alexandra Park Co.* 14 *Week. Rep.* 855.

831. Assignment or appointment of agent. The directors of a railroad company delivered to a "trustee" certain State bonds, "for the protection of the creditors." He was directed to pay them to such creditors as would receive them at a specified price, the balance of their claims to be paid in drafts; all bonds remaining, and not accepted by creditors as above, within a specified time, to be returned to the company. Subsequently the directors ordered the trustee to deliver ten of the bonds for another purpose, which order he obeyed. *Held*, that the transaction, especially when construed in view of the action under it as above, was not an assignment, passing the legal title to the trustee,

but merely an appointment of him as agent, leaving the title in the company. *Minn. Supreme Ct.* 1859, *Banning v. Sibley*, 3 *Minn.* 389.

§32. Exemption of stockholders' liability.

Where it is provided in a promissory note of a corporation, that the personal property of stockholders shall not be liable, the liability of the corporation is not thereby affected. *Cal. Supreme Ct.* 1856, *Smith v. Eureka Flour Mills Co.* 6 *Cal.* 1.

§33. "Lands, tenements, and estate."

A joint stock mining company borrowed money on debentures whereby they charged "all the lands, tenements, and estate of the said company, and all their undertaking" as security therefor. *Held*, that neither unpaid calls, nor future calls, were within those terms; and that, in winding up, simple contract creditors were entitled to resort to the assets of the company other than the real estate, and the "undertaking" as defined by this statute. *Rolls Ct.* 1864, *King v. Marshall*, 10 *Jur. N. S.* 921.

§34. "To clear him from all liabilities."

Where associates in an unincorporated company agreed with one of their number "to clear him from all liabilities, tax, or assessment, that have or may arise, from his one share." *Held*, that the meaning of the contract was to indemnify for whatever of damage he might unavoidably sustain from his liabilities that were strictly legal; and that if he should be compelled to pay company debts, he should first seek his remedy over against his associates, for all except his share, and for the whole, if there was company property sufficient for the purpose. *Ms. Supreme Ct.* 1844, *Lombard v. Fiske*, 24 *Ms.* 56.

§35. "Expenses of printing bonds, &c."

An agreement entered into by the holders of chattel bonds of an insolvent railroad company, by their attorney, under which a new company was organized on the basis of a division of the stock in certain proportions among those interested in the old company, provided, among other things, that the expenses of carrying out the agreement, printing new bonds, &c., should be sustained by the new company. In an action by certain of said bondholders against the new company to recover the amount paid by plaintiffs to such attorney for his professional services:

Held, 1. That the words "printing bonds,

&c.," did not restrict the agreement to expenses of that character only, but covered all reasonable and necessary expenses in carrying out the arrangement.

2. That the action was maintainable by the plaintiffs alone, without joining the other parties to the written agreement, they being the only persons by whom the expenses were paid. *Pa. Supreme Ct.* 1865, *Catawissa R. R. Co. v. Titus*, 49 *Pa. St.* 277.

§36. "Satisfaction." Where the sales of the East India Company were subject to a regulation that any buyer not making good the remainder of his purchase-money on or before the day limited for such payment should forfeit the deposit, "and should be rendered incapable of buying again at any future sale, until he shall have given satisfaction to the court of directors,"—*Held*, that the term "satisfaction" must be construed to mean pecuniary compensation for the non-performance of a buyer's agreement to pay on the appointed day; and that, having made default on the day, but afterward, within a further time given to him by the company, having paid the remainder of the purchase with interest, a buyer might maintain an action against the company for refusing to allow him to become a bidder at their sales: such sales being declared by statute to be public sales. *C. P.* 1802, *Eagleton v. East India Company*, 3 *Bos. & P.* 55.

Instances of interpretation of agreements peculiar to Particular corporations are, for the most part, under the titles of the several corporations:—*e. g.* interpretation of policies of insurance, under **INSURANCE COMPANIES**; of railway construction contracts, under **RAILROAD COMPANIES**.

2. When an agent or officer is personally bound.

§37. Interpretation of contracts generally. In general one who signs as agent, trustee, or president, is regarded as merely describing himself, and hence is held to be personally liable. But when a writing is thus executed with full authority from a principal, and is received by the payee as the obligation of the principal, the party on whose account it is executed is alone liable. *N. Y. Ct. of Appeals*, 1859, *Bank of Genesee v. Patchin Bank*, 19 *N. Y.* 312.

§38. If it appear upon the face of a simple contract, made by an authorized agent

of a corporation, that he intended to bind the corporation, it is the agreement of the corporation. *N. Y. Chancery*, 1841, *Many v. Beekman Iron Co.* 9 *Paige*, 188.

839. If the contract and the circumstances clearly show an intent to bind the corporation rather than the agents, and the agents do not exceed their authority, they are not personally liable, although the contract be in their own names, with a mere description as agents. *Vt. Supreme Ct.* 1842, *Roberts v. Button*, 14 *Vt.* 195; *Supreme Ct.* 1821, *Randall v. Van Vechten*, 19 *Johns.* 60.

840. A joint stock company having received an offer for the sale to them of property for \$1,000, to be considered as so much stock paid in advance, authorized their agents to purchase the same on the terms offered to the company. The agents took a conveyance in their own names, in which the part acknowledging the receipt of the consideration described them as such agents, and they gave a written promise to pay the amount, with a qualification that the payment was to be subject to assessments on the grantor's subscription for stock, and if the assessments did not equal the full amount, the balance only was to be paid; which written promise to pay was signed by the agents with their addition as such. *Held*, that they were not personally liable thereon. The intent to bind the company only was sufficiently clear from these circumstances, and there was no departure from their authority by the agents in qualifying the promise to pay. *Vt. Supreme Ct.* 1842, *Roberts v. Button*, 14 *Vt.* 195.

841. Where a contract on behalf of a corporation is signed by its agents with their own names and seals, although, presumptively, they may be personally liable upon it,* yet if it appear that the contract was for the benefit of the corporation, and was so understood by the parties, and that the agents were duly authorized by the corporation to make it, and the contract is of such a nature that the corporate seal is not essen-

tial, the remedy of the creditors is against the corporation, not against the agents. [Reviewing many authorities.] *N. Y. Supreme Ct.* 1859, *Haight v. Sahler*, 30 *Barb.* 218.

842. Although in general a promise by an agent, in writing not under seal, and disclosing the principal, though in form the promise of the agent, is binding on the principal and not on the agent personally, yet if it be a promise which he has not authority to make for the corporation disclosed as his principal, he may be held personally liable thereon. The privilege asserted in favor of agents of the government exonerating them from any personal liability on contracts, does not extend to agents of a corporation; although a public one, such as a town. *N. H. Superior Ct.* 1821, *Underhill v. Gibson*, 2 *N. H.* 352.

843. If such promise, not under seal, be made to the agent of another corporation, and the agent in consequence incurs a liability to the other corporation, an action may be sustained in the name of the agent. *Id.*

844. Under the English statutes, a trustee, or director of any public work, who makes a contract for any matter not provided for in the special acts of the company, or by the general statutes applicable to the subject, or in a different form from that so provided, will be taken to have intended to become personally responsible. *H. of L.* 1816, *Higgins v. Livingstone*, 4 *Dow*, 341; *C. P.* 1838, *Parrott v. Eyre*, 10 *Bingh.* 283; *Vice Chan Ct.* 1844, *Wilson v. Goodman*, 4 *Hare*, 54.

845. Where two members of a joint stock company, which was not completely registered, in their own names, entered into a contract, by their agent, but which was in fact for the benefit of the company,—*Held*, that they might sue and be sued upon the contract. *Exch.* 1852, *Clay v. Newman*, 7 *Exch.* 717; 16 *Jur.* 1074; 21 *Law J. N. S.* 202.

846. — of contracts by a committee. A simple contract, purporting to be between A of one part, and a corporation by their committee, of the other, and executed by C and D, in their own names, with the addition of "committee," they being duly empowered to execute it for the corporation, may be shown to be the contract of the corporation; and the committee-men, in such case, are not indi-

* That a contract of an agent of a corporation, in his own name, is not *prima facie* binding on his principal, see *Crutcher v. Memphis & Charleston R. R. Co.* 38 *Ala. N. S.* 579.

But where the treasurer of a jockey club agreed to rent, from the plaintiff, a piece of ground for the use of the club, and, by an agreement in writing, bound himself to pay the rent, it was *held*, that he was personally liable. *Va. M'Williams v. Willis*, 1 *Wash.* 192.

vidually liable on it. *N. Y. Supreme Ct.* 1848, *Stanton v. Camp*, 4 *Barb.* 274.

§47. Where A, B, and C, in writing, but not under seal, promised, in behalf of a certain school district, to pay a certain sum for the erection of a school house, signing as "a committee," and being duly authorized by the district to make such contract,—*Held*, that they did not thereby render themselves personally liable. *Ma. Supreme Ct.* 1884, *Andrews v. Estes*, 11 *Ma.* (2 *Fairf.*) 267.

§48. A member of a voluntary association, who is appointed by it one of a building committee, and who acts as such in making contracts and procuring materials for the building, is not thereby made personally liable to pay for services for which he thus contracts with one who knows his agency, and who knows that the contract is for the benefit of the association, and that it is entered into by the defendant merely as such agent. [3 *Vt.* 481.] *Vt. Supreme Ct.* 1845, *Abbott v. Cobb*, 17 *Vt.* 598.

§49. A committee of a town to build a bridge, made an agreement for the work, headed, "Agreement between" H. S. and H. "committee of the town of" W., and provided that "said committee are to pay," &c.,—*Held*, that the committee were personally liable; for here is an express undertaking on their part. *Mass. Supreme Ct.* 1839, *Simonds v. Heard*, 23 *Pick.* 120.

§50. Where parties are neither described in the contract to be, nor sign as, trustees, and there is nothing in it to show that they intended to bind any one but themselves, they are personally bound, and parol evidence of their intention not to be so bound—*e. g.* to show that they acted as building committee of a corporation about to be formed, and that the corporation subsequently approved the contract—is inadmissible. *N. Y. Supreme Ct.* 1839, *Lincoln v. Crandell*, 21 *Wend.* 101.

§51. — of contracts under seal. A contract in this form: "We the undersigned, a committee chosen by the town of A. to finish the basement of their town house, do hereby agree to pay," &c., for the finishing of said basement; and signed and sealed by the committee as "committee for the town;" is not a contract of the town, but of the individuals who sign it. *Mass. Supreme Ct.* 1864, *Fulham v. Inhabitants of West Brookfield*, 9 *Allen*, 1.

§52. A contract purporting to be "between A. and B., a committee appointed for

that purpose by the corporation of the city of A., of the first part, and B. of the second part," signed by A. and B., with the addition of their individual seals, they being actually a committee for the purpose, is not their covenant, but the simple contract of the corporation. *N. Y. Supreme Ct.* 1821, *Randall v. Van Vechten*, 19 *Johns.* 60.

§53. But where defendants executed a bond in their individual names, describing themselves as trustees of a corporation named, but sealing with their own seals. *Held*, (on demurrer), that it was their deed. *N. Y. Supreme Ct.* 1812, *Taft v. Brewster*, 9 *Johns.* 384.

§54. And where they described themselves as a committee of the *directors*, and signed and sealed individually,—*Held*, that in the absence of evidence that the contract was authorized by the *corporation*, the contract was their individual covenant. *Mass. Supreme Ct.* 1808, *Tippetts v. Walker*, 4 *Mass.* 595.

Followed, in a similar case, where the signature, however, was preceded by the words, "for the directors." *N. Y. Supreme Ct.* *White v. Skinner*, 13 *Johns.* 307.

§55. Where, in the body of a sealed instrument, the covenants are stated as if they were made by a corporation directly, without the agency of any one, and the agent is not named, but signs the instrument with his own name alone, sealing it with his own seal, the latter is not personally liable thereon as on his own deed, although, by reason of his not having authority to bind the corporation, it be not their deed. To make it the contract of the individual, there should be in it obligatory words applicable to him in person. *Pa. Supreme Ct.* 1824, *Hopkins v. Mehaffy*, 11 *Serg. & R.* 126.

§56. An agreement in writing, purporting by its recitals to be made "by and between the N. Y. Central R. R. Co. by their agent L.," but executed on the part of the corporation only by the signature and seal of L., is void. It is not binding on the agent, because he does not profess to contract for himself, and is not binding on the corporation because it is not executed in their name. [23 *Wend.* 435; 4 *Hill*, 351.] *N. Y. Supreme Ct.* 1856, *Sherman v. N. Y. Central R. R. Co.* 23 *Barb.* 239.

§57. An agent of a corporation, contracting for the use of the corporation, is not personally liable, though his contract is under

seal. *Md. Ct. of Appeals*, 1801, *M'Donough v. Templeman*, 1 *Harr. & J.* 156.

358. Where all the members of a corporation covenanted on its behalf, under their private seals, binding themselves and their heirs that the corporation should do certain acts,—*Held*, that they were personally bound. *Mass. Supreme Ct.* 1816, *Tileston v. Newell*, 13 *Mass.* 406.

359. — of bond. The obligors were described in the bond as "The corporation of," &c. The *testificandum* clause was, "In witness whereof the parties have," &c., and the signature was by the defendant, who was president of the corporation, signing his name, with the addition of "President of the Board of Trustees." *Held*, that the defendant was not personally liable, although such bond would not bind the corporation. *N. Y. Supreme Ct.* 1858, *Episcopal Church of St. Peter v. Varian*, 28 *Barb.* 644.

360. The president of a corporation is not personally liable on a bond in the following form: "Know all men by these presents, that the Appleton Mutual Fire Insurance Company, by W. P., President of said company, as principal, and J. M. and S. M. as sureties, are held and firmly bound," &c. "To which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, and every of them, firmly by these presents. Sealed with our seals." "W. P., President. (Seal.) J. M. (Seal.) S. M. (Seal.)" And an action alleging a joint execution of such bond by the president and sureties cannot be maintained. *Mass. Supreme Ct.* 1862, *Ellis v. Pulsifer*, 4 *Allen*, 165.

361. A bond containing no mention of a corporation as a party to it, and signed by four persons with nothing to designate them as agents of the corporation,—*Held* to be the individual obligation of those signing it; and extrinsic evidence was not allowed to change the character of the instrument, although given for the debt of the corporation. *Cal. Supreme Ct.* 1863, *Richardson v. Scott River & Co.* 22 *Cal.* 150.

362. Where an agent of a corporation purchased a tract of land and took a bond for a conveyance in his own name, and gave therefor his promissory note, signed by him, first in his own name, and second as agent for the corporation,—*Held*, in a suit against the corporation on the note, that the trans-

action must be considered as a transaction in the agent's own name (it appearing from the bond that he made the purchase in his own name); that parol evidence was inadmissible to contradict the bond, and show that the corporation was the real purchaser of the land; that, as the papers stood, a note given by the corporation for the purchase would be given as surety; and as the corporation had, by their charter, no authority to become surety, the note, as against them, was void. *Md. Ct. of Appeals*, 1848, *Savage Manuf. Co. v. Worthington*, 1 *Gill*, 284.

363. — of lease. A lease to "A., the treasurer of" &c., naming an Odd Fellows' lodge, and signed "A., Treas.," *Held*, a contract on which A. was personally bound. *Mass. Supreme Ct.* 1852, *Seaver v. Coburn*, 10 *Cush.* 324.

364. — of bill of exchange. Where a bill was drawn by one agent in favor of another agent of a corporation, upon, and was accepted by, L., with "president," &c., added to his name, and was transferred to the plaintiff for his wages due from the company; but the authority of the president to accept it was not shown;—*Held*, that the bill could not be deemed the obligation of the company, but the private act of the parties whose names were written upon it, and binding upon them individually as an ordinary bill of exchange. *N. Y. Ct. of Appeals*, 1850, *Moss v. Livingston*, 4 *N. Y. (4 Comst.)* 208. To the same effect, *N. Y. Com. Pl.* 1856, *Bruce v. Lord*, 1 *Hilt.* 247.

365. To defeat the action against the person individually who accepted such draft, he must show a resolution of the board of directors authorizing him to accept it. Mere parol proof that the defendant had, in the opinion of the witnesses, authority to bind the company, would never be held sufficient to make the company liable on such an acceptance, and it is not sufficient to defeat what otherwise would be a valid claim against the defendant. *N. Y. Com. Pl.* 1856, *Bruce v. Lord*, 1 *Hilt.* 247.

366. — of promissory note. The officers of a corporation are not liable personally at common law on a promissory note of the corporation made by them as such officers, in which the promise to pay is made by the corporation, and not by the officers personally. *Cal. Supreme Ct.* 1866, *Hall v. Crandall*, 29 *Cal.* 567.

867. A note by which a person, describing himself as the president of a corporation, promises to pay, is his individual note, and not that of the corporation, although given in the business of the corporation and within the scope of his authority, and although he adds his official title to his name in the note or signature. To conclude the company by his acts he should have contracted in their name, or at least in their behalf. *N. Y. Supreme Ct.* 1829, *Barker v. Mechanic Fire Ins. Co.* 8 *Wend.* 94; *S. P.* 1827, *Hills v. Bannister*, 8 *Cow.* 81.

868. On a note running, "I promise to pay," signed, "For the M. & F. Company, W. M. President," W. M. is individually liable. [2 *Wheat.* 56.] The law deduces the liability from the obligatory tenor of the note. *Ky. Ct. of Appeals*, 1819, *Macbean v. Morrison*, 1 *A. K. Marsh.* 545.

869. A note in the ordinary form, dated at a bank, with the words "cash'r" and "pres't" affixed to the two signatures respectively, and not otherwise showing their agency for the bank, shows a *prima facie* case for recovery against the makers individually. *Miss. Ct. of Errors*, 1842, *Fitch v. Lawton*, 6 *Hov.* 371.

870. Where individuals subscribe their proper names to a promissory note, they are, presumptively, personally liable, though they add a description of the character in which the note is given. But such presumption of liability may be rebutted by showing that the note was in fact given by the makers as a corporation, for a corporate debt due the payee, with his knowledge. *N. Y. Supreme Ct.* 1837, *Brockway v. Allen*, 17 *Wend.* 40.

871. An agent bought goods avowedly for the S. Company; and gave a note for the price, signed, "For the S. Company, S. B., Agent." It appeared that he had power to buy goods and make notes for the company. *Held*, he was not personally liable on the note. An agent is not liable to be sued upon contracts made by him on behalf of his principal, if the name of his principal is disclosed at the time of entering into the contract. *N. Y. Supreme Ct.* 1818, *Rathbon v. Budlong*, 15 *Johns.* 1.

872. A note purporting to be only the promise of the F. Iron Company, was signed by four other names besides the president's and the agent's.—*Held*, that their signatures imported a promise jointly with the com-

pany, and that they might be considered joint and several makers with the company. *N. Y. Supreme Ct.* 1842, *Parks v. Brinkerhoff* 2 *Hill*, 668.

873. A note, "The president and directors of the A. B. company promise to pay," signed with the name of the president, is the note of the corporation, and not that of the president individually. *Md. Supreme Ct.* 1857, *Hamilton v. Newcastle &c. R. R. Co.* 9 *Md.* 359; *Ind. Supreme Ct.* 1889, *Pitman v. Kintner*, 5 *Blackf.* 250; *N. Y. Supreme Ct.* 1823, *Mott v. Hicks*, 1 *Cow.* 518. And see *Thompson v. Tioga R. R. Co.* 36 *Barb. (N. Y.)* 79.

874. Where in a transaction on behalf of a corporation on a consideration moving from them, their treasurer gives his note, not under seal, describing himself in the body of the note and in the signature as such treasurer, he is not personally liable thereon; for such a contract must be deemed to bind the corporation. *Mass. Supreme Ct.* 1812, *Mann v. Chandler*, 9 *Mass.* 335.

875. A note in this form, "We promise to pay," &c., signed, "Mass. Steam Heating Co. L. L. F., Treasurer," is the note of the company, and does not bind the treasurer personally. *Mass. Supreme Ct.* 1862, *Draper v. Massachusetts Steam Heating Co.* 5 *Allen*, 388.

876. A promissory note in this form: "I, as treasurer of the Congregational Society, or my successors in office, promise to pay A. B. or order," &c., "S. S. R., Treasurer,"—*Held* to be the note of the society, if the treasurer had authority to bind it. *Mass. Supreme Ct.* 1864, *Barlow v. Congregational Soc. in Lee*, 8 *Allen*, 460.

877. Upon a promissory note, purporting to be given by the Patent Cloth Manufacturing Company, signed, "W. S., Agent," S. is not answerable in his individual capacity. *N. J. Supreme Ct.* 1820, *Shotwell v. M'Kown*, 2 *South.* 828.

878. Where a promissory note was expressed, "For value received, we jointly promise to pay," and was signed by three of the directors of a joint stock company, and countersigned by the secretary, and purported to have been on account of stock of the company,—*Held*, that it did not bind the signers personally, but imported, on its face, a contract on behalf of the company. *Exch. Ch.* 1858, *Lindus v. Melrose*, 3 *Hurl. & N.* 177; 81 *Law Times*, 86.

379. Directors of an English joint stock newspaper company, gave the following promissory note, for a purchase for the company: "On demand, we jointly and severally promise to pay, &c., for and on behalf of the Wesleyan Newspaper Association;" signing their names, as directors. *Held*, that the words "jointly and severally" were equivalent to jointly and personally; and that the defendants were therefore personally liable to the plaintiff on the note. *Exch.* 1848, *Healey v. Story*, 8 *Exch.* 8; 18 *Law J. N. S.* 8.

380. A promissory note was made in the following form:

"One month after demand we jointly and severally promise to pay J. B., &c.

"W. R. H. } Trustees.
"S. D. S. }
"W. D. F., Secretary."

Held, that the defendant, W. D. F., was personally liable on the note, and that the addition of the word "secretary" to his signature did not cut down or exclude his liability, his signature being placed where a party usually signs such a document, and from its position showing nothing like a counter signature as "secretary" merely. *Exch.* 1862, *Bottomley v. Fisher*, 6 *Law Times N. S.* 688; 1 *Hurl. & C.* 211. See *Aggs v. Nicholson*, 38 *Eng. L. & Eq.* 308; 25 *Law J. N. S.* 348; *Price v. Taylor*, 6 *Jur.* 402.

381. An agent of a private corporation, who gives a note, without any new consideration, for the amount of a debt previously contracted by another person for the corporation, though he may be responsible for debts contracted on its supposed credit, when the corporation had in fact no authority to contract, is not personally liable therefor; the note is a collateral contract, and void by the statute of frauds. *Ala. Supreme Ct.* 1858, *Drake v. Flewellen*, 33 *Ala. N. S.* 106.

382. An officer of a corporation, to whose order, as such, a note given to it is expressed to be payable, and who indorses the note with his name, adding his official character, and negotiates it on behalf of the corporation, is not personally responsible as indorser. The effect of such indorsement is merely to transfer the paper. *N. Y. Ct. of Appeals*, 1854, *Babcock v. Beman*, 11 *N. Y. (1 Kern.)* 200. *S. P. N. Y. Supreme Ct.* 1823, *Mott v. Hicks*, 1 *Cow.* 518.

383. An indorsement of a promissory note, payable to a bank, made by its president as follows: "Pay to the order of A. Marine Bank, by J. S. H., President," is binding on the bank. *Wis. Supreme Ct.* 1863, *Aiken v. Marine Bank*, 16 *Wis.* 679.

384. — of order for goods. The defendant, a director of a company, ordered certain goods of the plaintiff, and signed his name P., director of the company, intimating at the time that the goods were for the corporation. The company was duly incorporated, and the charter contained a clause enabling the company to sue and be sued, in respect of contracts made by any individual director on behalf of the company. *Held*, that, notwithstanding this, the defendant was liable in his private capacity. *Exch.* 1837, *Dewers v. Pike*, *Murphy & H.* 131.

385. — of receipt. A written agreement or receipt for goods to be transported, purporting to be an agreement on the part of the several railroad companies between A. and B., but without naming them, and signed by the agent with the words, "For the corporations," is an agreement by the corporations, and does not bind the agent, even though one of the companies had given him no authority; and a subsequent personal promise to pay for the loss of the goods is without consideration and void. *Mass. Supreme Ct.* 1856, *Lyon v. Williams*, 5 *Gray*, 557.

386. — of ticket. Upon lottery tickets in the usual form, purporting that the bearer will be entitled to the prize drawn to the number of the ticket, and signed by the secretary of the corporation issuing it, as secretary, the latter will not be held liable personally. [3 *Dall.* 384; 1 *D. & E.* 172.] *Pa. Supreme Ct.* 1809, *Passmore v. Mott*, 2 *Binn.* 201.

8. What constitutes performance.

387. Instances of sufficient performance. Where the plaintiff had, for a consideration contingent upon his success, agreed with a corporation to endeavor, as their secret agent, to procure from the legislature a certain right of way for the corporation, and another way was granted, differing from that proposed by him, and against his exertions, but by a compromise between the corpora-

tion and its opponents, the grant was subsequently modified, and then accepted by the corporation,—*Held*, that the plaintiff was not entitled to anything under the contract, even though it were a proper one for a court to enforce, for he had not obtained the specified grant. *U. S. Supreme Ct. 1853, Marshall v. Baltimore & Ohio R. R. Co. 16 How. 314.*

888. A president of a railroad company advanced sums of money for corporate purposes, upon an assurance of the directors, contained in a written memorandum, that provision would be made at their next meeting to indemnify him for such advances. Provision was so made, by an order directing the president to sell mortgage bonds of the company to raise money "to meet present claims," and to mortgage movable property to secure its creditors. The bonds were sold, and the proceeds applied to pay other and subsequent debts of the company. In an action by the president to recover of the directors, upon the written memorandum, the sums advanced by him,—*Held*, that the votes of the directors authorizing the sale of the bonds and the mortgage of the movable property, put it in the power of the president to pay or secure himself and were a sufficient fulfilment of the agreement of the directors. *Me. Supreme Ct. 1862, Miller v. Morrill, 51 Me. 9.*

889. Waiver of defects. The act of the company in leasing the road, and the running of cars on it by the lessees,—*Held* sufficient acceptance, as far as it was finished, subject to a deduction by the company for such deficiency as the referees appointed by the contract should allow. *Vt. Supreme Ct. 1855, Barker v. Troy and Rutland R. R. Co. 27 Vt. 766.*

890. An individual contracted to build a road for the inhabitants of a town, for a certain sum; one-half of which was to be paid when the work should be completed, and the other half in a year after. The contractor made the largest portion of the road, having underlet a portion of it, which was not completed; and the town made the first payment with knowledge of the facts, and without objection. Afterwards, and before the whole was finished, he sued for the stipulated price, counting upon the special contract, and on a *quantum meruit*. *Held*, that the payment of the first installment by the

town was a waiver of the terms of the special contract, and entitled the plaintiff to recover on the *quantum meruit* for as much as was completed. *Me. Supreme Ct. 1830, Hayden v. Inhabitants of Madison, 7 Me. (7 Greenl.) 76; S. P. Abbot v. Inhabitants of Hermon, Id. 121.*

891. S. and C. M. agreed to build certain locks and portions of canal for a canal corporation, by August 1, 1829, at a stipulated rate of payment; the work to be estimated monthly by the engineer, and three-fourths of the estimated sum to be paid monthly by the corporation; the residue to be retained till the whole should be completed. On the 1st day of August, 1829, the engineer made his monthly report of estimates of work performed, containing the sum of \$700, as due to S. and C. M. for work done; which sum the directors on the same day voted and ordered to be paid. Afterwards, on the same day, before payment, and before an order was drawn by the president, in the usual course of business, for the sum thus voted, the corporation was summoned as trustee of S. and C. M., who failed to fulfil their contract, which, in three days afterwards, was duly declared broken and abandoned by their non-performance. *Held*, that the vote to pay \$700 was a waiver of any advantage resulting to the corporation from the failure of S. and C. M. to complete the contract, and bound the corporation to pay that sum; and that therefore it was chargeable as their trustee. *Me. Supreme Ct. 1831, Wyer v. Merrill, 7 Me. (7 Greenl.) 342.*

892. Delivery. It is no objection to holding a corporation liable for goods purchased by their general agent on their behalf, that the goods were delivered, at places designated by the agent, to a third person, to be used by him, and that the vendor knew at the time of delivery that they were to be so used. Delivery of the goods at places designated by the corporate agents by whom they were purchased, is a good performance of the contract, without regard to whether they were to be used by the corporation or not. *Mass. Supreme Ct. 1849, Melledge v. Boston Iron Co. 5 Cush. 158.*

893. Payment. To make a payment binding on a banking corporation, it should be made to some agent authorized to receive it. *Miss. Ct. of Errors, 1846, State v. Commercial Bank, 6 Smedes & M. 218.*

894. Under an agreement by a bank, made in violation of its charter, to collect debts for another person in depreciated currency, the bank is not liable to pay over in specie the sum collected. To so hold would be a rescission of a part of the contract, and a substitution of a new agreement in lieu of the illegal part. *Mo. Supreme Ct.* 1846, *Bank of Missouri v. Merchants Bank*, 10 *Mo.* 123.

895. Where the agent of a railroad company agreed to pay to a contractor only what the engineer of the company certified, and supposed he was paying no more, while he in fact did pay more. *Held*, that the company might recover the sum erroneously paid. *Md. Ct. of Appeals*, 1847, *Baltimore & Susquehanna R. R. Co. v. Faunce*, 6 *Gill*, 68.

896. Where a contract is made by the agent of a corporation to render services, a part of which are authorized by the charter, but a part of which are not within the scope of the corporate business, payments thereon, if made to the corporation, should be deemed as made on account of the services which it was authorized to render; but payments thereon made to such agent, and understood by the parties to be in part for the purposes unauthorized by the charter, should be applied according to such understanding, and such part should not be deemed as payments to the corporation. *Mo. Supreme Ct.* 1848, *Bangor Boom Corporation v. Whitney*, 29 *Mo.* 123.

897. — *In stock.* Where contractors to perform work for a corporation in whose charter the legislature reserved power to alter or repeal, agree to receive a part of their compensation in stock of the company, they cannot refuse to receive it and demand money, because the legislature afterwards alter the charter, increasing the capital stock and debt of the company; nor because the company decided not to pay interest on the stock in cash, as they had before done; it not appearing that by either was the value of the stock impaired. *N. Y. Supreme Ct.* 1851, *Moore v. Hudson River R. R. Co.* 12 *Barb.* 156.

IV. VALIDITY.

898. *Presumptions relating to validity of corporate contracts.* Where a contract would be invalid if made by a corporation formed under a general law, but might be valid if made by another, and nothing ap-

pears on the face of the instrument to show that the corporation making it was of the former class, the court will not presume that it was. *Conn. Supreme Ct.* 1841, *Kilgore v. Bulkley*, 14 *Conn.* 362.

899. Though one who deals with a corporation is presumed to know the extent of its powers, yet he has a right to presume, in the absence of express notice to the contrary, that it does its duty, and acts according to its charter, and performs the conditions necessary to enable it to enter upon such dealings; and if he rely on such presumption he is to be protected as a *bona fide* purchaser without notice. *N. Y. Supreme Ct.* 1860, *Akin v. Blanchard*, 32 *Barb.* 527.

400. Acts done by a corporation, which presuppose the existence of other acts to make them legal, are presumptive proofs of the latter. *N. Y. Ct. of Appeals*, *Nelson v. Eaton*, 26 *N. Y.* 410; *S. C.* 16 *Abb. Pr.* 138.

401. The absence of such precedent facts is to be shown as matter of affirmative defence. *Id.*

402. A corporation authorized by their charter to purchase and hold real estate for the convenient transaction of their business, entered into an executory contract of purchase, by which they agreed to make payment at any time within one hundred years, and to pay taxes and interest in the mean time, taking no right of possession until payment was made. *Held*, in the absence of proof to the contrary, that the court must infer such purchase to have been for the legitimate use of the society. *Mich. Supreme Ct.* 1863, *Regents of University v. Detroit &c. Society*, 12 *Mich.* 188.

403. A company was incorporated with power to establish and maintain a ferry and to own vessels, steamboats and other personal property, not exceeding in value a certain amount. *Held*, that a contract by the company to let one of its steamboats at a certain rate per day, to be used for no specified length of time and in no specified place, was not in excess of its corporate powers, there being no proof that the steamboat was not necessary or proper to be used in the prosecution of the business of the ferry, or that by reason of owning it the company exceeded the limits of property which it was authorized to hold. *Mass. Supreme Ct.* 1865, *Brown v. Winnisimmet Co.* 11 *Allen*, 326.

404. A debt due to a corporation will be presumed to have been contracted in the lawful course of business, until the contrary is shown. *N. Y. Supreme Ct.* 1824, *N. Y. Firemen Ins. Co. v. Sturges*, 2 *Cow.* 664; *S. P. Ct. of Errors*, 1842, *Safford v. Wyckoff*, 4 *Hill*, 444; *Tenn. Supreme Ct.* 1849, *Dockery v. Miller*, 9 *Humph.* 731.

405. Where a loan, made by a corporation, would be legal if made from one fund, but illegal if made from another, the burden of proof is upon the party impeaching the loan, to show that it was made from the latter. *N. Y. Ct. of Appeals*, 1850, *Farmers Loan & Trust Co. v. Clowes*, 8 *N. Y.* (3 *Comst.*) 470; 4 *Edw.* 573, n.; 8 *N. Y. Leg. Obs.* 249.

406. Where a corporation having power to lend money, sues upon a bond, and there is no proof of the consideration upon which it is given, it will not be presumed to have been taken in any illegal transaction, but in the course of investment of its funds, or in some other legitimate business. *N. Y. A. V. Chan. Ct.* 1846, *Farmers Loan & Trust Co. v. Perry*, 8 *Sandf. Ch.* 339; *S. P. N. Y. Supreme Ct.* 1847, *McFarlan v. Triton Ins. Co.* 4 *Den.* 392.

407. Where a corporation is authorized to take a promissory note for any purpose, the presumption in regard to a note given to it, is that it was executed for a legitimate object; and the complaint, therefore, in an action upon a note given to a corporation need not state facts showing that the purpose for which it was given is authorized by the charter. *Wis. Supreme Ct.* 1863, *Howard v. Boorman*, 17 *Wis.* 459. And see *Barker v. Mechanic Fire Ins. Co.* 3 *Wend.* 94.

408. Thus a note given to a corporation for stock is valid in the hands of an indorsee without notice, though a statute forbids the corporation to receive a note in payment of an installment unless it is shown affirmatively that the note was given for an installment. *N. Y. Supreme Ct.* 1833, *Willmarth v. Crawford*, 10 *Wend.* 341. See also **BILLS AND NOTES**, 10, 11.

409. The memorandum of association of a company was signed by seven shareholders, and was duly registered. There were never any articles of association. Two of such persons, one professing to act as managing director, the other as chairman of the company, engaged the plaintiff as foreman

of the company's works. In an action by the plaintiff for his wages,—*Held*, that in the absence of proof to the contrary, the jury were justified in presuming that the two persons mentioned had authority to bind the company. *C. P.* 1866, *Totterdell v. Fareham Brick Co.* 1 *Law Rep.* 674; 35 *Law J. N. S.* 278.

410. Valid contract cannot be impaired by legislation. A contract, valid by the constitution and laws of a State, as expounded by the highest authorities, whose duty it was to administer them, at the time when the contract was made, cannot be impaired in its obligation by any subsequent action by the legislature or judiciary. *U. S. Supreme Ct.* 1863, *Gelpcke v. City of Dubuque*, 1 *Wall.* 175; 1865, *Havemeyer v. Iowa County*, 3 *Wall.* 294; *Thompson v. Lee County*, *Id.* 327.

411. Invalid contract may be confirmed. It is competent for the legislature, by a special act, to legalize contracts of a corporation which are obnoxious to the objection that they are in violation of law. The objection that a contract is illegal, and that no judgment can therefore be rendered upon it, is not allowed from any consideration of favor to those who allege it. The courts, from public considerations, refuse their aid to enforce obligations which contravene the laws or policy of the State. But when the legislature, by a subsequent act, relieves a contract from the imputation of illegality, neither of the parties to the contract can insist upon this objection. *U. S. Supreme Ct.* 1858, *Whitewater Valley Canal v. Valette*, 21 *How.* 414.

412. The legislature may, by a confirmatory law, passed on the petition of a corporation, make valid an act of the corporation which was void for want of power given by the original charter. The common law rule that a void act cannot be made good, cannot be true of sovereignty,—of legislation not conflicting with constitutional right. And in giving a construction to such a law, the only question can be, what was the intention of the legislature? When this is ascertained, it is an imperative duty to give it its legal effect. *Conn. Supreme Ct.* 1843, *City of Bridgeport v. Housatonic R. R. Co.* 15 *Conn.* 475.

413. Excess of power. A contract by a corporation, which is entirely foreign to the

objects and purposes of its charter, is void. *Wis. Supreme Ct.* 1860, *Rock River Bank v. Sherwood*, 10 *Wis.* 230.

414. Where a discount of a note is made by a corporation which has neither express nor implied power to loan money, the contract of loan, as well as the security taken on the loan, is void. *N. Y. Ct. of Errors*, 1829, *Beach v. Fulton Bank*, 3 *Wend.* 573.

415. A corporation having by charter power to loan money on a particular species of security—*e. g.* on bond and mortgage—and no other, cannot make a contract of loan in any other manner; and therefore if they do so, not only the security which may be taken, but the contract itself is void, and cannot be the foundation of an action. Where a corporation is prohibited from discounting notes, or taking any other particular security, but have a general power given them by their charter to loan money, if they make a loan and take the prohibited security, the security is void, but the contract of loan is valid, and the money may be recovered under the general counts; but where not only the security but the contract also is illegal, it cannot be enforced. *N. Y. Supreme Ct.* 1831, *Life & Fire Ins. Co. v. Mechanics Fire Ins. Co.* 7 *Wend.* 81. And see *N. Y. Firemen's Ins. Co. v. Ely*, 2 *Cov.* 678.

416. A contract with a corporation may be binding on the parties, though it may be an abuse of the corporate powers, for which the corporation may be answerable to the government which created it. *S. C. Ct. of Appeals*, 1845, *Bank of South Carolina v. Hammond*, 1 *Rich.* 281; *Fla. Supreme Ct.* 1853, *Southern Life Ins. & Trust Co. v. Lannier*, 5 *Fla.* 110.

417. Thus where the charter of a banking corporation provided that loans should be secured by mortgage,—*Held*, that a bond with sureties, for a loan not secured by mortgage, was binding upon the parties executing it. *S. C. Ct. of Appeals*, 1845, *Bank of South Carolina v. Hammond*, 1 *Rich.* 281.

418. A judgment of record recovered on a contract of a corporation cannot be impeached on the ground that the contract was void for want of corporate power to enter into it. *Ohio Supreme Ct.* 1853, *Bank of Wooster v. Stevens*, 1 *Ohio St.* 233.

419. If a corporation makes a contract, valid in part, and invalid as to the residue, for want of power in the corporation to make

the entire contract, even if such a question can be collaterally inquired into, the contract will be valid to the extent of the power, and void only as to the excess. *Miss. Ct. of Errors*, 1847, *Grand Gulf Bank v. Archer*, 8 *Smedes & M.* 151.

420. Delegation of powers. An agreement that another railway company shall work a particular line of railway, and that the property and plant shall be handed over for that purpose, implies a delegation of the powers conferred by statute on the particular company, which cannot be made by them nor accepted by the other company without the authority of parliament; and equity will grant an injunction to prevent the performance of such an agreement. *Vice Chan. (t.)* 1852, *Winch v. Birkenhead & C. Railway Co.* 12 *Eng. L. & Eq.* 506; 5 *De Gaz & S.* 562; 16 *Jur.* 1035.

421. A contract by which one railway company agrees to give up to another railway company a part of its profits, in consideration of securing a portion of the profits of the other company, is illegal, and *ultra vires*. *H. of L.* 1857, *Shrewsbury & Birmingham Railway Co. v. London & Northwestern Railway Co.* 29 *Law Times*, 186; 6 *H. L. Cas.* 113; 3 *Jur. N. S.* 775; 26 *Law. J. N. S. Ch.* 482.

422. Where the trustees of an academy are empowered by statute to appoint and remove teachers at pleasure, they have no power to make a contract with a teacher limiting their right "to remove him at pleasure." *N. Y. Chancery*, 1824, *Auburn Academy v. Strong*, *Hopk.* 278.

423. A contract which in effect makes the corporation a partner with individuals is nevertheless binding on the corporation, as toward third parties, if the contract related to the business for which the company was incorporated, and was but a mode of furthering the specific purpose of its creation. Strictly, perhaps, corporations should be restricted from contracting partnerships with individuals or corporations, and as between the parties to the contract, acting upon equal knowledge, a question of validity might be raised; but a corporation may contract with an individual in furtherance of the object of its creation, the effect of which contract may be to impose upon the company, as respects the community, the liabilities of a partner. There seems to be no sound reason why a

corporation, more than a natural person, which participates in the profits, as such, of a particular business in which it may lawfully engage, should not be holden liable to the public for losses. *N. Y. Supreme Ct. 1851, Catskill Bank v. Gray*, 14 *Barb.* 471.

424. Violations of charter. Contracts which are forbidden by the charter are void although the charter does not expressly declare them to be so. Thus, though the charter of a bank forbids the taking of more than six per cent. interest, without declaring a contract, on which greater interest is reserved or taken, to be void, yet such contract is void, on the general principle that courts will not aid violations of law.* *U. S. Supreme Ct. 1820, Bank of U. S. v. Owens*, 2 *Pet.* 527; *S. P. Mass. Supreme Ct. 1839, White v. Franklin Bank*, 22 *Pick.* 181.

425. Where a corporation is prohibited from taking more than a certain rate of interest, by a charter which does not expressly declare that contracts in violation of it are void, such contracts are governed as to the effect of transcending the limit by the usury laws, although the limit fixed by the latter be different from that fixed by the charter. *Miss. Ct. of Errors*, 1847, *Grand Gulf Bank v. Archer*, 8 *Smedes & M.* 151.

426. If a bank, prohibited by its charter from loaning its funds to its directors, make such loan and receive a transfer of stock as collateral security for it, the bank acquires no title to the stock transferred, and if an injury accrues to a third party from its acts, it is responsible to such third party. *Md. Ct. of Appeals*, 1852, *Albert v. Savings Bank*, 2 *Md.* 159.

427. Though a bank be specially restricted by its charter from taking more than a certain interest, a note securing higher interest is not void as being a contract which the bank is not authorized to make. *Wis. Supreme Ct. 1860, Rock River Bank v. Sherwood*, 10 *Wis.* 230.

428. Where the prohibition of a charter is directed against the corporation and not against any person dealing with it, the parties to a contract in violation of the prohibition, are not *in pari delicto*. The statute marks the corporation as the criminal.

Mass. Supreme Ct. 1839, White v. Franklin Bank, 22 *Pick.* 181.

429. Where an insurance and trust company entered into the business of banking by dealing in exchange, and in order to carry it on, their agent employed the agent of another corporation in a foreign State to open an account and receive and pay out funds for them,—*Held*, that the latter company were not involved in the illegality of the transactions, unless it were shown that their agent, in acceding to such arrangement, had actual notice that the former corporation were dealing in exchange, and that his employment was connected with and in the performance of that illegal business; and that even in that case, since the former corporation had ratified the arrangement, the parties were not *in pari delicto*, and the latter corporation were entitled to relief in an action for an accounting. *Tenn. Supreme Ct. 1850, Ohio Life Ins. & Trust Co. v. Merchants Ins. & Trust Co.* 11 *Humph.* 1.

430. Violations of statute. Except so far as they are privileged by the instrument of their creation, corporations, like individuals, are subject to legislative action; and all contracts made by them in violation of the laws of the land, are voidable, or may be made void by legislative enactment. [Ang. & A. 795.] *Mo. Supreme Ct. 1847, Blair v. Perpetual Ins. Co.* 10 *Mo.* 559.

431. A conveyance which, if made by an individual, would come within the statute of frauds, would, also, if made by a corporation; and if void in the one case, would be void in the other. *Cal. Supreme Ct. 1852, Smith v. Morse*, 2 *Cal.* 524.

432. A bond to indemnify the signer of drafts which it is agreed should be accepted by the corporation, and which are accordingly accepted by them, is void if the acceptances by the corporation are in contravention of a public law of the State. The bond here grows out of the illegal act. [4 *Wash. C. C.* 207.] *U. S. Circ. Ct. (Mich.) 1843, Hayden v. Davis*, 3 *McLean*, 276.

433. A contract by an express company, for the transportation of mailable matter, in violation of the mail law of the United States, is void; and the express has no lien growing out of such contract. *Ga. Supreme Ct. 1858, Hill v. Mitchell*, 25 *Ga.* 704.

434. A foreign corporation may make, and enforce within the State of New York,

* That the rule may perhaps be otherwise when a specific penalty is imposed by the statute,—see *Fleckner v. United States Bank*, 8 *Wheat.* 368.

contracts which it is competent by its charter to make, and which are not forbidden by the laws, or contrary to the policy, of the State. The fact that when such lawful contract was made, the corporation, by other disconnected acts, carried on at the same office and through the same agents, was violating laws of this State, does not avoid the lawful contract. *N. Y. Ct. of Appeals*, 1855, *Bard v. Poole*, 12 *N. Y.* (2 *Kern.*) 495.

435. There is a distinction between those provisions of law which enter into the ordinary contracts of a corporation with those dealing with it, and which, if violated, will render those contracts illegal, and those provisions of law which regulate the manner of conducting business, which are designed for the security of the stockholders and of the public, and a violation of which does not render the contract void as to a debtor. Of this latter class are restrictions as to stock, and the statute limiting the amounts which directors may borrow from the corporation. *Me. Supreme Ct.* 1856, *Richmond Bank v. Robinson*, 42 *Me.* 589.

436. — of laws restraining banking. Where a note was discounted by a bank, and indorsed by one of its directors, who was then liable to the bank to an amount exceeding eight per cent. of the capital, in contravention of a statute regulating banks, (*Me. Laws of 1841*, ch. 77, § 19),—*Held*, that the violation of the statute might afford ground for an injunction, or a forfeiture of charter, but could not be availed of by a debtor of the bank, in defence of the note. As to him, the violation was entirely collateral; it did not enter into or affect his contract. *Id.*

437. If a company become proprietors of a fund for the purpose of banking, in violation of a restraining act, all notes given to them for the purpose of being discounted, in contravention of the act, are null and void in the hands of the company.* *N. Y. Supreme Ct.* 1821, *Utica Ins. Co. v. Scott*, 19 *Johns.* 1; followed, 1828, in *The Same v. Hunt*, 1 *Wend.* 56; *S. P. N. Y. Superior Ct.* 1829, *Fulton Bank v. Benedict*, 1 *Hall*, 557. See also *N. Y. Firemen Ins. Co. v. Ely*, 2 *Cow.* 678; *The Same v. Sturges*, 2 *Id.* 664.

* The judgment was reversed. See 8 *Cow.* 709, on the ground that the transaction presented by the pleadings was not a discount, but a loan, which the company might lawfully make as an investment.

438. The officers of a foreign bank made an arrangement within New York State with parties whose notes the bank was to discount, that a part at least of the loan should be received in bills of less than \$5— for the purpose of circulation in the State (which was contrary to the statute). In fulfilment of this arrangement, the bills were brought by the cashier into the State, and there delivered to the borrower. *Held*, that the bank could maintain no action on the notes discounted. *N. Y. Chancery*, 1839, *Pratt v. Adams*,* 7 *Paige*, 615, 653.

439. A guarantee by a third person of an illegal contract of a corporation, partakes of the character of the principal contract, being intended to re-inforce and secure it, and is equally illegal and void. *N. Y. Supreme Ct.* 1846, *Swift v. Beers*, 3 *Den.* 70; 1848, *Tyler v. Yates*, 3 *Barb.* 222.

440. Where an assignment of securities is made by a bank to trustees, as a collateral security for the payment of illegal post notes issued by it, both being executed at the same time, and as parts of one and the same transaction, the assignment is void as well as the notes, so that no title passes to the assignee. *N. Y. Ct. of Appeals*, 1849, *Leavitt v. Palmer*, 3 *N. Y.* (3 *Comst.*) 19; *Supreme Ct.* 1848, *Tyler v. Yates*, 3 *Barb.* 222. And see *Green v. Seymour*, 3 *Sandf. Ch.* 292.

441. The provision of the New York restraining act (2 *Rev. L.* 234, ch. 71) forbidding discounting, at most only avoids the notes discounted, and leaves a good consideration for the money lent. The contract of lending, which, *per se*, affords a good cause of action for money lent and advanced, and is distinct from that founded in the note which is discounted, does not appear to be within the purview of the restraining act. The check against the continuance of banking operations would be complete the moment an association had ascertained that no security could be taken, and their own remedy would be against the individual to whom the money was lent. It was unnecessary to go further than to avoid the security; thereby depriving the association of the means of effectual operation.† *Supreme Ct.*

* See *Merchants Bank v. Spalding*, 9 *N. Y.* (5 *Seid.*) 53, 58, where this case is explained as turning on the fact that the transaction was a domestic one.

† This doctrine is questioned in so far as it allows the violator of the law to recover upon the very contract in

1827, *Utica Ins. Co. v. Kip*, 8 *Cow.* 20. To the same effect, 1821, *Utica Ins. Co. v. Scott*, 19 *Johns.* 1; 1827, *Utica Ins. Co. v. Kip*, 8 *Cow.* 20; 1829, *Utica Ins. Co. v. Cadwell*, 8 *Wend.* 296; 1830, *Utica Ins. Co. v. Bloodgood*, 4 *Id.* 652. Compare *Philadelphia Loan Co. v. Towner*, 18 *Conn.* 249.

442. A banking corporation—organized under a statute which required that all notes, bills, and other evidences of debt, excepting bills of exchange, discounted by any banking company, should be made, by the terms thereof, or by special indorsement, payable solely to the company—took from the pledgee of their debtor a note of a third person, which the debtor had pledged as collateral, and paid the demand for which it was pledged, and credited the surplus to the debtor. *Held*, that they could recover on the note.

1. The provision in the statute might be regarded as directory. As the provision in question was not designed for the benefit or protection of the parties to the securities, but rested upon general grounds of public policy, there was no good reason why such parties should be allowed to avail themselves of it to evade their just responsibilities.

2. Such a transaction is not "discounting" within the meaning of a provision of law which relates solely to banking companies. *N. Y. Ct. of Appeals*, 1858, *City Bank of Columbus v. Bruce*, 17 *N. Y.* 507.

443. The making of a single loan in good faith,—*Held*, not a violation of the provisions of an act which prohibited the keeping of an office of discount and deposit for the transaction of business. *N. Y. Ct. of Errors*, 1848, *Suydam v. Morris Canal & Banking Co.* 6 *Hill*, 217. Compare *BANKS*, 228.

444. Where corporations are by law forbidden to make notes of a certain description, a note made in violation thereof is void. And being void *ab initio*, it must be void in the hands of a *bona fide* holder. *U. S. Circ. Ct. (Mich.)* 1842, *Root v. Goddard*, 3 *McLean*, 102; 1845, *Root v. Wallace*, 4 *Id.* 8.

445. Notes of a character, the issuing of which is expressly prohibited by law, with a penalty upon the officers of the corporation who should violate the prohibition, are void, and cannot be enforced against the corporation, although it may be that the original

liability on account of which they were issued will still remain. *N. Y. Ct. of Appeals*, 1849, *Leavitt v. Palmer*, 3 *N. Y.* (3 *Const.*) 19.

446. A bank draft drawn in violation of the banking laws of the State,—*e. g.* a post note,—is void, and a delivery of it in payment of a debt is no defence to a subsequent action to recover the debt. *U. S. Circ. Ct. (Mich.)* 1848, *Davis v. Bank of River Raisin*, 4 *McLean*, 387.

447. The Pennsylvania statute of March, 1814, enacted that all notes issued by unincorporated banking companies should be void, and not recoverable. The statute of March, 1817, repealed so much of the former act as prevented the holder of such notes from recovering against the drawers. *Held*, that the holder of such notes issued after the former act, and before the latter, might recover against the members of the company. *Pa. Supreme Ct.* 1818, *Hass v. Werts*, 4 *Serg. & R.* 356.

448. An association was formed for the purpose of issuing bills to circulate as money, subject, however, to the proviso that bills of a less denomination than three dollars should not be issued. Under a contract for a loan of the bills of an unchartered association, bills of less denomination were received. *Held*, that this fact did not avoid the contract. *Ala. Supreme Ct.* 1846, *McGehee v. Powell*, 8 *Ala.* 327.

449. Notes issued by a corporation to pay its laborers, but in the form of bank notes, and intended to circulate as currency,—*Held*, void as against the corporation, (though not as against the individual members), because in violation of the law against banking. *Ohio Supreme Ct.* 1849, *Lawler v. Walker*, 18 *Ohio*, 151.

450. Violation of public policy. All contracts made in violation of public policy, as declared by common or statute law, are void, and neither courts of law or equity will enforce them; but where the parties to such a contract are not in equal fault, and the relief asked will sustain public policy, then relief will be given. Thus where a corporation unlawfully carrying on a banking business has transactions with others in the course thereof which would be valid if done in the course of their business, the latter may have relief, and recover back in disaffirmance of their contract, moneys paid under it. The corporation should not be permitted to derive a profit from its viola-

which the violation consists, in *Curtis v. Leavitt*, 15 *N. Y.* 9, 97.

tion of the statute, and therefore, in support of public policy, it should be decreed to pay debts contracted in furtherance of its lawful pursuit.* *Tenn. Supreme Ct.* 1850, *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.* 11 *Humph.* 1.

451. An agreement or understanding among the corporators in a corporation selling their lands at public auction, that they might bid, and afterwards take the lots or not, at their option, will not invalidate the sale, where the agreement was not carried into effect. *Mo. Supreme Ct.* 1860, *Buckley v. Briggs*, 30 *Mo.* 452.

452. If a note be made to a bank, without consideration, for the purpose of enabling the corporation, by including it as a part of its funds, to make a colorable and false statement of its actual position, although the facts may be a just cause for revocation of its charter, and, perhaps, for indictment of the persons concerned, for a conspiracy to defraud, yet the bank cannot maintain an action on such note against the maker. To enable them to sue upon it, there must have been a consideration at the time of making the contract; and no injurious consequences to the parties or to others which may afterward happen from its having been made, can constitute a legal consideration for it. *Mo. Supreme Ct.* 1844, *Agricultural Bank v. Robinson*, 24 *Mo.* 274.

453. A contract of a corporation tending to prevent the extension of a rival corporation's charter,—*Held* void, as against public policy. See *State v. Hartford & N. H. R. R. Co.* 29 *Conn.* 538.

454. In reference to contracts to procure legislative grants, it may be deemed settled that:

1. All contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, are void by the policy of the law.

2. Secrecy as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he can-

* That the courts of Michigan will not lend their aid to enforce a contract made with a corporation of another State, in violation of its charter,—see *Orr v. Lacey*, 2 *Doug. (Mich.)* 230.

not have the assistance of a court to recover compensation.

3. That what, in the technical vocabulary of politicians is termed "log-rolling," is a misdemeanor at common law, punishable by indictment. [18 *Pick.* 472; 7 *Watts*, 152; 5 *Watts & S.* 315; 6 *Dana*, 366; 8 *Ala.* 719; 2 *Virginia Cases*, 460.] *U. S. Supreme Ct.* 1853, *Marshall v. Baltimore & Ohio R. R. Co.* 16 *How.* 314.

455. There is no distinction in principle between a contract for the use of undue personal influence with members of a legislature, and one for the same influence with directors of a corporation. *N. Y. Superior Ct.* 1857, *Davison v. Seymour*, 1 *Bow.* 88.

456. The plaintiff was employed by the defendant's firm to procure from the directors of a railroad company a contract for building their road, and agreed to pay him for his services, should he succeed. Plaintiff concealed his own agency, and procured the contract for defendant's firm through the influence with the directors of the company of a third person, employed by him, who was ignorant of the abilities of defendant's firm. *Held*, that the contract, if not in its terms, yet in the nature of the means that were used to influence the action of the directors, was void, as contrary to morality and public policy. [4 *Comst.* 451; 4 *Barn. & C.* 319; 1 *Carr. & P.* 1; 2 *Swant.* 167; 4 *Com. B.* 518; 2 *Sim. & Stu.* 301; 16 *How. (U. S.)* 325; 18 *Pick.* 472; 10 *Barb.* 489.] *Id.*

457. Fraud. A company cannot set up, in defence of a security properly executed by them, that through fraud between other parties and among themselves, it was not executed and delivered to the party really entitled to receive it. *Exch.* 1852, *Horton v. Westminster Improvement Commissioners*, 1 4 *Eng. L. & Eq.* 378; 21 *Law J. N. S.* 297; 7 *Exch.* 780.

V. REMEDIES.

458. Enforcing Performance. A court of equity will not compel a corporation to execute a legal assurance of corporate property, in pursuance of a contract not under seal, unless valuable consideration for the contract be expressly proved, or evidence be given of acts done or omitted by the party contracting with the corporation on faith of

the promised legal assurance.* *Exch.* 1835, *Willmot v. Corporation of Coventry*, 1 *You. & C.* 518. Compare *Jacobs v. Peterborough & Shirley Railway*, 8 *Cush.* 223; *Parker v. Perkins*, *Id.* 818.

459. That a court of equity will decree a specific performance against a railway company of a contract to take land and pay a stipulated price,—see *Inge v. Birmingham W. & S. V. Railway Co.* 23 *Eng. L. & Eq.* 601.

460. Specific performance of an agreement to take a lease was enforced personally against the directors of a company who signed the agreement, although the agreement showed that the directors were trustees for the company; the company by their answer disclaiming; but specific performance of the execution of certain building works on the property leased, was refused. *Vice Chan. Ct.* 1864, *Kay v. Johnson*, 2 *Hemm. & Mil.* 118.

461. After a rule *nisi*, for a mandamus to compel a company to summon a jury to assess compensation to landowners, a contract was entered into, between the landowners and the agent of the company, wherein they agreed, in discharge of claim against the company, upon the payment of a stated sum, and also a weekly compensation. Upon the payment. The stated sum, and the execution of the contract, the proceedings were discontinued. The company paid the weekly sum for a time, and then discontinued the payment. The application for a mandamus being renewed,—*Held*, that as the contract was not under their seal, no action would lie upon it, against the company, and that it should therefore be enforced by mandamus. *Q. B.* 1845, *Regina v. Bristol & Exeter Railway Co.* 3 *Eng. Railw. Cas.* 777.

462. Where no binding and complete contract has been entered into by a company, under their seal, although the tenders made by a contractor have been accepted by their engineer, authorized to act on their behalf, and the contractor has incurred expense upon the faith of having the contract, in preparation to fulfil it, and the whole thing is after-

ward given up, equity can grant no relief. *Chancery*, 1849, *Jackson v. North Wales Railway Co.* 6 *Eng. Railw. Cas.* 112.

463. An agreement was entered into on behalf of, and was confirmed by, a railway company in consideration of a landowner's opposition to their bill in Parliament being withdrawn, to pay him a specified sum as the purchase money of land not exceeding eight acres, to be taken by the company for the formation of their railway, and for consequential damages to the landowner's property. The railway was abandoned, and the landowner filed a claim for specific performance. *Held*, that the plaintiff had means of complete redress at law, and that the claim must be dismissed. *Chancery*, 1852, *Webb v. Direct London & Portsmouth Railway Co.* 9 *Eng. L. & Eq.* 249; 21 *Law J. N. S.* 337; 16 *Jur.* 323; 1 *De Gez. M. & G.* 521.

See also RAILROAD COMPANIES.

464. That courts of equity will not decree specific performance of a contract of directors of a company, which is grossly improvident. See *Shrewsbury & Birmingham Railway Co. v. London & Northwestern Railway Co.* 29 *Law Times*, 186; 6 *H. L. Cas.* 113; 3 *Jur. N. S.* 775; 26 *Law J. N. S. Ch.* 482.

465. In England it has been—*Held* that a contract to make a railway is not one of which a court of equity will compel specific performance. See *Heathcote v. North Staffordshire Railway Co.* 6 *Eng. Railw. Cas.* 358.

466. Where, in a building contract, the corporation reserved the power to determine the contract, which they exercised, and it was also agreed, "that any dispute or difference which might arise between the contracting parties should be referred to and settled by the engineer; that it should not be competent for either party, to except at law or equity to his determination; and that without the certificate of the engineer no money should be paid to the plaintiffs." *Held*, it appearing that the engineer had never refused to discharge his duty according to the contract, and had nothing to disqualify him to act, and was ready and willing to proceed and determine all matters at issue between the parties; that there was no ground for the equitable interference of the court. *Vice Chan. Ct.* 1858, *Scott v. Corporation of Liverpool*, 31 *Law Times*, 147.

*It seems if a regular corporate resolution has been passed for granting an interest in the corporate property, and upon the faith of it, expenditure has been incurred, the court will compel the corporation to make a legal grant in pursuance of the resolution, although it is not under the corporate seal. *Marshall v. Corporation of Queensborough*, 1 *Sim. & S.* 520.

467. By a contract for the execution of railway works, after specifying certain works to be done for a gross sum, it was provided that extra works which the company or their engineer should by any writing under his hand, require to be executed, should be deemed to be included in the contract, and should be paid for at a certain rate; and that the contractor should not be entitled to make any claim for any alteration or addition which he might make without such written and signed instructions. *Held*, that a suit for an account of the moneys due to the contractor, in respect of work done under the contract, was a proper subject of jurisdiction in equity; and that a direction for an account of extra works done by the plaintiff under and by virtue of the contract did not authorize any account to be taken of works (other than the specified works) done by contractor, with the privity of the company, without written instructions; but that the court would give the plaintiff liberty to bring his action at law against the company in respect of works done without such instructions, notwithstanding relieving him against the legal effect of the lapse of time during the proceedings in equity. *Vice Chan. Ct.* 1848, *Nixon v. Taff Vale Railway Co.* 7 *Hare*, 186.

468. Recovering damages. By the act to restrain unauthorized banking (1816), all bills and notes issued by certain persons or corporations were declared void; and the members of such associations were made individually liable thereon. By a subsequent act (1824) it was provided that no action whatever should be maintained on such bills or notes. *Held*, that this latter act related to the remedy only, and, upon its subsequent repeal, actions could be maintained against the members of an unauthorized company to enforce against them, individually, notes issued by the company before its repeal. *Ohio Supreme Ct.* 1847, *Johnson v. Bentley*, 16 *Ohio*, 97.

469. A corporation which lends money without authority under its charter, and takes a promissory note therefor, cannot recover under the common money counts. *Ala. Supreme Ct.* 1860, *Grand Lodge of Alabama v. Waddill*, 36 *Ala.* 813.

470. Although it seems to be the general rule that if a corporation, having agreed to pay a certain amount in its own stock, re-

fuses to do so upon demand, they may be held to pay the amount in money without reference to a depreciation in the market value of the stock, yet where the right of recovery rests upon equitable grounds, there not having been a full performance, the plaintiffs may, in a proper case, be restricted to the market value of the stock. *Vt. Supreme Ct.* 1855, *Barker v. Troy & Rutland R. R. Co.* 27 *Vt.* 766.

471. Where an executory contract is made by a corporation to issue shares of its stock to a party when he shall have done certain work, and the company prevent him from completing the work, make no tender of certificates, and do nothing to set apart any particular shares for his use, they cannot defeat the action of the contractor for damages, on the ground that the contract on their part executed itself, and made him the owner of stock which they agreed he should have. *U. S. Circ. Ct. (Me.)* 1854, *Myers v. York & Cumberland R. R. Co.* 2 *Curt. C. Ct.* 28.

472. The plaintiff advanced money to a company upon the faith of a resolution that, when the time for which the loan was made expired, he should be entitled to be repaid in money with interest, or by an allotment of shares to the amount of his advance. He elected to accept shares in payment, but the company refused to allot him any, and he filed a bill for a specific performance of the agreement and for damages for the breach thereof against the directors and the company. At that time there were no shares remaining unallotted, and the plaintiff was aware of the fact. *Held*, that under the circumstances he could not maintain a bill for specific performance; and that, since he had no title to the relief sought, the court could not award him damages under the statute of 21 & 22 Vict. c. 27, which enabled a court of equity to do complete justice between the parties before it in matters actually within its own jurisdiction. *Chancery*, 1866, *Ferguson v. Wilson*, 2 *Law Rep. Ch. App.* 77; 36 *Law J. N. S.* 67; 12 *Jur. N. S.* 912; 15 *Law Times, N. S.* 230.

473. Where the managing director of a company agreed with a contractor, that if he would accept part of the price of his work in preference shares, the company should accept of such shares in payment of future calls upon the shares; but the company de-

clined to do so on the ground of the invalidity of the contract. *Held*, that the proper remedy was, an action for damages against the director. *Rolls Ct.* 1858, *Ellis v. Colman*, 31 *Law Times*, 144.

474. *Reformation*. That a court of equity will reform a bill of sale of property belonging to a company, which, through the mistake of a secretary, was made to include articles not owned by them, and in fact not covered by the agreement of the parties,—see *Menomonee &c. Manuf. Co. v. Langworthy*, 18 *Wis.* 444.

475. *Cancellation*. The court of chancery, though it has no power of visitation, may entertain a bill to avoid a contract of a corporation which it had no power to make. *N. Y. Chancery*, 1824, *Auburn Academy v. Strong*, *Hopk.* 278.

As to Actions by and against corporations, see *SUTTS*.

COUNTIES.

1. *How far deemed corporations*. That counties are mere *quasi* corporations, invested with corporate powers, *sub modo*, and for a few specified purposes, but deficient in many of the powers incident to the general character of corporations,—see *Goodnow v. Commissioners of Ramsey County*, 11 *Minn.* 31; *Louisville & Nashville R. R. Co. v. County Court of Davidson*, 1 *Sneed*, 637, 687; *Hannibal & St. Joseph R. R. Co. v. Marion County*, 36 *Mo.* 294; *Reardon v. St. Louis County*, *Id.* 555.

2. That a county is a public corporation, created for political purposes, and invested with subordinate legislative powers,—see *Maury County v. Lewis County*, 1 *Swan*, 236.

3. That a county is a corporation, but the people of it are not,—see *Smith v. Myers*, 15 *Cal.* 33.

4. *How liable to be sued*.^{*} That county commissioners, in Ohio, are a corporation, not a sovereignty, and may be sued before a justice of the peace; and though they are individually named, yet, if the description of their office is added, and the subject of the suit is public, the suit is deemed to be

against them as a corporation,—see *Paine v. Commissioners &c. Wright*, 417.

5. That a county has not the capacity to be sued, except it is conferred by special statute; and when that capacity is so conferred, the mode pointed out by the statute must be strictly pursued;—see *Rock Island v. Steele*, 31 *Ill.* 543.

6. *Liability after division*. By general principles of law, if a county is divided by setting off a part, or forming a new county, the remaining part retains all its property, power, rights, and privileges, and remains subject to all its obligations and duties; unless some express provision to the contrary should be made by the act authorizing the separation. And where this is done, a subsequent statute requiring the latter to bear part of the burdens of the new county cannot in general have any binding force, for it attempts to take away their vested rights. *Mass. Supreme Ct.* 1819, *Hampshire v. Franklin*, 16 *Mass.* 76. Compare *Bowdoinham v. Richmond*, 6 *Me.* (6 *Greenl.*) 112.

7. *What may be a county charge*. To charge a county with a claim for services rendered or expenses incurred, there must be some statutory authority authorizing the same to be rendered or incurred, or directing the payment thereof. Without this the board of supervisors cannot be compelled by mandamus to audit such claim. [14 *Barb.* 56; 1 *Hill*, 362; 6 *Hill*, 244; 6 *Cow.* 260; 18 *Johns.* 242; 16 *Wend.* 257; 2 *Cow.* 531, 533, 534; 2 *Green*, 473.] *N. Y. Supreme Ct. Sp. T.* 1864, *People ex rel. Hadley v. Supervisors of Albany*, 28 *How. Pr.* 22.

8. A county is not relieved from liability for moneys expended by a county officer in executing his official duties, by the fact that such duties are imposed by special laws, and that no pecuniary benefit inures to the respective counties from their execution. *N. Y. Ct. of Appeals*, 1865, *People ex rel. Hall v. Board of Supervisors of N. Y.* 32 *N. Y.* 473.

9. In what cases moneys disbursed by county officers in the performance of their official duties, are deemed "necessarily expended," within the meaning of 1 *N. Y. Rev. Stat.* 386, § 3, subd. 9, making moneys so expended a county charge. *Id.*

10. Services of a medical man, rendered by order of the district attorney in making a chemical analysis in aid of an inquiry into a

^{*} In Connecticut, a county is not liable to the process of foreign attachment. *Ward v. County of Hartford*, 12 *Conn.* 404.

case of alleged poisoning, are properly chargeable against the county. *N. Y. Supreme Ct. Sp. T.* 1865, *People ex rel. Sherman v. Supervisors of St. Lawrence*, 30 *How. Pr.* 178.

11. That a contract made by county commissioners, to be binding on the county, must be made by the board at a regular session,—see *Potts v. Henderson*, 2 *Ind. (2 Cart.)* 327.

12. Effect of decision of supervisors. After a claim against a county has been presented to the board of supervisors for allowance, and has been examined and passed upon by that body, the amount determined to be actually and justly due declared, and its payment provided for in the mode prescribed by law, no action will lie against the county to recover the same claim, upon the ground that the decision of the board was erroneous in respect to the amount actually and legally due to the plaintiff. Their action in the matter is final and conclusive. [10 *N. Y.* 260.] *N. Y. Ct. of Appeals*, 1864, *Martin v. Supervisors of Greene*, 29 *N. Y.* 645.

13. That where no other provision is made for the necessary expenses of the judiciary, in its official duties, the county where the court is held is in general liable,—see *Venango v. Durban*, 3 *Grant's Cas.* 66.

14. County bonds. A board of county commissioners has authority, under *Minn. Comp. Stat.* 153, § 13, to issue bonds, which shall be valid and binding upon the county, to pay for the building of a court house, jail, or other necessary building for the use of the county. *Minn. Supreme Ct.* 1861, *Chaska Company v. Board of Supervisors of Carver County*, 6 *Minn.* 204.

15. Where the statute constituted three commissioners of the county, and declared that two of them should form a board for the transaction of business. *Held*, that the bonds issued by the county, being signed by two out of three commissioners, were binding upon the county. [8 *Watts*, 128; 5 *Binn.* 481; 6 *Serg. & R.* 166.] *U. S. Supreme Ct.* 1860, *Curtis v. County of Butler*, 24 *How.* 435.

16. Where county officers have, in repeated instances, taken up one county bond by issuing another, and the county has ratified that action, they can bind the county by doing it in another instance, though they have no strict legal authority for so doing.

Ill. Supreme Ct. 1860, *Johnson v. County of Stark*, 24 *Ill.* 75.

17. — for bounties to volunteers. Boards of supervisors of the various counties in the State of New York authorized to adopt resolutions to provide for raising money upon the credit of their respective counties for the use of such counties (or upon the credit of any city or town for the sole use of such city or town), for the purpose of paying volunteers into the military or naval service of the United States during the civil war of 1861–65. *N. Y. Laws of 1864*, 111, ch. 72.

18. Under the New York act of 1864, above mentioned,—*Held*, that a resolution of a board of supervisors, providing for the issue of county bonds to each supervisor who might call for the same, to pay a bounty to each recruit that should be mustered into the service to the credit of their respective towns, must be deemed to contemplate the issue of these bonds upon the credit of the county; that the bonds issued under it were a county charge; and that it was the right and duty of the board of supervisors of that county to provide accordingly for their payment as legitimate public debts of the county. *N. Y. Supreme Ct.* 1864, *Magee v. Cutler*, 43 *Barb.* 239.

19. It makes no difference that such a resolution of a board of supervisors, authorizing the issue of bonds as obligations of the county to raise money for payment of bounties, contains a provision that, in payment of said bonds, the board of supervisors shall assess such sums on the towns respectively, in proportion to the amount of bonds or money taken by each town through its supervisor. This does not change the character of the bonds, or convert them into town obligations. This portion of the resolution is of no legal force. The board of supervisors have no right to lend the bonds of the county to towns so as to create town debts. Town debts can only be lawfully authorized under the act in question in the shape of town bonds—and such town bonds can only be issued by the town authorities, after a vote of the town duly had at a regular meeting called for the purpose. *N. Y. Supreme Ct.* 1865, *People v. Supervisors of Livingston*, 43 *Barb.* 298.

20. Nor can any vote or resolution of the towns respectively render such bonds obligations of the town, so that it shall be liable as a town separately, to pay any of the bonds, or to be assessed for any number of such bonds as issued or lent for its exclusive use

or benefit. The whole property of the county must be assessed to pay the bonds. *Id.*

For cases upon the power of counties and other public corporations to Subscribe for stock in railroad companies and other corporations for local improvements, and upon the validity of bonds issued to raise funds for such subscriptions, see SUBSCRIPTION.

DEBTS.

1. **Power to incur them.** Under the statutes of California the power of corporations to create debts is treated as an incident to the express powers, and not as itself, one of the express powers. *Cal. Supreme Ct. 1856, Smith v. Eureka Flour Mills Co. 6 Cal. 1.*

As to the power to incur obligations by contracting, see CONTRACTS.

As to Powers generally, see POWERS.

2. **What are corporate debts.** The president of a manufacturing company, under a lease of all its property to him for two years, carried on the business under the name of the corporation, and then failed, and assigned the property for the benefit of creditors. *Held*, that debts contracted in the business by him, with parties who, before the lease, had dealt with the corporation, and who had no actual notice of the lease, or with parties who had not dealt with the corporation before the lease, and who had not even constructive notice of it, were corporate debts, and entitled to preference over the personal creditors of the president or creditors of his firm. *N. Y. Supreme Ct. 1851, Conro v. Port Henry Iron Co. 12 Barb. 27.*

As to what are Corporate debts within statutes rendering stockholders individually liable for them, see INDIVIDUAL LIABILITY.

3. **Limit of amount.** Under a statute (*a. g. 1 N. Y. Rev. Stat. 602, § 8*), providing that the total amount of debts of a corporation shall not exceed three times its paid stock, indebtedness to the directors is included as well as indebtedness to third parties. *N. Y. Supreme Ct. 1848, Tallmadge v. Fishkill Iron Co. 4 Barb. 382.*

4. **Novation.** Trustees of a corporation having power to bind it by notes or other obligations, may lawfully change the liability

of the society by creating one debt to pay another, when they deem it expedient. *Mass. Supreme Ct. 1838, Hayward v. Pilgrim Society, 21 Pick. 270.*

5. If a bank, on the eve of insolvency, having notes out which it cannot redeem, and a large claim on a solvent stockholder for money lent, extends his debt by taking his notes, payable at two and three years, with its president as sole surety; this is a fraud on its creditors, and they may proceed in equity directly against such debtor, without a judgment at law or process of garnishment. *Ala. Supreme Ct. 1854, Bank of St. Mary's v. St. John, 25 Ala. 566.*

6. The fact that the cashier of a bank gives his own note for money borrowed by him for his bank, does not exonerate the bank from liability therefor. *N. Y. Superior Ct. 1859, City Bank of New Haven v. Perkins, 4 Bosw. 420.*

7. **Set-off.** A corporation, like an individual person, may cancel a debt due it by setting off a debt from the corporation to the same person, whether the debt be due from a stockholder for stock, or on any other account. *Ala. Supreme Ct. 1849, Goodwin v. McGehee, 15 Ala. N. S. 232.*

8. **Payment.** A payment of corporate debts by a stockholder in a foreign corporation will be deemed to have been voluntary, in the absence of proof that he was legally liable therefor. *Mass. Supreme Ct. 1864, Eastman v. Crosby, 8 Allen, 206.*

9. That a corporation is not bound to seek its creditors in a foreign country—see *Emlen v. Lehigh Coal & Co. 47 Pa. St. 76.*

10. **Promise to pay.** A majority of the directors of a corporation transferred a portion of their stock, and resigned their official positions, that their transferees might be elected in their stead and have control of the affairs of the company, in consideration, as was alleged, of their verbal promise to pay all the debts. After such transfer and election, a small portion only of the corporate debt was paid; in consequence whereof the corporate property was sold under execution, and a large part of the indebtedness left unpaid and lost, including a debt due by the company to one of the original directors and an alleged promisee. In an action brought by him to recover such debt,—*Held*, that the promise of the defendants was within the Statute of Frauds, and that the

plaintiff could not recover. *Pa. Supreme Ct.* 1865, *Maule v. Bucknell*, 50 *Pa. St.* 39.

11. Judgment. A judgment in favor of a creditor of a bank was confessed by the cashier, under a resolution of the directors to that effect; but subsequently, at the request of the vice-president, who acted without authority, other debts of the bank were included in the judgment. *Held*, that the judgment was void for the amount of the erroneous excess only, it appearing that the latter sum was not fraudulently included. *Pa. Supreme Ct.* 1865, *Davenport v. Wright*, 51 *Pa. St.* 292.

12. Upon an issue to try the validity of a judgment confessed in favor of a creditor of a bank, which was shortly afterwards assigned to the vice-president, evidence that all the assets went into that officer's hands; that no losses were sustained by the bank; and that no assets went into the hands of any of the other directors, is inadmissible to show fraud in the confession of the judgment, without the offer of other facts tending to show a fraudulent use of the assets. *Ib.*

13. In an action by the receiver of an insolvent bank against an original subscriber, for the amount of his subscription, a judgment in favor of a third person against the bank, in a court of record, in an action where the bank appeared and defended, was *Held prima facie* evidence that the bank owed the sum recovered. *N. Y. Superior Ct.* 1860, *Dayton v. Borst*, 7 *Bow.* 115.

How far a Judgment against the corporation may be relied on to prove the debt against a stockholder, see INDIVIDUAL LIABILITY.

DEDICATION.

1. Its effect. That if proprietors of land evince by their manner of laying it out, selling it, or appropriating it to public or corporate uses, an intent to set it apart and devote to the uses of a municipal, educational, religious, &c., corporation, their so doing is a dedication of the property to such uses, and they cannot afterwards resume control over it,—see *Canal Trustees v. Havens*, 11 *Ill.* 554; *Mayor of Macon v. Franklin*, 12 *Ga.* 239; *Hannibal v. Draper*, 15 *Mo.* 684; *Atkinson v. Bell*, 18 *Tex.* 474.

2. That railroad corporations have power, in connection with the owners of the fee, to

dedicate for a public highway lands taken by them under their charters, where there is nothing in their charters to forbid it,—see *Green v. Canaan*, 29 *Conn.* 157.

3. That a municipal corporation may make a valid dedication of land belonging to it, in the form of streets, commons, or squares, which will enure to the benefit of all who are at the time, or may afterwards become, citizens of the corporation,—see *Mayor &c. of Macon v. Franklin*, 12 *Ga.* 239; *Pomeroy v. Mills*, 3 *Vt.* 279; *Slate v. Trask*, 6 *Vt.* 355; *Stiles v. Curtis*, 4 *Day*, 328; *Mayo v. Murchie*, 8 *Mun.f.* 358.

4. That a public square or common, in a city or town, may be the subject of dedication,—see *Mayor of Macon v. Franklin*, 12 *Ga.* 239; *Hannibal v. Draper*, 15 *Mo.* 684.

5. What acts will amount to a dedication within the above rule, and how such dedications may be proved,—see *First Parish in Shrewsbury v. Smith*, 14 *Pick.* 297; *Medford v. Medford*, 21 *Pick.* 199; *Lakin v. Ames*, 10 *Cush.* 198; *Durgin v. City of Lowell*, 3 *Allen*, 398; *Canal Trustees v. Havens*, 11 *Ill.* 554; *President &c. v. Indianapolis*, 12 *Ind.* 620; *Mayor &c. of Macon v. Franklin*, 12 *Ga.* 239; *Attorney-General v. Merrimack Manuf. Co.* 14 *Gray*, 586.

6. That designating a lot, upon a town plan, as "church square," does not amount to a specific grant conferring the legal title on the only church then existing in the place; for, *non constat* that future churches might not also have an interest therein,—see *Christian Church v. Scholte*, 2 *Clarke (Iowa)*, 27.

7. That the fact that a road belonging to a turnpike corporation was traveled for two years subsequent to the repeal of the company's charter by all persons who wished to pass over it, is not competent evidence either of a dedication of the land by the owners to the public, for the purposes of a highway, of the usefulness of the road to the public, or of the acceptance of the road by the public as a highway,—see *State v. New Boston*, 11 *N. H.* 407.

DEEDS.

1. When necessary. Unless the charter require it, the acts of the company need not be evidenced by its corporate seal. *Ind. Supreme Ct.* 1857, *Hamilton v. Newcastle & Danville R. R. Co.* 9 *Ind.* 359.

2. **Authority of agent to make deed.** The general agent of a manufacturing company is not authorized, as such, to transfer by deed the real estate of the company. It may be incidental to his power as agent, to borrow money, give promissory notes, and do many other acts in the ordinary course of the business of the company; but to sell or convey real estate, a specific authority seems indispensable. But if such agent undertakes to convey real estate, asserting in the deed that he is properly authorized by vote of the company, and, in behalf of the company, covenants, that they are well seized, and that they will warrant and defend the premises, such agent is estopped, by the declaration and covenants ever to deny his authority. And if he is estopped, then all persons claiming under and through him are estopped. *Conn. Supreme Ct.* 1828, *Stow v. Wyse*, 7 *Conn.* 219.

3. A corporation may empower an agent to execute a deed for the corporation, by a vote of the stockholders. *Va. Ct. of Appeals*, 1846, *Burr v. McDonald*, 3 *Gratt.* 215.

4. — of committee. A vote of proprietors, authorizing a committee to sell the common lands, empowers them also to make deeds in the name of the proprietary; and in executing such deeds, one seal is sufficient, though the committee may consist of several persons. *Ms. Supreme Ct.* 1825, *Decker v. Freeman*, 3 *Ms.* (3 *Greenl.*) 338.

5. — of members. A deed by individuals in their own names, and not in pursuance of some vote of the corporation, though they are owners of all the shares in the corporation, and are so described in the deed, cannot convey the land of the corporation. A corporation is a mere abstraction, a mere existence in law, and can act only by votes through agents. The share owners are not tenants in common of the land. They have no title whatever, to any of the property of the corporation. *Vt. Supreme Ct.* 1843, *Wheelock v. Moulton*, 15 *Vt.* 519; 1847, *Isham v. Bennington Iron Co.* 19 *Id.* 230.

6. **Recital of authority.** A conveyance by a corporation, signed by the president in the corporate name, need not show the authority of the president to sign the corporate name. His authority, whether shown by the deed or not, is to be proved by evidence *aliunde*, and is not necessarily to be proved by a formal vote of the corporation,

Conn. Supreme Ct. 1861, *Hart v. Stone*, 30 *Conn.* 94.

7. Under the Revised Statutes of Vermont (Rev. Stat. 315, §§ 24, 25), it is not essential to the validity of a deed of the real estate of a private corporation, that the vote of the corporation, authorizing their agent to execute the instrument, should be recited. *Vt. Supreme Ct.* 1850, *McDaniels v. Flower Brook Manufacturing Co.* 23 *Vt.* 274. Compare *Isham v. Bennington Iron Co.* 19 *Vt.* 230.

8. It is unnecessary that deeds made by proprietors' committees should contain recitals of their authority and proceedings in the sale, as their certificates of such proceedings are not in themselves evidence of the facts they recite, and such facts may always be proved *aliunde*, and in proper cases will be presumed. *Ms. Supreme Ct.* 1826, *Innman v. Jackson*, 4 *Ms.* (4 *Greenl.*) 237; 1828, *Farrar v. Eastman*, 5 *Id.* 345. See also *Powell v. Brown*, 1 *Tyler*, 285.

9. **Form.** Where the terms of a contract proposed to the committee of a corporation were contained in a letter directed to them, and the committee wrote at the bottom of the letter, that the terms proposed were accepted, and thereto affixed the corporate seal, by way of showing the corporate assent, — *Held*, that such a mode of accepting the terms of the contract was not deemed to constitute the contract a specialty on which covenant would lie. *Tenn. Supreme Ct.* 1847, *Levering v. Mayor &c. of Memphis*, 7 *Humph.* 553.

10. If a note and deed are executed by an old corporation by a new name, the contracts will be as binding upon the corporation as if they had been executed by the proper name. *Ill. Supreme Ct.* 1862, *President &c. of Mount Palatine Academy v. Kleinschnitz*, 28 *Ill.* 133.

11. **Interpretation.** A deed of land to a railroad company, after describing one parcel by metes and bounds, and stating that it was to be for the uses and purposes of the road proper, and contained an area of sixty square rods, proceeded as follows: "Also, in addition to which said sixty rods, the company may be further entitled to an extra additional width of seventy feet on the south side of said railroad, for the uses and purposes of a side track, engine house, depot, &c., provided such buildings may be used

for purposes of railroad only, and which additional land contains an area of sixty-four rods, &c., to have and to hold all and singular the above mentioned and described premises, &c.," concluding with the usual covenant for the quiet possession of "the said premises" by the grantees, &c.

Held, 1. That the deed was sufficient to pass the title to both the parcels of land described. Its meaning was: "In consideration of one dollar, we have granted to the railroad company sixty-four square rods of land for their road proper; also seventy rods, in addition, which they may be entitled to for a side track, engine house," &c.

2. That if any doubt existed in regard to the construction and effect of the deed, the covenant for quiet enjoyment of the property by the grantees, estopped the covenantor, and those claiming under him, from interfering with such enjoyment. *N. Y. Ct. of Appeals*, 1884, *Long Island R. R. Co. v. Conklin*, 29 *N. Y.* 572.

12. A railroad company for the purpose of enabling the corporation to borrow money, executed deeds purporting to convey to a trustee, to secure the payment of the money borrowed, "all the present and in future to be acquired property" of the corporation, that is to say, the road made or to be made, including the right of way, and land occupied thereby, together with the superstructure, and tracks thereon, and all rails and other materials used therein, or procured therefor, and engines, tenders, cars, tools, materials, machinery, contracts, and all other personal property, right thereto, or interest therein, together with the tolls, rents, or income to be had or levied thereupon; and all franchises, rights, and privileges of the "corporation in, to, or concerning the same." *Held*, that cars, car wheels and fuel, acquired by the corporation subsequently to the execution of the deeds, passed under and by virtue of the deeds to the trustee. *Ky. Ct. of Appeals*, 1857, *Phillips v. Winslow*, 18 *B. Monr.* 481.

13. Effect. That in grants to corporations aggregate, the word "*successors*," though usually inserted, is not necessary to convey a fee simple; for, admitting that such a simple grant be strictly only an estate for life, yet as the corporation, unless of limited duration, never dies, such estate for life is perpetual,—see *Union Canal Co. v. Young*, 1 *Whart.* 425;

Overseers of Poor of Boston v. Sears, 22 *Pick.* 122.

14. Where proprietors executed by a committee a deed of land to a parish for a meeting house, reserving by vote to the inhabitants of the town the privilege of occasionally holding town meetings in the meeting house, — *Held*, that the deed conveyed the land subject to the reservation in the vote, although there was no such reservation in the granting part of the deed. *Mass. Supreme Ct.* 1846, *Goff v. Inhabitants of Rehoboth*, 12 *Metc.* 26.

15. Certain members of an unincorporated religious society took an absolute deed of lands bought with funds of the society, and one of them indorsed upon the deed, without the assent of the society, a declaration that he held it in trust for the society upon its members assenting to an open communion. *Held*, that the indorsement was of no force; that upon the subsequent incorporation of the society, the title vested in the corporation, but it was nevertheless proper for chancery, upon the bill of the corporation, to decree a conveyance. *N. Y. A. V. Chan. Ct.* 1839, *South Baptist Church v. Yates*, *Hoffm.* 142.

16. That a deed to a society's committee, and their successors, for the use of the society, is good,—see *Judd v. Woodruff*, 2 *Root*, 298.

17. What is a corporate execution. Where the trustees signed their names separately to a lease, and affixed the corporation seal,—*Held*, that the lease was well executed. *N. Y. Supreme Ct.* 1808, *Jackson v. Walsh*, 3 *Johns.* 226.

18. A deed by a corporation is in proper form if expressed to be by the corporation, naming it, by their agent, naming him, and concluding: "In witness whereof, they," naming the company, "by their agent, have hereunto set their seal, and the said agent hath hereunto subscribed his name." [*Ang. & A. on C.* 159.] *N. H. Superior Ct.* 1841, *Flint v. Clinton Co.* 12 *N. H.* 430.

19. A deed in this form: "We, the E. W. L. Co., in consideration of \$5,000 to us paid, &c., do give, grant," &c.; "we, the E. W. L. Co. do hereby covenant," &c.; "if the E. W. L. Co. shall pay," &c.; and concluding: "In witness whereof we have hereunto set our hands and seals," &c.; signed, "D. E. F., President," &c., and seal, E. S. C., Treas-

urer," &c., and seal; is the deed of the corporation, if the agents were authorized to execute it. *N. H. Supreme Ct.* 1861, *Tenney v. East Warren Lumber Co.* 43 *N. H.* 343.

20. An assignment of a mortgage of real estate from a corporation, concluding: "In witness whereof, the said B. C. S. Bank, by J. S., their treasurer, duly authorized for this purpose, have hereunto set their name and seal," signed, "J. S., Treasurer B. C. S. Bank," and sealed, is in form executed by the corporation. *Mass. Supreme Ct.* 1857, *Hutchins v. Byrnes*, 9 *Gray*, 367.

21. A corporation may execute a deed in these words: "In testimony whereof, said party of the first part have caused these presents to be signed by their president, and their common seal to be hereto affixed. A. B., President," and seal. *Mass. Supreme Ct.* 1862, *Haven v. Adams*, 4 *Allen*, 80.

22. A deed executed by a banking corporation to its president, signed by the president and countersigned by the cashier of such bank, is, *prima facie*, a good deed under the clause in the charter of said bank, which declares that "all contracts, on the part of the corporation, shall be binding, provided the same shall be signed by the president and countersigned by the cashier." * *Ga. Supreme Ct.* 1855, *Veasey v. Graham*, 17 *Ga.* 99.

23. What is not. A deed of conveyance by a corporation must be executed in the corporate name and under the corporate seal. One describing the grantors as a corporation, but executed by the president thereof, in his own name, and under his own seal, and describing him as president, does not pass the title from the corporation. *Ohio Supreme Ct.* 1824, *Hatch v. Barr*, 1 *Hamm*, 390.

24. Where the president of a corporation was authorized by a resolution to execute a deed of the corporate lands, and he executed the deed in the name of the corporation, but attested it in this form: "In witness whereof, I, ———, President, have hereunto set my hand and seal, &c.," and signed his own name as president, opposite to a seal

upon which there was no distinct impression,—*Held*, that the deed was inoperative, it being the individual deed of the president, who had personally no interest in the subject of the instrument. *Id.*

25. An instrument, purporting to be the deed of a legally established corporation, by C., its treasurer, reciting that it is executed by him, in behalf of the company, and as its treasurer, duly authorized for that purpose, and signed and sealed by him, with his own name and seal, followed by the words, "treasurer," &c. *Held*, not to be the deed of the corporation. *Mass. Supreme Ct.* 1848, *Brinley v. Mann*, 2 *Cush.* 337.

26. The proprietors of common and undivided lands are corporations; and, therefore, where they voted that their clerk should give a certain person a deed of land in their name, and he executed a deed in his own name as clerk,—*Held*, that the grantee acquired no title. *N. H. Superior Ct.* 1827, *Coburn v. Ellenwood*, 4 *N. H.* 99; *S. P.* 1840 *Atkinson v. Bemis*, 11 *N. H.* 44.

27. A deed of proprietary lands, reciting the votes authorizing the clerk of the proprietors to execute the same, approved by a written indorsement signed by three of a standing committee, two of whom were empowered to approve such deeds as they judged necessary, though sealed with the seal of the clerk,—*Held*, to transfer the title of the proprietors after thirty years' possession of the land by the grantee. *Ma. Supreme Ct.* 1825, *Thorndike v. Barrett*, 8 *Mc.* (3 *Greenl.*) 380.

28. If a charter require that deeds given by the corporation shall be under the corporate seal, and shall also be signed by the corporators, a deed signed by persons not named therein as corporators, and bearing a seal not proved to be the corporate seal, is fatally defective. *N. J. Ct. of Errors*, 1856, *Osborne v. Tunis*, 1 *Dutch.* 633.

29. Where the agent of the corporation signed his name to an obligation to pay money, with his private seal affixed, it was *Held*, that, although the instrument did not become the covenant of the corporation, yet it was evidence of a contract, on proof of the agency. *N. C. Supreme Ct.* 1859, *Osborne v. High Shoals &c. Manuf. Co.* 5 *Jones' Law*, 177.

For cases upon the Execution of other corporate contracts, see CONTRACTS.

* That in Vermont, private business corporations may convey real estate by the deed of their president, and such deed may be sealed with the seal of the president,—see *Warner v. Mower*, 11 *Vt.* 885; *Laham v. Bennington Iron Co.* 19 *Vt.* 230.

30. Presumptions in aid of execution. Where the seal of a corporation has been affixed to a deed by the proper officer and signed by him, it will be presumed that the instrument was executed by authority of the corporation. *N. H. Superior Ct.* 1841, *Flint v. Clinton Co.* 12 *N. H.* 430; *Mo. Supreme Ct.* 1859, *Chouquette v. Barada*, 28 *Mo.* 491.

31. The production of an instrument admitted to be executed under the corporate seal, and signed by the proper officers, is *prima facie* evidence of due execution by the defendants, and raises a presumption that it was executed by lawful authority of the corporation. This is as true of a religious corporation as of any other. *N. Y. Supreme Ct.* 1860, *Bowen v. Irish Presbyterian Congregation*, 6 *Bow.* 245.

32. Proof of the signatures of the officers of a corporation to a release under seal, purporting to have been executed by the corporation, is *prima facie* evidence of its due execution. *S. C. Ct. of Appeals*, 1859, *Josey v. Wil. & C. R. R. Co.* 13 *Rich. Law*, 134.

33. A deed of a municipal corporation having power by its charter to dispose of its lands, will be presumed to have been executed in pursuance of the power; and it is unnecessary for the grantor to show any special authority by resolution or ordinance. *Mo. Supreme Ct.* 1862, *Chouquette v. Barada*, 33 *Mo.* 249.

34. A statute which requires that, where a deed is executed by an agent, his authority shall be evidenced by a written power executed with the formalities of a deed, has no application to deeds executed in behalf of a corporation aggregate, by their agent. *Conn. Supreme Ct.* 1858, *Howe v. Keeler*, 27 *Conn.* 538.

35. On the trial of a writ of entry, as against a tenant in possession under a mere claim of title, it appearing that the deed to the demandant, conveying the demanded premises, was executed by the president of a corporation, who affixed thereto the corporate seal, and that this was done in accordance with a parol vote of the directors which was not recorded,—*Held*, that there was sufficient proof of authority to execute the deed to entitle the demandant to recover. *Ma. Supreme Ct.* 1859, *Clark v. Pratt*, 47 *Ma.* 55.

36. Delivery. Where an agreement by deed is made with a corporation through the intervention of a duly authorized agent, in

order to bind the corporation by the stipulations of the deed it is not necessary to show that it has been formally accepted by them, but a delivery to and an acceptance of the deed by the agent, is a delivery to and acceptance by the corporation. *Mass. Supreme Ct.* 1843, *Western Railroad Corporation v. Babcock*, 6 *Metc.* 346, 356.

37. Proof. In tracing the title of real estate through a corporation, it is not sufficient to show a deed, duly executed by a body purporting to be corporate, but the act of incorporation should be produced, or it should be shown, in some way, that such body is a body politic capable of taking and conveying real estate. *N. H. Superior Ct.* 1833, *Lumbard v. Aldrich*, 6 *N. H.* 269.

38. A corporate deed can be proved only by proving that the seal affixed is the seal of the corporation, or that it was affixed as the corporate seal by some person thereto duly authorized. Proof that the individuals whose names are subscribed to the deed, sealed and delivered the instrument as their deed, neither proves the seal of the corporation, nor their authority to execute the deed. *N. J. Ct. of Errors*, 1856, *Osborne v. Tunis*, 1 *Dutch.* 633.

39. Proof by the president of a corporation, signing its deed, that the seal is its seal and was affixed by its authority, entitles it to record. He may be deemed the party executing it, or the subscribing witness, within the statute. *N. Y. Chancery*, 1836, *Lovett v. Steam Saw-mill Association*, 6 *Paige*, 54. And see *Johnson v. Bush*, 3 *Barb. Ch.* 207, 233.

As to the custody of the Corporate seal, and by whom, and how it is to be affixed, see SEAL.

DEMAND.

1. On whom made. That a demand on a corporation must be on a person known to represent the corporation,—see *Langworthy v. N. Y. & Harlem R. R. Co.* 2 *E. D. Smith*, 195.

2. That when a bank has authorized agents, a demand to affect the bank should be made upon such agents,—see *Commercial Bank of Manchester v. Bonner*, 13 *Smodes & M.* 649.

3. Sufficiency. A passenger on a railroad having lost the check for his baggage, the company's employees at the station refused

to deliver the baggage without the check or proof of the property by affidavit. Having assigned the baggage to plaintiff, plaintiff went, in company with the passenger, and demanded it anew of the baggagemaster, who refused to deliver it, on the ground (then for the first time stated) that it was not in defendants' possession. *Held*, that the demand was sufficient, and that defendants were liable for the value of the baggage. *N. Y. Com. Pl.* 1852, *Cass v. N. Y. & New Haven R. R. Co.* 1 *E. D. Smith*, 522.

4. How made upon the corporation to lay a foundation for an action to enforce a stockholder's individual liability,—see *Haynes v. Brown*, 36 *N. H.* 545; *Harvey v. Chase*, 38 *N. H.* 272.

DEVISES.

I. POWER TO TAKE BY DEVISE.

II. INTERPRETATION.

I. POWER TO TAKE BY DEVISE.

1. Corporation not in being.* A devise to a religious society which had not obtained leave from the legislature to form themselves into a body politic, and to hold land,—*Held* to be void. *Md. Chancery*, 1829, *Murphy v. Dallam*, 1 *Bland*, 529.

2. A devise was made of a farm to the "Yearly Meeting of the people called Quakers, in aid of the charitable fund of the boarding school established by the Friends in Providence." *Held*, it appearing that the Yearly Meeting was not an incorporated body, that the devise could not be sustained as a charity, in an action at law by the heir against a tenant in possession under the Yearly Meeting, and also under the residuary devisee, as the legal title had not passed. *Conn. Supreme Ct.* 1826, *Greene v. Dennis*, 6 *Conn.* 292.

3. Corporation afterward created. A devise of property "to the use of the Associated Reformed Church at Sardis, in Mecklenburg County, North Carolina," was *Held* to be good, it appearing that the congregation had appointed trustees according to law. *N.*

C. Supreme Ct. 1849, *Kirkpatrick v. Rogers*, 6 *Ired. Eq.* 130.

4. A bequest was made to a corporation established in Virginia for the purpose of administering the literary fund of the State; but that body being incapable of taking the devise, application was made to the legislature by the president and directors of the fund for the passage of an enabling statute, and such application being granted, a bill was filed by the president and directors of the corporation against the executors and heirs of the testator to recover the estate devised by his will. *Held*, that it was competent for the complainants, on the neglect of the executors of the will so to do, to make such application; and such act having been obtained, authorizing the corporation to take the devise, it was no objection to their claim under the will, and the act in question, that the latter was passed against the consent of the executors. *Va. Ct. of Appeals*, 1842, *Literary Fund v. Dawson*, 1 *Rob.* 402.

5. Land in another State. Where a corporation is generally competent to take land, the prohibition, in the statute of wills of the State in which it was created, against all devises of lands to corporations, does not prevent it from taking and holding land in another State by devise of one of its own citizens. The statute was intended to regulate the testamentary power of their own citizens, not that of citizens of other States, and to define the capacity of testators, and not that of corporations. *Pa. Supreme Ct.* 1855, *Thompson v. Swoope*, 24 *Pa. St.* 474; *S. P. Ohio Supreme Ct.* 1864, *American Bible Society v. Marshall*, 15 *Ohio St.* 587.

6. What terms will confer the power. Though, in its most general sense, the power to take by "purchase" includes taking by devise, a provision of charter conferring a right to take by purchase, will not be construed to include a right to take by devise contrary to the statute of wills. *N. Y. Ct. of Errors*, 1827, *McCartee v. Orphan Asylum Society*, 9 *Cow.* 437.

7. The charter of a corporation declaring it to be capable of "taking, purchasing, holding, and conveying" real estate, does not authorize it to take by devise. *N. Y. Chancery*, 1834, *Theological Seminary of Auburn v. Childs*, 4 *Paige*, 419.

8. That authority to a corporation to take "by direct purchase or otherwise," is an "ex-

* That a devise made to designated parties, who, though officers of a corporation, are not themselves a corporation to take in succession must fail—see *Christ's College Case*, 1 *W. Blackst.* 90; *Ambl.* 351.

press authority to take by devise,"—see *Downing v. Marshall*, 28 *N. Y.* 866.

9. Under the Code of Virginia (ch. 77, § 8), which provides that conveyances and devises which have been made, and conveyances of land which shall hereafter be made, to charitable uses, shall be valid, &c. *Held*, 1. That the word "conveyance," though generally embracing a devise, was intended to be used in a restricted sense, as meaning an acquisition of property by contract only, and could not be construed to include future devises to religious corporations.

2. That a bequest of money to be laid out in land, or invested for the use of a church, is also void, as being unauthorized by statute and void at common law. *Va. Ct. of Appeals*, 1859, *Seaburn v. Seaburn*, 15 *Gratt.* 428.

For a view of the Power to take property, in common with other corporate powers, see POWERS.

As to the power of Religious corporations, and of other particular corporations, to take by devise or bequest, see RELIGIOUS CORPORATIONS, and other titles of corporations.

As to devises and bequests to Unincorporated associations, see ASSOCIATIONS, 14, 15.

II. INTERPRETATION.

10. Whether in favor of individuals or a corporation. The testator by his will, which took effect in 1818, devised land to an orphan asylum society, to be applied to the charitable purposes for which the society was incorporated.

Held, by the Chancellor, that the devise was not to be construed as direct to the corporation, but to the executors in trust; but if it were deemed direct, the corporation, by a just construction of its charter, had power to take under such devise; and even if the devise was void under the statute of wills, it was to a charitable use, which the court was authorized and bound to enforce.

Held, by the Ct. of Errors, reversing his decree, that the devise was not in trust to the executors, but direct to the corporation; and that the corporation had not by its charter any power to take by devise, and therefore the charitable use could not be maintained. *N. Y. Ct. of Errors*, 1827, *McCartee v. Orphan Asylum Society*, 9 *Cow.* 487.

11. A devise of lands to the fellows of certain specified colleges, living at the testator's death, is a devise for the benefit of the whole body corporate of each college, not of the particular fellows in their natural capacities, and is valid under the exception in the statute of mortmain applying to the universities and their colleges. *Chancery*, 1757, *Attorney General v. Tancred*, *Ambl.* 351; 1 *Wm. Blacks.* 90; 1 *Eden*, 10.

12. A devise to a Roman Catholic priest who might succeed the devisor in a certain place, to be entailed to him and to his successors in trust, &c., was *Held* to be intended in case of the congregation, and for its sole benefit, though for the maintenance of the priest; and that upon its incorporation it legally held the estate devised. *Pa. Supreme Ct.* 1829, *McGirr v. Aaron*, 1 *Pa.* 49. See *Browers v. Fromm*, *Addis.* 862.

13. The terms "Congregational persuasion," in a will,—*Held*, to have the same meaning as the term Congregational denomination. See *Dublin Case*, 38 *N. H.* 459.

14. Identifying the corporation intended. Where there are two associations of the same name which is used by a testator to describe the beneficiary intended, resort may be had to extrinsic evidence for the purpose of ascertaining which one he had in mind. *Mass. Supreme Ct.* 1864, *Bodman v. American Tract Society*, 9 *Allen*, 447.

15. A devisee may be designated by description as well as by name; and such a description is as available in the case of a corporation as of a natural person. *Conn. Supreme Ct.* 1842, *Brewster v. McCall*, 15 *Conn.* 274.

16. A testator gave one-fourth part of all his estate, not previously disposed of, "to the Missionary Society of Foreign Missions, two-thirds to be appropriated for the natives of this land." It did not appear that there was any society for foreign missions bearing that precise name. But evidence was introduced to show that several societies pursuing the object of foreign missions were in existence when the will was executed, among which was one incorporated by the name of the "American Board of Commissioners for Foreign Missions;" that, of four others, two were never incorporated, and one was not until after the execution of the will; that the fourth was established by a denomination of Christians to which the testator did

not belong, and had no organization in the State; that, before the execution of the will, he was intimately connected with the American Board, being a prominent and active member of one of its auxiliary societies; that he was one of the officers of such auxiliary society, and paid to its treasurer the amount of the annual subscription required of its members; that he was also a member and an officer of another auxiliary society in his own town, having the same object in view; and that his religious views accorded with those under whose patronage the American Board was conducted. It also appeared from the will that the devise contained therein to other benevolent objects were in furtherance of his religious views. *Held*, 1. That the devise was not void on its face for uncertainty as to the devisee intended, it not being a case of patent ambiguity. 2. That the extrinsic evidence introduced was proper to ascertain such devisee. 3. That, under the circumstances proved, in connection with the will, the American Board was sufficiently designated as the devisee, by description. 4. That the devise was not void as to the "two thirds to be appropriated for the natives of this land," on the ground that the latter society had no power by its charter, to make such appropriation, inasmuch as that institution was incorporated "for the purpose of propagating the gospel in heathen lands," which expression was strictly applicable to the Indians on this continent. *Ib.*

17. The testator gave one-eighth part of all his estate, not previously disposed of, to the "Foreign Mission School at Cornwall, Ct." and it appeared from extrinsic evidence that, before the execution of the will, the American Board had established a school at Cornwall for the education of heathen youth, both American and Asiatic, to fit them to be missionaries, but this school was never incorporated, and was discontinued before the testator's death. *Held*, that said school had no capacity, and the American Board were not entitled to take under this devise. *Ib.*

18. The testator gave one-eighth part of all his estate, not previously disposed of, to the "American Tract Society," and it appeared from extrinsic evidence, that, previous to the execution of the will, there had existed two societies of that name, one

established at Boston, and the other at New York; that the former was incorporated and capable of taking, while the latter was not; and that the latter became united to the former as an auxiliary, before the execution of the will. *Held*, that the American Tract Society, established at Boston, was the object of the testator's bounty, and entitled to receive it. *Ib.*

19. Where a testator, near the close of his will, gave all the rest of his estate, not previously disposed of, after his just debts and funeral charges were paid, and suitable monuments were erected at his grave, to the "Society for ameliorating the Condition of the Jews," and it appeared from extrinsic evidence, that, some years previous to the execution of the will, a society was incorporated by the legislature of New York, by the name of the "American Society for ameliorating the Condition of the Jews," and it did not appear that any other society for a like purpose was ever formed in this country. *Held*, that the society so incorporated was entitled to the devise; but did not, as residuary devisee, take that part of the estate, the devise of which was void. *Ib.*

20. A testator devised his estate to "the Protestant Episcopal Church in New Canaan; the income of which to be paid for the support of the rector or minister of said church; and the same to be a perpetual fund, under the management of the wardens and vestry of said Episcopal church." Parol evidence was offered to show that there was an incorporated society of the Episcopal denomination in New Canaan, legally formed by the voluntary association of its members, having no other name than that which it had acquired by assumption or reputation; that its warden, vestrymen, and other officers, and also its delegates to the general convention, were chosen by this society, at its meetings; that the terms "church" and "parish" were, by this denomination of Christians, used indiscriminately, and in the same sense as the term "society;" that there was also, another body of persons, not incorporated, composed of those members of said society only who were communicants, and had been baptized, and which constituted the "church" in the society; that the deviser himself, in speaking of the affairs of the society, always called it the "church;" that he had long been a member of the society,

and contributed to its support very liberally. *Held*, that such parol evidence was admissible to show that said society was intended by the testator, in the will, as the object of his bounty. *Conn. Supreme Ct.* 1844, *Ayres v. Weed*, 16 *Conn.* 291.

21. Effect of uncertainty in the designation of the corporation. Where a testator desired his executors to pay a certain sum to a benevolent society, if any existed, to alleviate the sufferings of the most prudent poor, but not the intemperate, in procuring food, clothing, and other necessities, which such persons want in winter,—*Held*, that a society whose objects were the promotion of the temperance cause, by the diffusion of temperance knowledge, the circulation of the pledge of total abstinence from all intoxicating liquors, and the dispensation of the charity of the association to the suffering poor of a certain city and its districts, of good moral character, who do not use intoxicating liquors as a beverage, was not entitled to the legacy. *Pa. Supreme Ct.* 1844, *Grandom's Estate*, 6 *Watts & S.* 537.

22. A devise to the fellows and demies of Magdalen College, Oxford, upon the happening of a particular event,—*Held* void for uncertainty; the language of the condition and the description of the legatees being too loose and indefinite to enable it to be carried into effect. *Chancery*, 1830, *Attorney General v. Sibthorp*, 2 *Russ. & M.* 107.

23. A testator devised property "to the annual conference of the Methodist Episcopal Church, for the benefit of institutions of learning under the superintendence of said conference, and the missionary society of the Methodist Episcopal Church, and to be otherwise disposed of as the Tennessee annual conference may deem best in their wisdom." *Held*, that the devise was void, being indefinite and uncertain, both as to the persons and objects of the charity. *Tenn. Supreme Ct.* 1844, *Green v. Allen*, 5 *Humph.* 170.

24. — in the specification of the object intended. A devise that land should be sold and "the proceeds laid out in building convenient places of worship, free for the use of all Christians, who acknowledge the divinity of Christ and the necessity of a spiritual regeneration," is void for uncertainty. *N. C. Supreme Ct.* 1845, *White v. Attorney General*, 4 *Ired. Eq.* 19.

25. One L., in his last will and testament, devised as follows: "All the real estate of which I shall die seised and possessed, shall fall into the possession of my wife, G., for her own use and benefit during her lifetime; at which time I direct and authorize the Right Reverend Bishop Loras, or his successors, to dispose of my real estate, and apply so much thereof to the church, or to the education or maintenance of poor children, as he in his wisdom may think proper and legal." The Bishop, after the death of the wife of the testator, conveyed a portion of the real estate by deed. *Held*, that the devise was void for uncertainty; that no legal estate, or beneficial interest, passed to Bishop Loras under the will; and that the real estate of L., after the death of his wife, descended to his heirs, unaffected by the provisions of the will. *Iowa Supreme Ct.* 1857, *Lepage v. McNamara*, 5 *Iowa*, 124.

26. A devise of a lot of land to A, in trust, as the site for a building for a free school, for the benefit of all poor children in a certain district in a city, and for a lecture room for religious worship, and of another lot of land as a site for a dwelling house to be occupied by the minister that may from time to time officiate in said room, the said lecture room to be for the use of the denomination of Christians called Methodist Episcopal, and a bequest of \$1,200 towards said building, are good. *N. J. Chancery*, 1848, *Baldwin v. Baldwin*, 3 *Halst. Ch.* 211.

27. Neglect of condition. Where land was devised to a town for the purpose of building a school house, but the town neglecting for twenty years to comply with the condition, in the mean time, applied part of the rents and profits "for the use of schooling,"—*Held*, that the residuary devisee could recover the land from the town, as forfeited by breach of the condition. *Mass. Supreme Ct.* 1827, *Hayden v. Stoughton*, 5 *Pick.* 528.

28. Gift of proceeds of lands. Under the Delaware act of 1787, which provides that all devises of land to religious corporations shall be void, a devise of the net proceeds of the sale of a testator's land to the trustees of a church, to be by them applied to the purpose of educating poor children of the members of the church,—*Held* to be void; upon the principle that the proceeds of the realty are to be subject to the same rules as the

realty itself. *Del. Superior Ct.* 1885, *State v. Wiltbank*, 2 *Harring*. 18.

29. A devise of lands, to be sold by the executors with direction to distribute the proceeds among certain religious corporations, is a devise of personalty, and as such is not prohibited by the South Carolina act of 1783 (8 Stat. 341), excepting corporations from the objects of the devises of land. *S. Ct. of Appeals*, 1859, *American Bible Society v. Noble*, 11 *Rich. Eq.* 156.

30. Surplus. A testator devised an estate to the rector and church wardens of a church, in trust, out of the rents and profits thereof to pay a certain sum annually to the church, for its own use, and certain other sums annually for certain public charities. No specific disposition of any surplus which might exist or arise, was made. Yet it did not appear that such surplus was unexpected by the testator, who showed his intention in various parts of the will to devise his estate for the benefit of the church. A large surplus was subsequently developed. *Held*, that the church was entitled to hold it for its own use. *Mass. Supreme Ct.* 1864, *Attorney General v. Rector &c. of Trinity Church*, 9 *Allen*, 422.

31. Change in value. A testator by his will founded a charity, towards which he directed certain definite sums to be applied, and he devised estates to a corporation for that purpose. The will contained no express beneficial gift to the company. *Held*, however, under the circumstances, that the corporation was entitled to the increased rents of the property after making the fixed payments. *Rolls Ct.* 1848, *Attorney General v. Grocers' Co.* 6 *Beav.* 526; 12 *Law J. N. S.* 195; 8 *Jur.* 1155.

DIRECTORS.

- I. THEIR OFFICE GENERALLY.
- II. THEIR POWERS AND DUTIES.
- III. THEIR RIGHTS AND LIABILITIES.

I. THEIR OFFICE GENERALLY.

1. Who is eligible. Provision in a bank charter requiring a certain portion of the directors to be practical mechanics,—*Held*, not to require that they should be in actual practice at the time of election. *Circ. Ct. D. C.* 1812, *Gray v. Mechanics' Bank of Alexandria*, 2 *Cranch C. Ct.* 51.

2. A by-law of a corporation provided that any person chosen a director should cease to be one when he ceased to be a proprietor. *Held*, that this, by implication, rendered any one not a proprietor ineligible to to the office. *N. H. Superior Ct.* 1841, *Despatch Line of Packets v. Bellamy Manuf. Co.* 12 *N. H.* 205.

3. That a married woman may be a trustee—*e. g.* of a corporation,—see *People v. Webster*, 10 *Wend.* 554.

4. That a treasurer of a corporation may also be a director,—see *Sargent v. Webster*, 13 *Metc.* 497.

5. Where the charter of an incorporation provides that stockholders only shall be elected directors, persons having no interest in the stock, but fraudulently and collusively receiving the transfer of a share to qualify them are not eligible; and such fraud on the charter will prevent those participating in it from receiving any protection under its provisions to escape private responsibility. *Ohio Supreme Ct.* 1852, *Bartholomew v. Bentley*, 1 *Ohio St.* 37.

6. Where the qualification of a party to act as a director of a company consists in his being the proprietor of a certain number of shares, the qualification will not be lost by a mortgage of those shares. *Exch.* 1887, *Cumming v. Prestcott*, 2 *You. & C.* 488.

7. By the articles of association of a joint stock company, S. and others were appointed directors. One clause provided "that no person should be eligible as a director unless he should hold fifty shares at the least." S. only held twenty-five shares. *Held*, on the winding up, that S. was only a contributor for twenty-five shares. The clause as to qualification did not apply to a director appointed by the articles. *Chancery* 1864, *Re Llanharry Hematite Iron Co. (Stock's Case)*, 33 *Law J. N. S.* 731.

As to Mode of electing directors, in common with other officers, see ELECTION.

8. Directors *de facto*, of a corporate body, are to be considered, *prima facie*, as directors *de jure*. It is not incumbent upon them, in an action to recover the amount of a subscription for stock, to prove that the managers were elected by a majority of the votes.*

* In England it has been held that in assumpsit by directors of a joint stock company, constituted by deed, the deed must be produced to show who are the directors; and it is not sufficient to show that the plaintiffs are the persons act-

Circ. Ct. D. C. 1824, Rockville & Washington Turnpike Road v. Van Ness, 2 *Cranch C. Ct.* 449.

9. How their qualifications may be questioned. If a corporation elect a person a director who is ineligible to that office, and permit him to act as such, the corporation will be bound by the acts which he performs, within the scope of the authority possessed by a director. *N. H. Superior Ct.* 1841, Despatch Line of Packets v. Bellamy Manuf. Co. 13 *N. H.* 205.

10. A court of equity will not entertain a bill by shareholders in an incorporated company in matters relating merely to the internal government of the corporation, such as to restrain directors *de facto* from acting as such, on the sole ground of the alleged invalidity of their title to their offices. *Chancery*, 1847, Mozley v. Alston, 1 *Phill.* 790.

11. In an action for calls, the defendant applied to set aside the proceedings on the ground that the action had been brought without authority, as the company had ceased to exist. *Held*, that as the cause had been set down for trial, and the defendant had known the facts for a long time, the application was too late; and that as the persons authorizing the action had for some time acted as directors, the validity of their appointment could not be questioned on such an application. *C. P.* 1843, Thames Haven Dock, &c. Co. v. Hall, 3 *Eng. Railw. Cas.* 441.

12. A stockholder in a corporation, which has exercised all the functions and franchises contemplated by its charter for more than a year, cannot set up in defence to a suit by the corporation for an assessment upon his stock, that, the board of directors by whom the assessment was made, having been elected beyond the limits of the State by which the charter was granted, the call was illegal. The directors were such *de facto*, and the legality of their election cannot be inquired into collaterally without showing a judgment of ouster against them in a direct proceeding by the government for that purpose. *Mo. Supreme Ct.* 1864, Ohio & Mississippi R. R. Co. v. McPherson, 35 *Mo.* 13.

13. Acceptance of the office necessary. As to what is sufficient dissent from appoint-

ment as a director or committee man, to prevent one from being liable as such,—see *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 *Paige*, 127.

14. An injunction will lie to restrain the provisional directors of a joint stock company who have, without the authority of the plaintiff, published a prospectus, stating him to be a trustee of the company, from using his name in connection with the company. *Rolls Ct.* 1847, Routh v. Webster, 10 *Beav.* 561; 11 *Jur.* 701.

15. A person, on being invited to become a director in a banking company consented, provided he should be satisfied that a certain proportion of the capital had been subscribed, and that certain persons named in the prospectus as directors would actually become such. He attended one meeting of the direction, and joined in signing a check with another director; but on receiving, a few days afterwards, a letter of allotment of the shares necessary to qualify him, at once returned it, declining to act as director, as he was not satisfied upon the two points stipulated by him, or to receive the shares. The secretary wrote back, saying that his resignation had been accepted. *Held*, that he was not liable as contributory. *Vice Chan. Ct.* 1866, *Re Peninsular &c. Bank (Austin's Case)*, 2 *Law Rep. Eq. Cas.* 485.

16. The charter of a bank provided that the directors should remain in office until their successors should be elected. An election for bank officers took place at a time when the corporation was insolvent, and for sixteen years no corporate acts were performed. *Held*, that the directors could not be deemed to have continued in office, their neglect to perform any duty for so long a time being equivalent to an abandonment or resignation of the office. *Ohio Supreme Ct.* 1852, Bartholomew v. Bentley, 1 *Ohio St.* 37.

17. A director in a joint stock company who has become bankrupt, must nevertheless be joined as plaintiff in an action of assumpsit by the directors, even although he has ceased to act, unless it be shown that he has vacated his office. A director, by becoming bankrupt and ceasing to act, does not cease to be a director, unless in pursuance of the provisions of the deed. *Q. B.* 1839, Phelps v. Lyle, 2 *Per. & D.* 314; 10 *Ad. & E.* 113; 3 *Jur.* 479.

ing as directors. *Q. B.* 1839, Phelps v. Lyle, 2 *Per. & D.* 314; 11 *Ad. & E.* 113; 3 *Jur.* 479.

18. It lies upon plaintiffs suing as directors, to show that they are such directors; and, if one who was also a director is omitted, to show that his character of director has legally determined. *Id.*

See also OFFICERS.

19. Where church membership is a necessary qualification of the trustees who are to manage the affairs of the corporation, a trustee who withdraws himself from the church, and joins a church of another denomination, which latter church prohibits a connection by its members with the former, will be considered as having abandoned his office of trustee, and as having no further interest in the property of the church he has left. *La. Supreme Ct.* 1859, *Ross v. Crockett*, 14 *La. Ann.* 811.

20. Removal. Where a bank in insolvent circumstances transferred its effects to a single trustee, for the equal benefit of all its creditors. Subsequently, by a valid deed, additional trustees were associated in the trust, in good faith, and openly, and with the advice and consent of a large number of its creditors, without being required to give bond. There was no evidence of mismanagement or neglect of the trust, or that the trustees had done anything to forfeit the confidence reposed in them, nor of any unfavorable change in their circumstances since their appointment, and no cause appeared to apprehend any. The court refused to interpose by the appointment of receivers or otherwise. *Md. Ct. of Appeals*, 1836, *Bank of Maryland v. Ruff*, 7 *Gill & J.* 448.

21. Relation between directors and shareholders. The relation between directors of a corporation and its stockholders, is that of trustee and *cestui que trust*. *N. Y. Supreme Ct.* 1862, *Butts v. Wood*, 38 *Barb.* 181. And see *Verplank v. Mercantile Ins. Co.* 1 *Edw. Ch.* 84.

22. Directors of a public company are trustees for the shareholders, and their private interests must yield to their public duty whenever they are conflicting. *Rolls Ct.* 1854, *Exp. Bennett*, 18 *Beav.* 339.

23. Directors to whom the entire management of the company is intrusted, and who receive a remuneration for their services out of the funds of the company, are under an obligation to the shareholders at large, to use their best exertions in all matters which relate to the affairs of the company. And

without any stipulation to that effect, the duty results, from the employment, not to make any profit out of the employment, beyond their compensation, and not to acquire any adverse interest, while they remain directors. *Vice Chanc. Ct.* 1842, *Benson v. Heathorn*, 1 *You. & C. Ch.* 326.

24. The directors of a corporation are the persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by the shareholders, therefore, that shares or any other species of property shall be placed at the disposal of the directors, is a resolution that it shall be at the disposal of trustees; in other words, that the persons entrusted with that property shall dispose of it within the scope of the functions delegated to them in the manner best suited to benefit their *cestuis que trust*. To construe these words as importing a gift to the directors for their individual advantage, or as investing them with a secret and irresponsible trust, is impossible, unless they are coupled with clear and unambiguous expressions to that effect. In the absence of any such expressions, not only the obligation of discharging the duty lies upon the persons accepting the trust, but also the further obligation of accounting for their discharge of it to their *cestuis que trust* whenever required. *Vice Chanc. Ct.* 1853, *York & C. Railway Co. v. Hudson*, 19 *Eng. L. & Eq.* 361; 16 *Beav.* 495, 22 *Law J. N. S.* 529.

25. Directors and managers of insolvent corporations are trustees of the funds, as well for the creditors as for the corporation, and are bound to apply them *pro rata*, and cannot use them to exonerate themselves to the injury of other creditors. *N. H. Supreme Ct.* 1861, *Richards v. New Hampshire Ins. Co.* 43 *N. H.* 263.

26. The directors of a life insurance company, on the transfer of its business to another company, received from the latter a large sum for compensation, the particulars of which they withheld from their members. Held, that they were trustees of the money for the members (the profits of the company being divisible among the policy holders), and they were ordered, on an interlocutory application, to pay it into court. *Rolls Ct.* 1858, *Gaskell v. Chambers*, 26 *Beav.* 860.

27. The managers or directors of a bank are not, *it seems*, considered in equity as trustees of the corporation, in such sense that they cannot purchase and retain stock of the bank by them purchased of it, the stock having been in the first place bought up by the bank as a mode of employing its capital. See *Hartridge v. Rockwell*, *R. M. Charlt.* 260.

28. The directors of a business corporation are, by the nature of their office, the general agents, and it is one of their duties to provide for the payment of the debts and liabilities. And one of them cannot, when sued by the holder of a draft drawn on him by authority of a vote of the board, passed in his presence, and for the purpose of providing for payment of a debt due to himself, dispute the authority of the vote. *Mo. Supreme Ct.* 1841, *Belknap v. Davis*, 19 *Mo.* 455.

29. The directors of a corporation are its agents with limited powers, and their duties are to conduct its affairs in furtherance of the ends of its creation. They have no power to destroy it, to give away its funds, or to deprive it of any of its means to accomplish the full purpose for which it was chartered. *Pa. Supreme Ct.* 1864, *Bedford R. R. Co. v. Bowser*, 48 *Pa. St.* 29.

30. Though the directors of a company undoubtedly stand in the position of agents, and cannot bind their company beyond the limits of their authority, they also stand in some degree in the position of trustees, and as such are entitled to be indemnified against expenses *bona fide* incurred by them in the due execution of their trust. *Chancery*, 1854, *Re German Mining Co.* 27 *Eng. Law. & Eq.* 158.

31. The shareholders in a corporation are not bound to look into the management, and will not be held to have notice of everything which has been done by the directors, who may be assumed by the shareholders to have done their duty. *Chancery*, 1866, *Re Agriculturist's Cattle Ins. Co.* (*Stanhope's Case*), 1 *Law Rep. Ch. App.* 161; 35 *Law J. N. S.* 296; 12 *Jur. N. S.* 79.

II. THEIR POWERS AND DUTIES.

32. What powers may be conferred. The legislature may confer enlarged powers upon the managers of a corporation with the as-

sent of the body of the shareholders, and no one stockholder, by refusing his assent, can hinder their exercise. Thus, the directors of a corporation, authorized by an act of the legislature, which the stockholders have accepted, may issue preferred stock, notwithstanding the opposition of individual shareholders. *Pa. Supreme Ct.* 1867, *Curry v. Scott*, 54 *Pa. St.* 270.

33. Where they may meet. The directors of a corporation are not a corporate body; they are, when acting as a board, but a board of officers or agents, and they may exercise their powers as agents beyond the bounds where the corporation exists. Thus, where a charter, granted by the State of Illinois, created a corporation and appointed a board of directors. *Held*, that the directors had power to meet and act in the State of Missouri. *Mo. Supreme Ct.* 1864, *Ohio & Mississippi R. R. Co. v. McPherson*, 85 *Mo.* 13.

34. The act of the directors of a corporation, by which an authority is conferred upon an agent to execute a deed, is not a corporate act: the directors act in such a case, not as the corporation, but as the agents of and in behalf of the corporation. And it is no objection to the validity of the vote of the directors that it was passed at a meeting of the board, held out of the State where the corporation was created and exists. *Vt. Supreme Ct.* 1864, *Arms v. Conant*, 86 *Vt.* 744.

35. How far a formal meeting is necessary. A formal meeting of the directors of a corporation is not necessary in order to enable them to do any act which is within their corporate powers. *Vt. Supreme Ct.* 1865, *Waite v. Windham County Mining Co.* 37 *Vt.* 608.

36. Where the clauses of a statute (8 *Vict. ch. 16*) enact that the directors of companies incorporated under the act are to hold meetings, at which the prescribed quorum must be present, and that questions at such meetings are to be determined by a majority of votes, it is essential that the directors act together, and as a board, though a fixed place of meeting is unnecessary. *Exch.* 1867, *D'Arcy v. Tamar &c. Railway Co.* 2 *Law Rep. Exch.* 158; 86 *Law J. N. S.* 37; 4 *Hurlst. & O.* 468.

37. The prescribed quorum of directors of an incorporated company being three, the

secretary affixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third, to sign the authority. In an action upon this bond,—*Held*, that the corporate seal was affixed without lawful authority, and that the company were therefore not liable upon the bond. *Ib.*

38. *It seems* that it is sufficient presumptive proof, for a stranger, of the concurrence of a quorum of a board of directors of a corporation, to show that they assented separately. *N. H. Supreme Ct. 1861, Tenney v. East Warren Lumber Co. 48 N. H. 843.*

39. The presence, in unofficial capacity, of two directors of a corporation, at an interview between a contractor for the corporation and its agent for a particular purpose, is no evidence of their assent or the assent of the corporation, to an arrangement then made in behalf of the corporation, by such agent, and exceeding his powers, with the contractor. *Mo. Supreme Ct. 1857, Barcus v. Hannibal &c. Plank Road Co. 26 Mo. 102.*

40. How many must unite. Where the directors of a corporation have power to bind it by their contracts, that power may be exercised by a majority of that body. *Me. Supreme Ct. 1835, Cram v. Bangor House Proprietary, 12 Me. (8 Fairf.) 354.*

41. Where the president and two of the directors of a corporation constitute a quorum, the two directors, at a meeting at which the president and two directors are present, are competent to make a valid sale to the president, of real estate belonging to the corporation. *Iowa Supreme Ct. 1864, Buell v. Buckingham, 16 Iowa, 284.*

42. The action of a committee appointed in pursuance of the by-laws of a corporation, to audit the accounts of the treasurer and all other financial accounts of the corporation, is not conclusive upon the corporation until the same has been accepted and adopted by the board of directors; nor even then, where it appears that at such acceptance before the board, of which the committee were members, one of the votes of such committee was required to make a majority. *Vt. Supreme Ct. 1863, Waite v. Windham County Mining Co. 36 Vt. 18.*

43. Proof of directors' acts. Where, in

an action against a corporation by its treasurer, for a balance due him for services rendered, which has been audited, and allowed by the board of directors, a doubt is raised from what appears upon the company's records, that the action of the board is not of such a character as to be binding on the company, the latter may be permitted to inquire into the action of the auditors and directors, so far as to determine whether there has been a *bona fide* allowance of the plaintiff's account as presented. *Ib.*

44. Proof of directors' acts. The non-recorded acts of directors may be proved by parol, unless otherwise provided in the charter. *Ind. Supreme Ct. 1859, Langsdale v. Bonton, 12 Ind. 467.*

45. Delegation of powers. Where the power of allotting or distributing unsubscribed shares in an incorporated company is vested by the deed of settlement in the board of directors, they have no right to delegate such power. *Chancery, 1866, Re Leeds Banking Co. (Howard's Case), 1 Law Rep. Ch. App. 561; 12 Jur. N. S. 655; 14 Law Times, N. S. 747.*

46. Where, by a bank charter, the power of discounting notes and bills was vested in the board of directors,—*Held*, that they could not delegate this trust to an agent or agents of the board. *La. Supreme Ct. 1832, Percy v. Millaudon, 3 La. 568.*

47. Power to apply for amendment of charter. Under a charter providing that the stock, property, and affairs, of the corporation, shall be managed by directors, and that they shall have power to make such by-laws, rules, and regulations, as they think expedient for the management of the concerns of the corporation, the directors have not power to make application to the legislature for an increase of their powers. Such application can be made by the corporation only. And a resolve of the legislature, passed on such application without authority from the company, giving power to the company to raise an additional assessment on the stockholders, for the purpose of paying the debts is inoperative. *Conn. Supreme Ct. 1818, Marlborough Manuf. Co. v. Smith, 2 Conn. 579.*

48. — to accept one. The acceptance of an amendment to its charter is a power incident to a corporation, which may be exercised by a board of directors, if there is

no other active governing body in whom it is vested. *Cincinnati Superior Ct.* 1855, *Dayton & Cincinnati R. R. Co. v. Hatch*, 1 *Disney*, 84.

49. — to bind the company by declarations or representations. The declarations or acts of a director in a corporation will not bind, or in any manner affect, the corporation, unless they are within the scope of his ordinary powers, or some special agency relative to the subject matter. *N. Y. Supreme Ct.* 1855, *Soper v. Buffalo & Rochester R. R. Co.* 19 *Barb.* 310.

50. The declarations of individuals, who are directors of a bank, not forming a part of an official act, are not admissible to prove an antecedent fact against the bank. *N. H. Superior Ct.* 1846, *Pemigewassett Bank v. Rogers*, 18 *N. H.* 255.

51. Neither stockholders nor directors, without special power, can create a corporate liability; hence the confessions, admissions, or knowledge of either, while not engaged in the precise business confided to them, cannot affect the corporation. *Cincinnati Superior Ct.* 1857, *Loomis v. Eagle Bank of Rochester*, 1 *Disney*, 285.

52. Directors of a company, in publishing false and fraudulent representations with regard to the affairs of the company, or in doing any other act not within the scope of their authority as limited by the deed of settlement, cannot be considered as the agents of the company, so as to bind the company. *Chancery*, 1859, *Re Royal British Bank (Ex p. Nichol)*, 5 *Jur. N. S.* 205; 28 *Law J. N. S.* 257.

53. Hence, if directors, in the course of the performance of their duty, make false or fraudulent representations addressed to shareholders, and afterwards give them an authorized circulation beyond the limits of the company, a stranger acting upon such representations, and suffering loss in consequence, has no remedy against the company, unless he can show that the whole company was a party to the fraud. *Id.*

54. A company was formed for mining purposes. The prospectus referred to the memorandum and articles of association, and described in favorable terms a mine for the purchase of which a contract had been entered into. This mine was afterwards found to be worthless, and the directors rescinded the contract, and agreed to purchase

another. *Held*, that a shareholder who had subscribed on the faith of the prospectus was entitled to an injunction against an action for calls, although the directors had themselves been deceived, and had been guilty of no willful fraud. Directors are bound to ascertain the truth of the representations made on their prospectus. *Vice Chan. Ct.* 1866, *Smith v. Reese River Co.* 2 *Law Rep. Eq. Cas.* 264.

55. — to bind the company by contracts. A corporation entered into an agreement with certain railroad contractors, that, if the latter would contract to build a certain railroad in which the corporation were interested, upon the basis of a stock subscription, and subscribe for a specified amount of stock, the former would convey as many shares of their stock as should be agreed upon by the president and the contractors, subject to the approval of the directors. The contract was subsequently completed; the stock subscribed for; the shares of the corporation transferred by the president, whose action the directors approved; and the resolution of the directors was approved by the stockholders. *Held*, that, even if the road was never built, and the stock never paid for, and admitting that the corporation were entitled in equity to a return of their stock, neither the fairness nor validity of the issue of the stock, nor the legality of the election of directors chosen by votes cast upon the stock thus issued, was thereby impaired. *N. J. Chancery*, 1864, *Savage v. Ball*, 17 *N. J. Eq.* (2 *O. E. Green*), 142.

56. Where a corporation sued one who had contracted to build a bridge and furnish all materials, for a breach of the contract,—*Held*, that the fact that the work was unfinished because the corporation had not provided certain materials which the president, a director, told the contractor that the corporation should furnish, was not available; on the ground, among others, that the directors had no authority to give a construction to the written agreement. *Conn. Supreme Ct.* 1822, *Hartford Bridge Co. v. Granger*, 4 *Conn.* 142.

57. A railway company which was not in a position to raise money under the borrowing powers in their special act, requiring money, the chairman and one of the directors raised it on their joint and several promissory notes, and the money was applied for

the purposes of the company. Subsequently the director paid the notes, and brought his action against the chairman, when the board, "to discharge the liability of the chairman," authorized the secretary to seal "Lloyd's bonds" to the amount of the liability:—*Held*, in an action brought by the chairman upon one of these bonds, that it was illegal, and that the plaintiff could not recover. *Q. B.* 1864, *Chambers v. Manchester & Milford Railway Co.* 33 *Law J. N. S.* 268.

58. A director, is not authorized, as such, without special authority, to make notes binding the corporation. *N. Y. Supreme Ct.* 1864, *Lawrence v. Gebhard*, 41 *Barb.* 575.

59. Where a trustee of a corporation gave his note to it, but not for the purpose ostensibly put forth, and there was a lawful purpose for which it might have been given, of the same apparent character as that put forth,—*Held*, that the jury might find it to have been given for the latter object, rather than to find that the maker had made it in fraud of those for whom he was trustee. *N. Y. Superior Ct.* 1848, *Brower v. Hill*, 1 *Sandf.* 629.

60. The directors of a mining association cannot bind the members by accepting a bill, unless they are authorized to do so by the deed or instrument of copartnership, by the necessity of such a power to the carrying on of the business, by the usage of similar establishments, or by express assent of the party sought to be charged. Still less can the directors bind the members by a bill drawn upon the directors by their own servant, such a bill being in effect a promissory note. *K. B.* 1829, *Dickinson v. Valpy*, 10 *Barn. & C.* 128; 5 *Mann. & R.* 126.

61. The subscribers' agreement of a provisionally registered company authorized the directors to adopt all such measures as they should in their judgment consider necessary or expedient for the promotion of a certain undertaking. *Held*, that a resolution of the directors, enabling any three of them to draw checks on the funds of the company was within this power, and that when the three directors drew a check under the authority given by that resolution, and applied the money improperly, those directors, who were not privy to such drawing or application were not liable. *Chancery*, 1855, *Re Direct East &c. Railway Co.* (*Exp. Johnson*), 31 *Eng. L. & Eq.* 480.

62. — to deal with the company.* An agreement, made by a majority of the directors of a corporation, among themselves, privately and unofficially, that they should be paid a percentage, upon all the money raised upon the credit of a bond of indemnity, signed by them, against the future indebtedness of the corporation, is not binding on the corporation. *Conn. Supreme Ct.* 1853, *Butler v. Cornwall Iron Co.* 22 *Conn.* 385.

63. A ship's husband being a servant of the ship owners, holding an important office and open to the vigilant superintendence of his employers, it is presumptively a breach of trust in any director of a company established for the purpose of acquiring and working vessels, especially where the directors have the exclusive management of the concern, to take upon himself the duties of a ship's husband. *Vice Chan. Ct.* 1842, *Benson v. Hearthorn*, 1 *You. & C.* 326.

64. Where, therefore, in a company so constituted, one of the directors, with the consent of others forming with himself a board of directors, undertook the office of ship's husband, and in that character received out of the funds of the company such sums for commission and brokerage as are usually allowed to the ship's husband,—*Held*, that he must refund those moneys. And it seems the other members of the board of directors would be similarly responsible, in the event of any inability in the principal party implicated, to refund. *Id.*

65. — to dispose of assets. A purchase

* The English "companies clauses consolidation act" (8 & 9 Vict. ch. 16), provides that no person interested in any contract with the company shall be capable of being a director, and no director shall be capable of being interested in any contract with the company during the time he shall be a director; and that, "if any director, at any time subsequent to his election be directly or indirectly concerned in any contract with the company, then the office of such director shall become vacant, and he shall cease from voting or acting as director." Under these provisions, it has been—*Held*, that if a director enters into a contract with the company, the contract is not thereby rendered void, but only the office of director is vacated. *Foster v. Oxford &c. Railway Co.* 13 *C. B.* 290; 17 *Jur.* 167; 14 *Eng. L. & Eq.* 306.

Under similar provisions, in an earlier act of incorporation, it was *Held*, that being a member of a banking company, who were the bankers and treasurers of the railway and who, as such, received and gave receipts for calls, and paid checks drawn by the directors, would not disqualify one from acting as director, but that the clause only applied to such contracts as were made with the company in the prosecution of its enterprise. *Sheffield &c. Railway Co. v. Woodcock*, 7 *Mess. & W.* 574; 2 *Eng. Railw. C.* 522.

of property by a director of a corporation from the board of directors, like a purchase of a trustee from his *cestui que trust*, is not void but only voidable, and when the director is guilty of no fraud or concealment, and pays the value of the property, and it is the intention of the directors to sell it to him, equity will uphold the sale. *Iowa Supreme Ct.* 1864, *Buell v. Buckingham*, 16 *Iowa*, 284.

66. The directors of an incorporated company cannot speculate with the funds or credit of the company and appropriate to themselves the profits of the speculations. *N. J. Ct. of Errors*, 1858, *Redmond v. Dickerson*, 1 *Stockt.* 507.

67. The directors of a corporation have no power to sell the entire movable property of the corporation, where this prevents the continuance of their business; and such a sale made by them, is void as against such stockholders as do not assent.* *N. Y. Supreme Ct.* 1861, *Abbot v. American Hard Rubber Co.* 38 *Barb.* 578; *S. C.* 21 *How. Pr.* 198.

68. A resolution passed by the board of directors of a corporation, the design and effect of which was to transfer the property of the company to the directors, without value, or by way of inducement to them to pay their honest debts to the company, is void. And the fact that the only party to be injured by the transfer of stock, in pursuance of such a resolution, was himself acting fraudulently towards the company will not justify a violation of their duty on the part of the directors. *N. J. Chancery*, 1862, *Hilles v. Parrish*, 14 *N. J. Eq.* (1 *McCart.*) 380.

69. Directors of a railway company have no right to enter into, or to pledge the funds of the company in support of, any project not pointed out by their act, although such project may tend to increase the traffic upon the railway, and may be assented to by the majority of the shareholders, and the object of such project may not be against public policy. And acquiescence by shareholders in a project for ever so long time, affords no presumption of its legality. *Rolls Ct.* 1846, *Colman v. Eastern Counties Railway Co.* 4 *Eng. Railw. Cas.* 518.

70. The managing directors of a joint

stock company, who have power, under a simple trust, to sell or lease the works of the company, cannot, in the lease, give an option to the lessee, to purchase, or not, at a price fixed, the entire works of the company, at any time within twenty years. Such a contract must be ratified, by every member of the company, to become binding upon them. *Vice Chan. Ct.* 1852, *Clay v. Rufford*, 19 *Eng. L. & Eq.* 350; 5 *De Gaz & S.* 768.

71. Directors and stockholders of a bank cannot, by making an assignment to which the creditors of the bank are not parties, nor consenting, deprive such creditors of their remedies against them for a breach of duties. *Ga. Supreme Ct.* 1858, *Schley v. Dixon*, 24 *Ga.* 278.

72. A majority of the directors of an insolvent corporation conveyed the property of the company to two of the stockholders, A and B, under an agreement by which a part of the directors were to be interested in the purchase, and, with A and B, were to pay therefor. A and B afterward procured an assignment of a judgment and execution which had been levied on all the property of the company, and were proceeding to sell the same on the execution when a junior judgment creditor obtained an injunction restraining such sale, on a bill in equity, alleging that the conveyance to A and B was fraudulent, and without consideration, and that it was calculated to prevent any one from bidding at the sale. The answer filed by A and B stated it to be a part of the arrangement that the consideration money for the conveyance should be paid and applied directly on account of the company to the creditors thereof, but it did not allege that they ever paid, or secured, or promised or intended to pay the consideration, or any part of it, in the way consideration money is usually paid or secured. *Held*, that the injunction should not be dissolved. *N. J. Chancery*, 1845, *Smith v. Loomis*, 1 *Halst. Ch.* 60.

73. — to fix salaries of officers. The power to fix the salary of the treasurer of a corporation, unless prohibited or otherwise restricted by charter, is incident to the duties of the directors. *Vt. Supreme Ct.* 1865, *Waite v. Windham County Mining Co.* 37 *Vt.* 608.

74. — to remove officers. Power of amotion (including that of suspension) cannot

* A sale by the building committee of a corporation, of the corporate property to the builder, in liquidation of his claim, made without special authority, is illegal, and will be declared void. *African M. E. Church v. Durn*, 19 *La. Ann.* 802.

be delegated to board of directors. *State ex rel. Graham v. Chamber of Commerce of City of Milwaukee*, 20 Wis. 63.

75. — to release subscribers. It may well be doubted whether a board of directors are authorized, under their general power, to release a subscriber from his obligation to take stock, without consideration. But if they exercise such power and, by vote, grant an optional release, the subscriber must make the election contemplated in the charter within a reasonable time. An appearance by proxy and voting upon the shares subscribed for, after the expiration of such time, will be held an election to keep them. *Ms. Supreme Ct.* 1855, *Penobscot & Kennebec Railroad Co. v. Dunn*, 39 Me. 587.

76. A board of directors of a railroad company, after reciting a condition attached to certain subscriptions, by the commissioners appointed to take such subscriptions prior to the organization of the company, resolved that the condition be adopted as the act of the company; that the stock of each subscriber be purchased by the company, and the payment of the subscription assumed; that the stock be surrendered, and the subscription annulled and canceled by the secretary. *Held*, that such action on the part of the board was irregular and unauthorized, and the cancellation of the subscription in accordance therewith, invalid. And it was error on the part of the court to instruct the jury that, if the company had assets sufficient to pay their debts, the cancellation was valid and released the subscribers, of whom the defendant was one. *Pa. Supreme Ct.* 1864, *Bedford R. R. Co. v. Bowser*, 48 Pa. St. 29.

77. In an action to recover the amount of a subscription for railroad stock that had been so canceled,—*Held*, that minutes of the company showing, that immediately after the election of the new board of directors, they repealed the resolution of their predecessors, were admissible in evidence against the defendant as a corporator. The books of the company were evidence against him, unless his relationship to it had terminated, which the court had no right to decide. It was also competent for the company to prove what took place when the first resolutions were adopted, as showing that the action of the board was fraudulent and unauthorized. *Id.*

78. The deed of settlement of a joint stock company provided for the transfer of shares, with the approbation of the directors. Some of the shareholders being dissatisfied with the management of the company's affairs, and threatening to take proceedings to set aside a purchase and lease for fraud, the directors agreed with them, that they should be allowed to transfer their shares on payment to the company of a specified sum, out of which a claim of one of the directors against the company should be satisfied. The money was paid and the claim satisfied, and the shares were transferred to nominees of the directors for a nominal consideration. *Held*, that the transaction was *ultra vires*, the directors having no authority thus to sanction the retirement of a body of the shareholders, and that the shareholders were, notwithstanding the transfer, properly placed on the list of contributories. *Chancery*, 1854 (*Exp. Bennett*), 5 De Gea, M. & G. 284; 24 Law J. N. S. 130.

79. Effect of excess of power. Where the directors of a company do acts in violation of their deed, in a matter in which they have no authority, such acts are altogether null and void. But when acts to be done are within the power and duty of the directors, and are neglected, and thereby third parties are damaged, neither a court of law nor of equity will allow the company to take advantage of that neglect. *H. of L.* 1854, *Bargate v. Shortridge*, 31 Eng. L. & Eq. 44; 5 H. L. Cas. 297.

III. THEIR RIGHTS AND LIABILITIES.

80. Right to compensation. Generally, directors are not entitled to compensation for their personal services, as such, unless rendered under some express contract, or vote of the company. *Vt. Supreme Ct.* 1856, *Hall v. Vermont & Massachusetts R. R. Co.* 28 Vt. 401. See also *Pierson v. Thompson*, 1 Edw. Ch. 212.

81. A director of a corporation, elected to serve without compensation, cannot recover against the company for services rendered in that capacity, or for such as were incidental to his office of director. Even a resolution, passed by the corporation after the services rendered, that they be paid, is without consideration, and cannot be enforced by action. *Pa. Supreme Ct.* 1858, *Loan Association v.*

Stonemetz, 29 Pa. St. 534. To nearly same effect, *K. B.* 1832, *Dunston v. Imperial Gas Co.* 3 Barn. & Ad. 125.

82. A director of a bank, although he receives no compensation for his services, cannot recover of the bank a reward offered by it for the recovery of money of which it was robbed, or the detection of the robber. In affording such information to the bank, the director performs nothing more than his duty, and so is entitled to no reward. *Ill. Supreme Ct.* 1842, *Stacy v. State Bank of Illinois*, 4 Scamm. 91.

83. Where the compensation of directors of a State bank was fixed by statute,—*Held*, that a director of a branch bank, who received the compensation provided by law, could not be allowed extra compensation by the board for extra services rendered while he continued a director. *Ala. Supreme Ct.* 1844, *Branch Bank at Mobile v. Collins*, 7 Ala. N. S. 95; *Branch Bank at Mobile v. Scott*, *Id.* 107.

84. A director of a bank, although not entitled to compensation for extra services rendered while in that capacity, may be allowed for services rendered before he became director, and may also receive, on behalf of other persons, compensation due them for services they have performed. *Ala. Supreme Ct.* 1844, *Branch Bank at Mobile v. Collins*, 7 Ala. N. S. 95.

85. A provision in the charter of a banking corporation that "no director shall be entitled to any emolument unless the same shall have been allowed by the stockholders at a general meeting," applies to the directors only in their official capacity, and does not prevent them from taking compensation for services rendered individually by them, while they are directors, as agents of the bank. *N. J. Supreme Ct.* 1832, *Chandler v. Monmouth Bank*, 1 Green, 255.

86. A director is not entitled to compensation for services rendered to the corporation, previous to the organization, unless the services are most unquestionably beyond the range of his official duties. *Conn. Supreme Ct.* 1858, *New York & New Haven R. R. Co. v. Ketchum*, 27 Conn. 170.

87. A director of a railroad corporation had rendered special services in procuring subscriptions to the stock of the company and in its organization, which services were rendered on his part in the expectation of

compensation. The stockholders voted to grant him a free pass over the road for himself and family during his life, which grant was inadequate as a compensation for the services, but was accepted by him as such. Some years after, the stockholders rescinded the vote. *Held*, in an action brought by the company for railroad fares accruing after that time: 1. That the services rendered created no indebtedness, and could not constitute a consideration for the contract. 2. That it would have made no difference if the services had been rendered upon an express understanding with his associates that he was to be paid by the company after its organization. Aside from the technical difficulty of binding a corporation before its existence, the policy of the law wholly discountenances such arrangements. *Id.*

88. A vote of the directors of a railroad limiting the amount *per diem* of pay allowable to a director for special services, does not apply to work done by a director in an entirely different capacity, and in one where the services could have been performed by persons not directors, as agents. *Vt. Supreme Ct.* 1855, *Henry v. Rutland & Burlington R. R. Co.* 27 Vt. 435; 1857, *Hodges v. Rutland & Burlington R. R. Co.* 29 Vt. 220.

89. In general, railroad directors are not bound to render any services to the corporation beyond their board meetings; and therefore, if, by a vote of the board, a director be empowered to transact certain business, he will be entitled to a reasonable compensation, in the absence of some agreement express or implied to the contrary, the law implying a contract between the company and the director. *Miss. Ct. of Errors*, 1859, *Shackelford v. New Orleans &c. R. R. Co.* 37 Miss. 202.

90. — to reimbursement of sums expended. Directors who were obliged, by an adjudication to repay money which they had borrowed in good faith for the uses of the company. *Held*, entitled to be reimbursed by the company. *Chancery*, 1844, *Re German Mining Co.* 4 De Gez, M. & G. 19; 27 Eng. L. & Eq. 158. Compare *Hutchinson v. Sidney*, 28 Eng. L. & Eq. 472.

91. — to subrogation. A director of a manufacturing company against whom a judgment has been rendered for assenting to a dividend greater than the profits, has no right of subrogation against the company.

Pa. Supreme Ct. 1853, *Hill v. Frazier*, 22 *Pa. St.* 320.

92. — to knowledge of co-directors' acts. Each one of the directors of a bank has a right to know the transactions of his co-directors, in relation to the management of the institution; and a mandamus is the proper remedy to enforce his right to the inspection of the books. *N. Y. Supreme Ct.* 1834, *People v. Throop*, 12 *Wend.* 183.

93. Liability for acts of co-directors.* Although a director of a company is not bound to look back through the minute book of the company into entries made in it before he became a director, yet, where subsequently to his becoming a director, he is a party to dealings founded on those noticed in such prior entries, and allows his brother directors to act and proceed upon the notion that he affirms and adopts the transactions to which such entries relate (and this course of action goes on during two years), he is precluded from impeaching such transactions, unless he can establish a case of deception, or want of due information. *Chancery*, 1859, *Burt v. British &c. Association*, 4 *De Gez & J.* 158; 28 *Law J. N. S.* 731.

94. Where deposits were paid, according to a rule of a projected joint stock company, as set forth in the prospectus, to certain bankers, and the account with the bank was kept in the name of five directors,—*Held*, in an action to recover back the deposits, the scheme having become abortive, that other directors who had interfered in the management were liable in an action for money had and received, along with those five. *C. P.* 1856, *Johnson v. Goslett*, 37 *Eng. L. & Eq.* 308.

95. At the meeting at which an amalgamation with another company was resolved, one of the directors opposed the project, but, finding that he was in a minority, insisted on the insertion of certain terms, which, as he believed, would prevent its taking place; and a resolution was then passed for an amalgamation subject to those terms. *Held*, that he was not responsible in respect of the amalgamation. *Chancery*, 1855, *Re Direct East &c. Railway Co.* (*Exp. Johnson*), 31 *Eng. L. & Eq.* 430.

* See an explanation of various liabilities incurred by directors of an English joint stock company in respect of the acts of their co-directors. *Benson v. Heathern*, 3 *Coll. Ch. Cas.* 309.

96. — for acts of subordinates. The directors are not sureties to the corporators for the fidelity of an officer whom the directors appoint, unless they have knowledge of his bad character. The secretary of an insurance company, by means of forgery, for two or three years, defrauded the corporation of about one hundred and seventy thousand dollars. It appearing that all the checks and precautions in ordinary use by such companies had been used by the directors, and that the loss was in no respect attributable to a want of ordinary care,—*Held*, that the directors were not responsible for the loss. *N. Y. V. Chan. Ct.* 1838, *Scott v. Depeyster*, 1 *Edw.* 513.

97. Provisional directors of a projected joint stock company, who were induced to become such by the representations of the nominal secretary (the getter-up of the company), that he would pay the preliminary expenses, and that they should not be liable; passed a resolution, *inter alia*, that the company should be advertised. The secretary agreed with the plaintiff to advertise the company, showing him the resolution of the directors, but not informing him of the above understanding with the directors. *Held*, that the directors were liable to plaintiff for the advertisements, there being nothing to show that the secretary, in giving the orders, or in communicating to the plaintiff the resolution of the directors, had acted beyond the scope of his actual or apparent authority as secretary. *Exch. Ch.* 1864, *Maddick v. Marshall*, 17 *C. B. N. S.* 829; 18 *Week. Rep.* 205.

98. A person who had agreed to become a director of a projected company, and who, in a letter to the secretary, noticing that the company was being advertised, advised certain alterations in the spelling the names of the directors, and that it should be advertised in a particular paper,—*Held* not liable for the costs of advertisements ordered by the secretary, it not appearing that he had not directed the latter to pledge his credit. *Exch.* 1865, *Burbridge v. Morris*, 34 *Law J. N. S.* 181.

99. — for error or neglect. Directors who act in good faith, and with reasonable care and diligence, but nevertheless fall into a mistake either as to law or fact, are not liable for the consequences of such mistake. *R. I. Supreme Ct.* 1850, *Hodges v. New England Screw Co.*

1 *R. I.* 812; 1853, *Same v. Same*, 3 *R. I.* 9; *Ala. Supreme Ct.* 1847, *Godbold v. Branch Bank at Mobile*, 11 *Ala. N. S.* 191; 1857, *Smith v. Prattville Manuf. Co.* 29 *Ala. N. S.* 503.

100. The directors of a union store association will not be held to a strict performance of all the duties prescribed for them in the by-laws, as in case of trustees or directors of a private corporation, when it appears that those duties were mainly transferred by the association to an agent; and the members thereof knew how the business was being managed, and of the deviations from the by-laws, and acquiesced in the same. *Vt. Supreme Ct.* 1865, *Henry v. Jackson*, 87 *Vt.* 431.

101. If directors of a public company do acts in a matter in which they have no authority, those acts are null and void; but if they neglect the acts which are within their authority, and which they ought to perform, neither a court of law nor of equity will allow them afterwards to take advantage of their own neglect. *H. of L.* 1855, *Bargate v. Shortridge*, 5 *H. L. Cas.* 297; 24 *Law. J. N. S. Ch.* 457.

102. — for mismanagement.* The directors of a banking or other corporation are, in the management of its affairs, only trustees for its creditors and stockholders, and are bound to administer its affairs according to the terms of its charter, and in good faith. If they fail in either respect, they are liable to the party in interest who is injured by it for a breach of trust, and may be made to account with him in a court of chancery. *R. I. Supreme Ct.* 1850, *Hodges v. New England Screw Co.* 1 *R. I.* 812; *Ala. Supreme Ct.* 1854, *Bank of St. Mary's v. St. John*, 25 *Ala. N. S.* 566. But see *Patteson v. Baker*, 84 *How. Pr.* 180; and *Winter v. Baker*, *Id.* 183.

103. The members of the governing body are the agents of a corporation; and if they exercise their functions for the purpose of

injuring its interests and alienating its property, they are personally liable for any loss occasioned thereby. *Chancery*, 1840, *Attorney General v. Wilson*, 1 *Craig & Ph.* 1; 10 *Law J. N. S.* 53; 4 *Jur.* 1174.

104. A director of a manufacturing company, who has assented to a dividend amounting to more than the profits, may be sued for such violation of duty, without joining with him the company as co-defendant. *Pa. Supreme Ct.* 1853, *Hill v. Frazier*, 22 *Pa. St.* 820.

105. It is a violation of the Ohio act to incorporate the State Bank of Ohio, &c. (43 O. L. 24), for one of the independent banks chartered by it, to make loans to a director before the adoption, by the stockholders, of by-laws to regulate the liabilities of directors; and such violation may be a cause of forfeiture of the charter, and render each director who knowingly assents to it individually liable for all damages which the company, shareholders, or others shall sustain in consequence thereof. *Ohio Supreme Ct.* 1853, *Conant v. Seneca County Bank*, 1 *Ohio St.* 298. Compare *Schley v. Dixon*, 24 *Ga.* 273; *Hinsdale v. Larned*, 16 *Mass.* 64.

106. The stock of certain shareholders being about to be sold, the officers of the company appointed an agent to buy it "for the use of the company," but when purchased they took a portion of it to themselves. *Held*, they were liable, in an action at law, to any shareholder, for the damage thereby sustained by him. *Pa. Supreme Ct.* 1851, *Kimmel v. Stoner*, 18 *Pa. St.* 155.

107. Proceedings were instituted by several shareholders in a railway company against the company and the directors for repayment of two calls, on the ground that the directors had made them for personal and corrupt purposes, and that they were unnecessary for any of the statutory purposes of the company, no part of the railway having been made, and the company's powers having expired prior to the commencement of the suit. *Held*, that the calls having been originally valid, such a suit would not lie either for an account or for damages. *H. of L.* 1860, *Orr v. Glasgow &c. Railway Co.* 6 *Jur. N. S.* 877; 8 *Week. Rep.* 643.

108. A company was formed for the purpose of carrying on the business of bill brokers and scriveners, lending on securities, invest-

* Under section 165 of the English companies act of 1862, which confers power on the court to compel payment by directors and officers of companies in respect of misfeasance or breach of trust relating to the affairs of the company,—the executors of a deceased director, in the winding up of the company of which he was such officer, cannot be made personally responsible for misfeasance committed by him. *Vice Chan. Ct.* 1865, *Re East of England Bank*, 1 *Law Rep. Eq. Cas.* 219; 35 *Law J. N. S.* 196; 18 *Law Times, N. S.* 741.

ing in securities, and doing all such things as the directors should consider incidental or conducive to the attainment of those objects. The directors took shares in a projected banking company, not disclosing the transaction to the shareholders, binding themselves not to sell the shares before a certain time. Upon a bill filed by the official liquidator of the company against its late directors,—*Held*, on demurrer by one of the defendants, that the charges in the bill as to concealment must be answered. *Vice Chan. Ct.* 1866, *Joint Stock Discount Co. v. Brown*, 3 *Law Rep. Eq. Cas.* 139.

DISSOLUTION.

I. THE POWER TO DISSOLVE.

II. CAUSES AND GROUNDS.

III. CONSEQUENCES.

IV. RIGHTS OF CREDITORS AND STOCKHOLDERS.

I. THE POWER TO DISSOLVE.

1. Courts. A court of one State has no jurisdiction to dissolve a corporation created by the laws of another State, and wind up its affairs, although its property is mainly situated in the State in which such court exists.* *N. Y. V. Chan. Ct.* 1843, *Barclay v. Talman*, 4 *Edw.* 123. Compare *Barclay v. Macanly*, 3 *Ch. Sent.* 56.

2. A court of chancery has no jurisdiction over corporate bodies, either under the principles of the common law or through its general equitable powers, for the purpose of restraining their operations, with a view to a dissolution or to take away corporate rights and franchises. It is only by statute, and for the particular causes enumerated, to be made out by due proof, that chancery entertains jurisdiction.† *N. Y. V. Chan. Ct.* 1881, *Verplanck v. Mercantile Ins. Co.* 1 *Edw.* 84.

* As to the effect to be attributed to a decree of a foreign government dissolving a corporation, when the rights of such corporation are drawn in question in the courts of one of the States,—see *Hamilton v. Accessory Transit Co.* 26 *Barb.* 46; *Murray v. Vanderbilt*, 39 *Barb.* 140; *Lee v. Atlantic & Pacific Canal Co.* 3 *Abb. Pr. N. S.* 1.

† See, to the same general effect, *Attorney General v. Reynolds*, 1 *Eq. Cas. Abr.* 131, pl. 10; *Attorney General v. Earl of Clarendon*, 17 *Ves.* 491; *Bayless v. Orne*, 1 *Freem. (Mass.)* 173; *Fountain Ferry Turnp. Road Co. v. Jewell*, 8 *D. Monr.* 142; *State v. Merchants' Ins. & Trust. Co.* 8 *Lumpk.* 252; *Ferris v. Strong*, 3 *Edw.* 127.

3. Power of the corporation. A private corporation—*e. g.* a railroad company—may abandon their charter and dissolve, except so far as creditors may have a right to object, and so far as their obligation to the public to exercise their franchise, may interfere.* And the legislature may, at pleasure, release it from the latter limitation and allow a transfer of its duties to other hands. *Pa. Supreme Ct.* 1858, *Lauman v. Lebanon Valley R. R. Co.* 30 *Pa. St.* 42.

4. That a dissolution may be effected by the consent of both the State and the corporation, without the necessity of resorting to particular judicial proceedings for the purpose,—see *Savage v. Walshe*, 26 *Ala.* 619.

5. — of officers. The officers of a corporation, composed of several integral parts, cannot dissolve the corporation without the full assent of the great body of the society. *S. C. Chancery*, *Smith v. Smith*, 3 *Deaus.* 557.

6. — of members. A corporation cannot be dissolved by the consent of the members, except it be by the surrender of their franchise to the government, and an acceptance by the government of the surrender. *Ind. Supreme Ct.* 1836, *Harris v. Muskingum Manuf. Co.* 4 *Blackf.* 267.

7. No corporation can be dissolved by a mere resolution of its members or stockholders.† It can only be dissolved by a judicial sentence or by a surrender of its charter accepted by the State. *N. Y. Superior Ct.* 1855, *N. Y. Marbled Iron Works v. Smith*, 4 *Duer*, 862.

8. It is not within the power of the majority of the members of a corporation to

* In what cases and to what purposes a corporation may dissolve itself by its own consent only, and how far the assent of the sovereign power is requisite, see also *Riddle v. Proprietors of Locks &c. on Merrimack River*, 7 *Mass.* 185; *Hampshire v. Franklin*, 16 *Mass.* 86, 87; *McLaren v. Pennington*, 1 *Paige*, 107; *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 *Conn.* 45, 52; *Slee v. Bloom*, 19 *Johns.* 456; *Canal Co. v. Railroad Co.* 4 *Gill & J.* 1; *Trustees of McIntire Poor School v. Zanesville Canal and Manuf. Co.* 9 *Ohio*, 208; *Penobscot Boom Co. v. Lamson*, 16 *Me.* 224; *Hodsdon v. Copeland*, *Id.* 314; *Mumma v. Potomac Co.* 8 *Pet.* 261; *Mobile & Ohio R. R. Co. v. State*, 29 *Ala.* 573; *Attorney General v. Clergy Society*, 10 *Rich.* 604; *Town v. Bank of River Raisin*, 2 *Doughl. (Mich.)* 580; *Portland Dry Dock Co. v. Trustees of Portland*, 12 *B. Monr.* 77.

† When the charter provided that the corporation might discontinue business, when stockholders owning two thirds of the capital stock voted to do so,—*Held*, that stock held by the company was merged for the purposes of such a vote, and that such a vote, duly passed by stockholders owning two thirds of the stock which was issued to stockholders was effectual. *Green v. Seymour*, 3 *Sandf. Ch.* 285.

dissolve it, as long as a sufficient number of members to represent and continue the corporation exists. They may dissolve their own connection with it, but cannot prejudice the vested rights of their co-corporators by any act foreign to the objects of the corporation. *La. Supreme Ct.* 1861, *Polar Star Lodge v. Polar Star Lodge*, 16 *La. Ann.* 53, 76. And see *Revere v. Boston Copper Co.* 15 *Pick.* 351; *Campbell v. Mississippi Union Bank*, 6 *How. (Miss.)* 681.

9. The dissolution of a corporation cannot be effected by a resolution to that effect by a majority of its members. The majority of the members of a corporation may, by an abuse of its powers, commit an act which would justify the forfeiture of the charter, but they cannot make such act the basis of an action instituted by themselves against the minority for the purpose of having the franchises of the corporation declared forfeited. *La. Supreme Ct.* 1861, *Curien v. Santini*, 16 *La. Ann.* 27.

10. A joint stock association formed for a special period, cannot be dissolved within that period without the unanimous consent of the stockholders, except by the interposition of a court of equity. *Cal. Supreme Ct.* 1850, *Von Schmidt v. Huntington*, 1 *Cal.* 55.

11. Corporations of a private nature, established solely for trading or manufacturing purposes, may, by a vote of the majority of their members, against the protest of a minority, wind up their affairs and close their business, if, in the exercise of a sound discretion they deem it expedient so to do; and may sell the whole of their property to a new corporation, taking payment in shares of the new corporation, to be distributed among those of the old stockholders who are willing to take them. *Mass. Supreme Ct.* 1856, *Treadwell v. Salisbury Manuf. Co.* 7 *Gray*, 393.

II. CAUSES AND GROUNDS.

12. In general. A private corporation in this country may be dissolved: 1. By the death of its members; 2. By the surrender of its franchises; 3. By a judgment of forfeiture for nonuser or abuse. *Ohio Supreme Ct.* 1839, *McIntire Poor School v. Zanesville Canal & Manuf. Co.* 9 *Ohio*, 203.

13. A private corporation aggregate may be dissolved by the death of all its members, or by the loss of an integral part whereby

it is rendered unable to do any corporate act, or to restore itself by a new election; or it may be dissolved by a surrender of its franchises to the State, or its assent to an act of the legislature repealing the charter. It may also be dissolved by a forfeiture of its charter, through abuse or neglect of its franchises, as if for condition broken; but not every nonuser is sufficient ground of forfeiture.* Where dissolved by either of the two former methods, no judgment of dissolution is necessary; but where there is an existing corporation capable of acting, which has been guilty of such neglect or abuse of its franchises, or of the powers committed to its trust, as to amount to a cause of forfeiture, such forfeiture must be judicially ascertained and declared. It can be enforced only by a *scire facias* or *quo warranto*, issued at the instance of the government creating the corporation, and cannot be taken advantage of incidentally, or in any other way, or by an individual; and this rule applies as well to the forfeiture of a particular franchise, as to that of the whole charter. *Md. Ct. of Appeals*, 1832, *Chesapeake Canal Co. v. Ohio R. R. Co.* 4 *Gill & J.* 1.

For What are grounds for decreeing a forfeiture, see FORFEITURE.

14. A corporation will not be dissolved by a sale of the franchise, or of all the corporate property, and a settlement of all its concerns, and a division of the surplus; or by a cessation of all corporate acts; or by any neglect of corporate duty; or any abuse of corporate powers; or by doing acts which cause a forfeiture of the charter without a

* For a statement of the rules of the common law relative to the dissolution of corporations, and the distinction between the dissolution of a corporation and the suspension of its franchises, and between an original charter and a revival,—see *Lea v. American & Co. Canal Co.* 3 *Abb. Pr. N. S.* 1.

That a corporation may be said not to be dissolved *quoad* the individuals, for particular purposes, though it is so *quoad* the corporate body,—see *Rex v. Pasmore*, 3 *Dumf. & E.* 199, 245.

A corporation is, of course, dissolved by expiration of the period of its duration, limited by its charter, or by general law; and all the consequences of dissolution, such as forfeiture of property, extinguishment of debts, abatement of suits, &c., then ensue, unless they are provided against. *Bank of Mississippi v. Wrenn*, 8 *Smed. & M.* 791.

But the expiration of a charter of a bank, pending a bill in chancery for the collection of a debt due to it, has been held, not to affect the right to the debt which was previously vested in others,—as in the superintendent and board of common-school commissioners of a State. *Ingraham v. Terry*, 11 *Lumpk.* 573.

judgment declaring such forfeiture. Such dissolution can take place only, 1. By an act of the legislature where power is reserved for that purpose; 2. By a surrender, which is accepted, of the charter; 3. By a loss of all its members, or of an integral part, so that the exercise of corporate functions cannot be restored; 4. By forfeiture, which must be declared by judgment of court. [5 Johns. Ch. 367; 6 Cow. 23; 8 Wend. 645; 4 Paige, 481; 4 Gill & J. 121; 14 Pick. 63; 15 Pick. 351; 6 Barn. & C. 703; 2 Kent's Com. 312.] *Me. Supreme Ct.* 1889, *Penobscot Boom Corporation v. Lamson*, 16 *Me.* 224; *Hodsdon v. Copeland*, 16 *Me.* 314. See also *Boston Glass Manufactory v. Langdon*, 24 *Pick.* 49.

15. Construction of special statutes. The date of the incorporation of a company,—within the meaning of a statute (*e. g.* 1 N. Y. Rev. Stat. 600, § 7), declaring that if a corporation shall not organize and commence the transaction of its business within one year from the date of its incorporation, their corporate powers shall cease,—is the time when the act creating the corporation takes effect as a law, *i. e.* in New York, twenty days after its passage. [1 Rev. Stat. 157, § 12.] But on a fair construction, an amending act, though not expressly extending the time, may have the effect of extending it. *N. Y. Chancery*, 1848, *Johnson v. Bush*, 3 *Barb. Ch.* 207.

16. A statute provision for the dissolution of a company in a particular manner, does not exclude the jurisdiction of the court to decree a dissolution in case of misconduct. *Chancery*, 1825, *Kinder v. Taylor*, 3 *Law J.* 68.

17. A clause in the charter of a bank, that the corporation shall not be dissolved before the time specified in the charter, *unless all debts are paid*, does not protect the corporation from dissolution by *quo warranto*, for a violation of the charter; such clause being merely intended to prevent the corporation from dissolving itself before the expiration of the charter, without paying its debts. *Ind. Supreme Ct.* 1823, *State Bank v. State*, 1 *Blackf.* 267.

18. A statutory provision (*e. g.* 2 N. Y. Rev. Stat. 463, § 39),—declaring that a corporation which, for one whole year, have remained insolvent or suspended ordinary business, shall be deemed to have surrendered their franchises, and be adjudged dissolved,—is to be regarded as cumulative,

and not a limitation upon the common law rule, that if a corporation suffer acts which destroy the object of the incorporation, this is equivalent to a surrender of their rights. *N. Y. Ct. of Appeals*, 1858, *Bradt v. Benedict*, 17 *N. Y.* 93.

19. Under such a statute a corporation is not *ipso facto* dissolved, by a suspension of its ordinary and lawful business for one year. The statute merely enables parties who are interested, to have a dissolution judicially declared. Until that is done, a creditor may proceed by suit against the corporation, as if nonuser or insolvency had not occurred. *N. Y. Chancery*, 1844, *Mickles v. Rochester City Bank*, 11 *Paige*, 118.

20. Even where the terms of a charter are that the corporation shall be dissolved on the non-performance of a condition, the mere failure to perform is not, *ipso facto*, a dissolution; but a judgment of ouster is required. *N. Y. Supreme Ct. Sp. T.* 1858, *Matter of Reformed Presb. Church of N. Y.* 7 *Hov. Pr.* 476. And see *Caryl v. McElrath*, 3 *Sandf.* 176.

21. Under a provision in a charter that on breach of a condition, "the company should not be entitled to any benefit, privilege, or advantage, under the act, and that all the interest, &c., of the corporation should be forfeited and cease," a violation does not work a dissolution of the charter, *ipso facto*, and without judicial proceedings by the State. *Md. Ct. of Appeals*, 1832, *Chesapeake &c. Canal Co. v. Ohio R. R. Co.* 4 *Gill & J.* 1.

22. The charter of the Manhattan Co., entitled "An act for supplying the city of New York with water," contained a proviso that the company should, within ten years, furnish and continue a supply of water, "in default whereof they shall be dissolved." Held, that the proviso was a defeasance merely, and the corporation must continue to exist until judgment of ouster. *N. Y. Supreme Ct.* 1832, *People v. Manhattan Co.* 9 *Wend.* 351.

23. The mere judgment of forfeiture against a bank under the Mississippi act of 1843, does not, of itself, work a dissolution of the corporation. There must first be an execution for the seizure of the franchises, before the penalties of forfeiture take place. *Miss. Ct. of Errors*, 1845, *Nevitt v. Bank of Port Gibson*, 6 *Smedes & M.* 513.

24. Under a provision in the charter of a navigation company, which declares that the right to collect toll shall be suspended upon the report to the governor by a commissioner, that the river is not in the condition contemplated by the act, the making of such report does not divest the company of its corporate character, nor of its right to sue for and recover toll due to it prior to the making of the report. *Ala. Supreme Ct.* 1849, *Duke v. Cahawba Nav. Co.* 16 *Ala.* 372.

25. Section 27 of the general banking law of Pennsylvania of April 16, 1850, (Laws of 1850, 488), requiring the directors of banks, upon refusal to redeem its notes, to execute assignments, preparatory to a forfeiture of the charter, is technically a penal statute, and must be strictly construed. To authorize a dissolution under it, it must appear that the financial officer of the bank not only refused to pay its notes or certificates in gold or silver on demand, but that he also willfully refused to indorse on them the day and year when they were presented for payment, or refused to give a certificate for money deposited in the bank. *Pa. Common Pleas, Erie County*, 1861, *Commonwealth v. Bank of Commerce*, 9 *Am. Law Reg.* 379.

26. Insufficient acceptance of charter. Upon *quo warranto* by the State's attorney against a municipal corporation and those holding office therein, it appearing that the charter under which they were acting had not been legally accepted by reason of fraudulent voting,—*Held*, that the corporation be dissolved, and that the officers should no longer exercise the functions of their offices. *Vt. Supreme Ct.* 1859, *State of Vermont v. Village of Bradford*, 32 *Vt.* 50.

27. Ceasing to act as a corporation. A corporation is not dissolved by merely ceasing to exercise its powers. *Me. Supreme Ct.* 1851, *Rollins v. Clay*, 88 *Me.* 182.

28. A corporation having become by virtue of its charter, a legal entity, the failure to perform an act prescribed in the charter will not dissolve it; that end can only be attained by a direct proceeding.* *Ind. Supreme Ct.* 1857, *Stooper v. Greensburgh & C. Plank Road Co.* 10 *Ind.* 47.

* That mere nonuser of its franchise is not ground for dissolving a corporation,—see *Slee v. Bloom*, 19 *Johns. R.* 456; *Attorney General v. Bank of Niagara*, *Hopk.* 354.

29. In order to infer a surrender of corporate franchises, from insolvency, suspension of business, &c., for less than a year, the circumstances must be such as to show that the corporation has no moral or legal capacity to continue their business. A mere resolution not to proceed with business is not enough, so long as the company has still the appliances, &c., necessary to proceed with. The resolution may be rescinded. *N. Y. Ct. of Appeals*, 1858, *Bradt v. Benedict*, 17 *N. Y.* 93.

30. Under an original grant of corporate rights, the grantee must comply strictly with all the conditions precedent to the taking effect of the grant. But where a corporation passes, by judicial sale, under the control of purchasers, by virtue of a statute declaring that the franchises shall vest in the purchasers, with all the rights, privileges, and franchises, of the original corporation, the directions of the statute in regard to reorganization are not conditions of being; and, therefore, if not followed, the utmost effect can be no more than to *work* a forfeiture, and enable the State to re-take the franchises, but it cannot entitle it to judgment that the franchise has no existence. *Pa. Supreme Ct.* 1866, *Commonwealth v. Central Passenger Railway*, 52 *Pa. St.* 506.

31. A bank is not taxable during the period (of six years) allowed by New York Laws of 1859, 503, ch. 236, after the redemption of ninety per cent. of its circulation for closing its business, if it has permanently ceased to transact any banking business. By ceasing to act as a bank, it loses its character as such, and is no longer deemed to exist as a bank for purposes of taxation. *N. Y. Supreme Ct.* 1864, *Metcalf v. Messenger*, 46 *Barb.* 325.

32. The plaintiff conveyed, in consideration of only half its actual value, a lot of land, to the trustees of a county seminary and their successors in office forever, "to have and to hold the premises for the use of said seminary forever." The trustees were, at the time of the conveyance, a body politic and corporate, empowered to hold land for seminary purposes, and this lot was conveyed and used for a seminary site. By the State constitution, it was provided that the common school fund should in part be made up from the sale of county seminaries, and the manner of making such sales was pro-

vided by statute. This lot had not been sold, but had long ceased to be used for seminary purposes. The plaintiff claimed that it had properly reverted to him.

Held, 1. That the seminary corporations were not abolished, either expressly or by implication, either by the constitution or the statute, but continued to exist, at least for the purpose of holding the title to their property, until the same was sold and the title thereto had vested in the purchaser.

2. That if the property could not be sold under the authority of the State, and the proceeds applied to the support of common schools (which point was not raised or decided), then the title remained in the corporations, despite any such attempted sale. But if the sale could be legally made, against the consent of the corporation, then, when made, it would be valid and would vest a good title in the purchaser. *Ind. Supreme Ct. 1863, Heaston v. Commissioners &c. 20 Ind. 398.*

33. Omission to elect officers. A corporation does not become defunct from a simple neglect to elect officers, while the capacity to elect remains in the members.* *Pa. Supreme Ct. 1833, Lehigh Bridge Co. v. Lehigh Coal & Nav. Co. 4 Rawle, 9; 1850, Commonwealth v. Cullen, 18 Pa. St. 133; Conn. Supreme Ct. 1850, Evarts v. Killingworth Manuf. Co. 20 Conn. 447.*

34. If the board of trustees, by a failure to elect when vacancies occur, or through any other means, becomes reduced to a less number than was authorized to act by the charter, the corporation is not thereby dissolved. In such a case, its franchises would be suspended only, until its functions were restored by legislative action. *U. S. Supreme Ct. 1852, Vincennes University v. Indiana, 14 How. 268.*

35. Managers and officers of a private business corporation,—e. g. a turnpike company,—do not form an integral part of a corporation,† and an omission to elect them,

at the time appointed by charter, will not dissolve the corporation. Subsequent election will restore its functions, which may have been suspended by such omission. *Pa. Supreme Ct. 1834, Rose v. Turnpike Co. 8 Watts, 46.*

36. The stockholders compose the corporation; hence their mere failure to elect officers at the designated time does not work a dissolution. *N. J. Chancery, 1861, Hoboken Building Association v. Martin, 2 Beas. 427.*

37. A stockholder sued on his personal liability cannot avoid a recovery on the ground of a failure of the corporation to elect a clerk in a year previous to the incurring of the debt sued for. Such omission does not work a dissolution of the corporation. *Mass. Supreme Ct. 1851, Knowlton v. Ackley, 8 Cush. 93.*

38. If the corporation have the power in themselves to supply the deficiency in their body, their rights are not extinguished, but only dormant.* If, however, that power is gone, and they cannot act until the deficiency is supplied, the corporation is dissolved. This is not a forfeiture for nonuser, but is a consequence of law. [3 Durnf. & E. 199.] *N. Y. Chancery, 1829, Philips v. Wickham, 1 Paige, 590.*

39. Resignation of officers. The existence of a corporation is not destroyed by resignation of its officers and agents. *Iowa Supreme Ct. 1865, Muscatine Turnverein v. Funck, 18 Iowa, 469.*

40. Change of members. No loss of members destroys a corporation, so long as a sufficient number remain to continue the succession and fill up vacancies. *Ind. Supreme Ct. 1854, State v. Trustees of the Vincennes University, 5 Ind. 77.*

41. A purchase by only two individuals, pursuant to an agreement, of all the shares in a manufacturing corporation, does not dissolve the corporation. The legal title in the corporation remains, notwithstanding the

* See also, in confirmation of this general proposition, *Wier v. Bush, 4 Litt. 438; Blake v. Hinkle, 10 Yerg. 218; Nashville Bank v. Petway, 3 Humph. 594; Russel v. McClellan, 14 Pick. 65; Smith v. Natches Steamboat Co. 1 How. (Miss.) 479; Cahill v. Kalamazoo Mut. Ins. Co. 2 Dougk. (Mich.) 140.*

† Where a corporation consists of several distinct integral parts, if one of these parts become extinct, whether by the death of the persons of whom it is composed, or by any other means, the corporation is dissolved. *Reg. v. Ballif*

Ac. of Bewdley, 1 P. Wms. 207; Rex v. Pasmore, 3 Durnf. & E. 199.

But a corporation is not extinguished by the destruction of an integral portion thereof, if the remaining portion has power to restore or renew the defective part. *Smith v. Smith, 3 Deaus. 557.*

* That an election of trustees made apparently for no purpose but to keep the company in existence, will not prevent a decree of dissolution,—see *Briggs v. Penniman, 8 Cow. 367.*

individual members change. The stock, if every member should die at the same moment, would be distributed under the statute of distributions, or according to the testaments of the deceased. The legal representatives of the deceased members would have authority by law to manage the corporation, and no dissolution would, in such case, take place; and if the shares should all center in one man, and the forms of proceeding under the charter should require acts to be done by two or more, the owner could make sale of shares so as to conform to the letter of the rule. *Mass. Supreme Ct.* 1883, *Russell v. M'Lellan*, 14 *Pick.* 68.

42. Copartners purchased the charter and all the property and stock of a manufacturing corporation, elected themselves trustees, and carried on the corporate business. *Held*, that the corporation was not thereby dissolved, and the title to its property was still in it for their benefit. *N. Y. Chancery*, 1834, *Wilde v. Jenkins*, 4 *Paige*, 481.

43. It is not sufficient ground for dissolving a manufacturing corporation, on the petition of a majority in number of the stockholders owning a minority of the stock, that one owner of the majority of the stock has for many years controlled the election of officers and elected himself agent and clerk; that he has for a long time managed the business "according to his own will and choice, regardless of the wishes and interests of the petitioners;" that, according to his statement, the corporation has been doing a losing business for many years; that he has refused to make any change in the business, or to purchase the shares of the petitioners; and that, if the business were skillfully and properly managed, it might be made a source of profit to all concerned. It must appear that such owner has done illegal and fraudulent acts. *Mass. Supreme Ct.* 1857, *Pratt v. Jewett*, 9 *Gray*, 34.

44. Surrender of corporate rights. A corporation may subject itself to dissolution by a surrender of its corporate rights and franchises; or by acts amounting to or implying such surrender. *N. Y. Ct. of Errors*, 1822, *Slee v. Bloom*, 19 *Johns.* 456; 1826, *Briggs v. Penniman*, 8 *Cow.* 387; *Ind. Supreme Ct.* 1861, *McMahon v. Morrison*, 16 *Ind.* 172; *Md. Ct. of Appeals*, 1862, *Washington & Co. Road v. State*, 19 *Md.* 239.

45. A corporation is subject to dissolution

by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and nonuser; and a stockholder therein is not liable to the process of garnishment, under a statute regulating the issuance of such writs against the stockholders of incorporated companies, at the suit of a creditor of the corporation, after the dissolution of the corporate body. *Ala. Supreme Ct.* 1847, *Paschall v. Whitsett*, 11 *Ala. N. S.* 472.

46. Where a private corporation suffered all their property to be sold on execution, and the trustees surrendered their trust, and omitted the annual election of officers, the court, in behalf of creditors, presumed a surrender of the corporate rights and a dissolution of the corporation from that time. *N. Y. Ct. of Errors*, 1822, *Slee v. Bloom*, 19 *Johns.* 456.

47. So the insolvency of a manufacturing company, and its entire cessation of all corporate acts except the form of electing trustees, especially where the capital is exhausted, and the trustees have no power to resuscitate the corporation by issuing new stock, amounts to a surrender, which may be deemed a dissolution of the corporation. *N. Y. Ct. of Errors*, 1826, *Briggs v. Penniman*, 8 *Cow.* 387.

48. But these facts are not available as showing a dissolution of the corporation which will defeat an action brought in their name. *N. Y. Supreme Ct.* 1832, *Bank of Niagara v. Johnson*, 8 *Wend.* 645; *Mich. Supreme Ct.* 1845, *Cahill v. Kalamazoo Mut. Ins. Co.* 2 *Doug.* 141; *La. Supreme Ct.* 1839, *Atchafalaya Bank v. Dawson*, 18 *La.* 497; *Md. Ct. of Appeals*, 1838, *Regents of University of Md. v. Williams*, 9 *Gill & J.* 365.

49. A chapter of freemasons disposed of all their real and personal property, consisting of their hall, furniture, and equipments, pursuant to a vote of the association, and for twenty-three years held no meetings, elected no officers, performed no acts required by its laws and rules, and ceased to have any visible sign of organization. *Held*, that the legal existence of the chapter was destroyed, and that it was beyond the power of the State chapter to restore it to life, so as to preserve for it a continued existence from the time of its disorganization. *Vt. Supreme Ct.* 1864, *Strickland v. Prichard*, 87 *Vt.* 324.

50. A rule of the association that officers elected should hold their offices till others

were elected cannot operate in such a case to preserve its legal existence. *Ib.*

51. Although a legal surrender may be presumed where, for a sufficient length of time, there has existed an entire nonuser of corporate franchises, and a neglect to choose corporators, yet, in Vermont, a corporation was *Held* not to have lost its corporate existence by having ceased to do business for eleven years, and by disposing of their personal property, and neglecting to choose their corporate officers in that time. *Vt. Supreme Ct. 1852, Brandon Iron Co. v. Gleason, 24 Vt. 228.*

52. The mere fact of the sale of all the visible property of the corporation, and a temporary suspension of its manufacturing business, is not a sufficient ground for considering it dissolved, so as to render the stockholders individually responsible; so long as, by a regular election of trustees, there has been kept up a continued succession, and the company has been kept in operation, and has capacity to resume its business. *N. Y. Chancery, 1823, Brinckerhoff v. Brown, 7 Johns. Ch. 217; S. P. [reviewing the cases], Ct. of Appeals, 1858, Bradt v. Benedict, 17 N. Y. 93.*

53. Neither discontinuance of business, reputed insolvency and inability to pay their debts, having large amounts of notes outstanding and unpaid, suffering their circulating notes to be returned to the comptroller for redemption, non-payment of rent for the premises occupied by the association, nor having on hand less than twelve and a half per cent. of specie, nor the issue of post-notes,—*Held*, grounds warranting a dissolution of a New York banking association to be ordered. See *Farmly v. Tenth Ward Bank, 8 Edw. 395; 2 Ch. Sent. 20.*

54. That a union or consolidation of a defendant corporation with other corporations, under a law which continues its liabilities, is not such a dissolution of the corporation as will abate an action commenced before the consolidation was effected,—see *Baltimore & C. R. R. Co. v. Musselman, 2 Grant's Cases, 348.*

55. Transfer of assets. Though a corporation may, by a transfer of all its property, render itself unable to discharge the ordinary purposes of its institution, yet it does not, in consequence thereof, cease to be an existing corporation. See *Maryland v. Bank of Maryland, 6 Gill & J. 205; Smith v. Gowan, 2 Duwall, 17.*

56. A voluntary assignment by a corporation of all its property, for specific purposes, is not, of itself, a dissolution, as between the stockholders or corporators. *N. Y. V. Chan. Ct. 1843, Barclay v. Talman, 4 Edw. 123.*

For cases on this rule as applied to Railroad companies, see RAILROAD COMPANIES; also see ASSIGNMENTS.

57. Insolvency. The possession of property is not essential to the exercise of a corporation. Its insolvency cannot, therefore, extinguish its legal existence. Hence, where a manufacturing corporation became insolvent, and assigned its property for the payment of its debts, the instrument of assignment providing that the assignees might use the name of the corporation for the collection of debts, and that the corporation would perform any further acts which might be necessary to enable the assignees to execute the trust, and the corporation omitted for several years to hold meetings or to elect officers, the by-laws, however, providing that the officers, though elected for one year, should continue in office until others should be chosen in their places. *Held*, that the corporation had not been dissolved, so as to prevent a suit from being brought and maintained in its name. *Mass. Supreme Ct. 1834, Boston Glass Manufactory v. Langdon, 24 Pick. 49.*

58. The mere insolvency of a corporation neither impairs its power to manage its affairs, nor converts its property into a trust fund for the benefit of its creditors. *Conn. Supreme Ct. 1856, Pondville Co. v. Clark, 25 Conn. 97. And see People v. Bank of Hudson, 6 Cow. 217.*

59. The mere insolvency of a bank, incorporated with the usual powers of such an institution, does not convert its effects into a trust fund for its creditors. Hence, where the directors of a banking corporation, after it became actually insolvent, mortgaged its real estate, assigned sundry promissory notes, and paid a sum of money to another bank in security and payment of a debt due to it for moneys deposited. *Held*, that a bill in chancery, brought by another creditor, to have these conveyances set aside, and all the funds of the bank distributed ratably among the creditors, could not be sustained. *Conn. Supreme Ct. 1826, Catlin v. Eagle Bank, 6 Conn. 283.*

As to What constitutes insolvency of a corporation, see *INSOLVENCY*.

60. **Frauds.** The fact that in the organization of a corporation, a single subscriber and the appraisers committed a fraud upon the corporation by allowing him stock on insufficient security, affords no ground for dissolving the company, unless the directors who accepted the security, were privy to the fraud. *N. Y. Ct. of Errors*, 1841, *King v. Sea Ina Co.* 26 *Wend.* 62.

61. **Fraud upon creditors, when a ground for decreeing a dissolution,—**see *Stocks v. Van Leonard*, 8 *Ga.* 511; *State v. Northern Central Railway Co.* 18 *Md.* 193; *Galway v. United States Steam Sugar Refining Co.* 13 *Abb. Pr.* 211; 21 *Hov. Pr.* 813.

III. CONSEQUENCES.

62. **Extinguishment of debts.** Upon the dissolution of a corporation, debts due to or from it (in the absence of some statutory provisions to preserve them), become extinguished.* *Del. Superior Ct.* 1835, *Commercial Bank v. Lockwood*, 2 *Harring.* 8; *N. C. Supreme Ct.* 1841, *Fox v. Horah*, 1 *Ired. Eq.* 358; *Miss. Ct. of Errors*, 1849, *President, &c. of Port Gibson v. Moore*, 13 *Smed. & M.* 157; *Tenn. Supreme Ct.* 1844, *White v. Campbell*, 5 *Humph.* 38; 1858, *Hopkins v. Whitesides*, 1 *Head.* 31; *N. C. Supreme Ct.* 1863, *Mallory v. Mallett*, 6 *Jones Eq.* 345.

63. It is within the power of the legislature to rescue the assets from this principle, in any special case. *Ga. Supreme Ct.* 1856, *Robinson v. Lane*, 19 *Ga.* 337.

64. It is not in the power of the legislature (without a previous provision), by renewing the charter, to revive the liabilities to the corporation. *Del. Superior Ct.* 1835, *Commercial Bank v. Lockwood*, 2 *Harring.* 8.

65. Where a note was made payable to the cashier of a bank, by whom it was discounted as trustee for the bank, and the bank charter afterwards expired,—*Held*, that although the cashier might sue and recover at

law, yet as the bank had the sole right to the money when collected, and the right was extinguished by the dissolution of the corporation, a court of equity would enjoin perpetually against the collection of the judgment. *N. C. Supreme Ct.* 1841, *Fox v. Horah*, 1 *Ired. Eq.* 358.

66. Where a bank charter was granted upon the consideration expressed therein that the corporation should pay \$2,000,000 to the State in annual installments, and after payment of a part the bank became insolvent,—*Held*, that it could not, by making assignment of all its assets, and relinquishing business, avoid payment of the residue. A corporation has no right or power to discharge itself of an obligation once assumed, by an act of its own, in which the party holding the opposite interest had no participation. *Pa. Supreme Ct.* 1851, *Bank of United States v. Commonwealth*, 17 *Pa. St.* 400.

67. Under a provision in an act of incorporation, "that the private property of the individual stockholders shall be liable for the debts, contracts, and liabilities of the corporation,"—*Held*, that the responsibility imposed on the stockholders was secondary; and that, when the debts against the corporation became extinct by the expiration of its charter, the liability of the individual stockholders was extinguished also. *N. C. Supreme Ct.* 1863, *Malloy v. Mallett*, 6 *Jones Eq.* 345.

68. **Reversion of property.** Upon the rule of the common law, that on the dissolution of a corporation real property held by them, upon a gift for corporate uses reverts to the donor or his heirs,—see *Dean &c. of Windsor v. Webb*, *Godb.* 211; *Edmunds v. Brown*, 1 *Lev.* 237; *Attorney General v. Gower*, 9 *Mod.* 224; *Hooker v. Utica Turnpike Co.* 12 *Wend.* 371; *White v. Campbell*, 5 *Humph.* 38; *Bingham v. Weiderwax*, 1 *N. Y. (1 Comst.)* 509; *Folger v. Chase*, 18 *Pick.* 66.

69. Upon the dissolution of a corporation, the title to its real property granted to it in fee, and not for a special purpose, vests in its receiver, and does not revert to the original grantors, and the same is to be administered by him for the benefit of the creditors and stockholders. *N. Y. Supreme Ct.* 1860, *Owen v. Smith*, 31 *Barb.* 641.

70. Upon the expiration of a corporation or its dissolution, unless otherwise provided by statute, such real estate only as remains in

* See also, upon this doctrine, *Edmunds v. Brown*, 1 *Lev.* 237; *Rex v. Pasmore*, 3 *Durnf. & E.* 241; *Colchester v. Seaber*, 3 *Burr.* 1866; *Bank of Mississippi v. Wrenn*, 3 *Smed. & M.* 791; *Commercial Bank of Natches v. Chambers*, 8 *Smed. & M.* 9; *Miami Exporting Co. v. Gano*, 18 *Ohio*, 269; *Renick v. Bank of West Union*, *Id.* 298; *White v. Campbell*, 5 *Humph.* 38; *Hightower v. Thornton*, 8 *Ga.* 466; *Robinson v. Lane*, 19 *Ga.* 337; *Moultrie v. Smiley*, 16 *Ga.* 369.

a corporation at that moment reverts to the original proprietors; what has been divested out of the corporation by its own act, or the act of law, does not so revert. *N. C. Supreme Ct. 1844, State v. Rivers, 5 Ired. 297.*

71. That a dissolution of a corporation will terminate a mere tenancy at will,—see *Lea v. Hernandez, 10 Texas, 187.*

72. A provision of a State constitution, that “no man’s property shall be taken for public use without the consent of his representatives,” does not prohibit a judgment of seizure of corporate franchises in *quo warranto* for a violation of its charter, nor prevent the common-law consequences, upon such a dissolution of a corporation, as to its property. *Ind. Supreme Ct. 1823, State Bank v. State, 1 Blackf. 267.*

73. The dissolution of a corporation, which is made the ground of an action, is not shown by evidence that the discharge of the corporate functions under the charter has become impossible by reason of the diminution of the number of corporators, where the forfeiture of the franchise has not been declared, by a court, in a proper proceeding. Hence, one who has granted lands to a corporation cannot maintain an action to recover them, on the ground, that, by the neglect to elect trustees, and the acquisition of all the stock in the company in one person, the corporation has been dissolved, and the land has reverted. It must be regarded as in legal existence until a judgment of forfeiture has been had in a direct proceeding. *Miss. Ct. of Errors, 1856, Bohannon v. Binns, 31 Miss. 355.*

74. Effect of dissolution upon contracts.* That, after an order enjoining a corporation from exercising its franchises, made in pro-

ceedings for its dissolution, it can make no contract which will bind its assets,—see *Carrington v. Commercial Fire & Marine Ins. Co. 1 Bosw. 152.*

75. After the directors of a corporation had been, by a vote of the stockholders, pursuant to the charter, divested of all authority except to close its concerns, they issued new obligations of the company, and took a mortgage therefor. *Held*, that the mortgage thus taken was void. *N. Y. A. V. Chan. Ct. 1846, Green v. Seymour, 3 Sandf. Ch. 285.*

76. Where a note, secured by a deed of trust, is executed to a defunct corporation, the note is void for the want of a payee, and the deed of trust for want of a beneficiary. *Tenn. Supreme Ct. 1844, White v. Campbell, 5 Humph. 88.*

77. A statute authorizing a corporation to surrender its charter and be dissolved, is not invalid as infringing the obligation of its contracts. The obligation of its contracts survives. By the nature of its political existence, a corporation is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for willful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. The existence of the private contracts of the corporation does not force upon it a perpetuity of existence. *U. S. Supreme Ct. 1834, Mumma v. Potomac Co. 8 Pet. 281.*

78. Unpaid subscriptions to the capital stock of a corporation are property of the corporation, which may be reached by creditors through the aid of a court of equity. Although the debts due to or from the corporation, are (at common law) extinguished by a dissolution, yet the individuals composing the corporation may, during its existence, incur liabilities which will survive. *Ga. Supreme Ct. 1850, Hightower v. Thornton, 8 Ga. 486.*

79. — upon liabilities of directors. Under statutes of the State of New York, the directors and managers of a corporation, after its dissolution, are liable for its debts only so far as they received assets. If the corporation was dissolved and a new corporation organized, to which its assets are transferred and by which specified liabilities of the old corporation are assumed, the

* In England, it is *Held*, that an order for “winding up” a public company, is notice of discharge to the company’s servants. And such servants are not entitled to receive payment of wages or salaries earned before such order, in full, in preference to the claims of other creditors. *Rolle Ct. 1866, Re General Rolling Stock Co. (Chapman’s Case), 1 Law Rep. Eq. Cas. 246; 19 Jur. N. S. 44.*

But, although, where the business of a company is wholly at an end, a winding-up order may be notice of discharge to the servants of the company from the date of the order, yet where the business is continued after the winding up, (the company being a continuing one, and the official liquidator representing the company), and the former servants are employed, the old contract between the company and its servants remains in force, and notice of discharge must be given pursuant thereto. *Vice Chan. Ct. 1867, Re English Joint Stock Bank, (Exp. Harding), 3 Law Rep. Eq. Cas. 241; 15 Law Times N. S. 523.*

trustees of the old corporation are not liable, without proof of assets in their hands, for a debt of the old corporation not among those assumed by the new. *N. Y. Supreme Ct.* 1864, *Hoffman v. Van Nostrand*, 42 *Barb.* 174; 28 *How. Pr.* 116.

80. The act of incorporation of a bank provided that the debts which the corporation should at any time owe should not exceed three times the amount of the stock paid in, over and above the deposits in their vaults; and that, in case of excess, the directors under whose administration it should happen should be liable for the same in their individual, natural, and private capacities, in an action of debt to be brought against them. *Held*, that the expiration of the charter by its own limitation, while a suit against certain directors, who were guilty of an over-issue, was pending, did not abate the action; and that a creditor of the corporation could not recover the entire excess *in solido*, but only the amount of his debt or demand. *Ga. Supreme Ct.* 1854, *Moultrie v. Smiley*, 16 *Ga.* 289.

81. — upon suits by the corporation. By a decree of forfeiture issued against a corporation, the corporation loses the faculty of suing in its corporate name. *La. Supreme Ct.* 1867, *Bank of Louisiana v. Wilson*, 19 *La. Ann.* 1. Compare *Green v. Seymour*, 3 *Sandf. Ch.* 285.

82. If a corporation become extinct by expiration of charter, or by decree of forfeiture, pending a suit at law for a corporate demand, and that fact be brought regularly before the court, the action must terminate. An attachment made in such suit will be dissolved. And if, even after judgment in favor of the corporation, the corporation become extinct, no execution can issue regularly in their name, and if one be sued out, it may be quashed on showing that the corporation had become extinct before it was sued out. *Va. Ct. of Appeals*, 1848, *May v. State Bank of North Carolina*, 2 *Rob.* 56.

83. Where a corporation had assigned its rights during its existence, so that the controversy was pending on appeal when the charter expired, in the name of the corporation, for the benefit of the assignees, the court permitted the cause to proceed in the name of the corporation, without noticing on the record its dissolution. *Va. Ct. of Appeals*, 1848, *Bank of Alexandria v. Patton*, 1 *Rob.* 499.

84. — or against them. The expiration of the charter of a corporation does not affect legal proceedings already commenced against it. *Mo. Supreme Ct.* 1840, *Lindell v. Benton*, 6 *Mo.* 361.

85. The dissolution of a corporation by an act of the legislature deprives it of its corporate existence, and no legal judgment can be rendered against it subsequent to that time. Therefore where a judgment is rendered against a corporation after its dissolution, and execution levied upon the property of an individual as a stockholder, he is a privy to the judgment, and may maintain a writ of error in his own name, without joining his co-stockholders, to reverse it. *Me. Supreme Ct.* 1849, *Merrill v. Suffolk Bank*, 31 *Me.* 57.

86. Power to settle the corporate affairs.* After dissolution, a corporation has a prolongation of its existence in the nature of an administration of its estate. All rights under the defunct corporation are fixed at its dissolution; but it has a nominal existence for the purpose of closing its concerns in the most convenient manner, and especially of compelling it to execute its contracts and discharge its obligations and liabilities. [16 *Mass.* 245.] *Mass. Supreme Ct.* 1839, *Crease v. Babcock*, 28 *Pick.* 334.

87. A dissolution of a corporation by the voluntary act of its stockholders does not deprive it of its power to act in closing up its affairs, or the right of a creditor for relief. *Iowa Supreme Ct.* 1865, *Muscatine Turnverein v. Funck*, 18 *Iowa.* 469.

IV. RIGHTS OF CREDITORS AND STOCKHOLDERS.

88. Notice of proceedings. When the legislature has, under a general statute, reserved to itself power to wind up the con-

* For cases upon the extent of this power conferred by special statutes authorizing corporations to act after dissolution in settling their business,—see *Folger v. Chase*, 18 *Pick.* 63; *Ferguson v. Miners & Manufacturers' Bank*, 3 *Sneed*, 609; *Herron v. Vance*, 17 *Ind.* 595; *Campbell v. Mississippi Bank*, 6 *How. (Miss.)* 674; *Nevitt v. Bank of Port Gibson*, 6 *Smed. & M.* 518; *Commercial Bank of Natchez v. Chambers*, 8 *Smed. & M.* 9; *State of Mississippi v. Commercial and Railroad Bank*, 13 *Smed. & M.* 276; *Grand Gulf Bank v. Wood*, *Id.* 482; *Grand Gulf Bank v. Jeffers*, *Id.* 486; *Bacon v. Cohen*, *Id.* 516; *Robertson v. Hay*, *Id.* 566; *Chew v. Peale*, *Id.* 700; *Lewis v. Robertson*, 13 *Id.* 553; *Nashville Bank v. Petway*, 8 *Humph.* 523; *Mariners' Bank v. Sewall*, 50 *Me.* 220.

cerns of banking corporations, those provisions of the statute calculated to apprise all interested of the fundamental change about to be wrought, should be complied with, in order to give legal efficacy to the acts done under it; otherwise the property of the corporation will not be divested, and its charter will continue in force. *Md. Ct. of Appeals*, 1888, *Farmers' Bank of Delaware v. Beaton*, 7 *Gill & J.* 421.

89. Where a bill was filed by one of several parties interested in a common business enterprise, against the others who claimed to have become organized as a corporation, the complainant insisting that the company was not a corporation, but a simple copartnership, and asking the court so to declare, and to dissolve the partnership, and appoint a receiver,—*Held*, that the appointment of a receiver was erroneous, without making the corporation, as such, a party to the suit, the court having no power to deprive the company of its property and decree its dissolution, when the company is not present to defend itself. *Ill. Supreme Ct.* 1868, *Baker v. Backus*, 32 *Ill.* 79.

90. It is not essential to the determination of a suit in chancery to dissolve a joint stock company, that all its members should be made parties; but where the parties before the court are sufficient to authorize it to adjudicate upon the company's rights, and it is difficult, if not impracticable, to bring in all the stockholders, the court may dissolve the company, and decree a distribution of its effects, taking care that there may be due representation of all substantial interests. *Cal. Supreme Ct.* 1850, *Von Schmidt v. Huntington*, 1 *Cal.* 55.

91. Equities of creditors in capital stock. The capital stock of a company is a fund, set apart, by its charter, for the payment of its debts; which amounts to a contract with those who shall become its creditors, that the fund shall not be withdrawn and appropriated to the use of the owner or owners of the capital stock. On the dissolution of a corporation, its effects are a trust fund for the payment of its creditors, who may follow them, into the hands of any one not a *bona fide* creditor or purchaser without notice. A State law, which deprives creditors of this right, and appropriates the property to other uses, impairs the obligation of their contracts, and is invalid. The fact

that a State is the sole owner of the stock in a banking corporation, does not affect the rights of the creditors in this respect. *U. S. Supreme Ct.* 1853, *Curran v. State of Arkansas*, 15 *How.* 304. See also *Wood v. Dummer*, 3 *Mass.* 308; *Nathan v. Whitlock*, 9 *Paige*, 152; *Mumma v. The Potomac Co.* 8 *Pet.* 281; *Wright v. Petrie*, 1 *Smed. & M.* 319; *Nevitt v. Bank of Port Gibson*, 6 *Smed. & M.* 513; *Hightower v. Thornton*, 8 *Ga.* 486; *Fort Edward &c. Plank Road Co. v. Payne*, 17 *Barb.* 567; *Gillett v. Moody*, 3 *N. Y. (8 Comst.)* 479.

92. The creditors of a dissolved insolvent corporation have an equitable lien upon its assets, in the hands of another, for the payment of their debts. *N. Y. Supreme Ct.* 1860, *Tinkham v. Borst*, 31 *Barb.* 407.

93. Upon general principles, the *bona fide* and just creditor of a corporation which has been dissolved, under judicial sentence, for a breach in its charter, has a claim upon the corporate property for the satisfaction of his debt, apart from any reservation in the act of legislature which directed the prosecution, and the members or stockholders of the corporation have a similar right, as against the parties who claim to hold the corporate property; and a court of equity will aid the parties to release the property belonging to the corporation, and compel its application to the satisfaction of these demands. *U. S. Supreme Ct.* 1855, *Bacon v. Robertson*, 18 *How.* 480.

94. The note holders of a foreign banking corporation, which has suspended payment and become insolvent, may, without first obtaining a judgment at law, proceed in equity against the bank, its directors, stockholders, and agents; charging them with fraud and misapplication of the assets, and seeking a discovery and account. Such a bill may be maintained under the general powers and jurisdiction of the court, which regard the capital stock of the company and all its assets as a trust fund for the payment of its creditors, and the directors, stockholders, and agents as trustees. *Ala. Supreme Ct.* 1854, *Bank of St. Mary's v. St. John*, 25 *Ala.* 566.

95. Where there are sundry *fi. fas.* against a railroad company which is insolvent, and it is threatened to levy upon and sell the road, with its equipments, equity will take jurisdiction, directing a sale for all con-

cerned, and distribute the funds to such as shall show themselves entitled to the same, according to the usual course of the courts of equity in marshalling assets. In such a proceeding, any one who has a claim upon the fund, but who is not a party to the suit, may become a party, by presenting his claim before the master, or under the decree, before it becomes final. But if he neglects to do so, equity will not aid him in setting it aside. *Ga. Supreme Ct.* 1851, *Macon & Western R. R. Co. v. Parker*, 9 *Ga.* 377.

96. The Mississippi statute of 1843 provides that the trustees shall apply the assets collected by them as thereafter directed by law. *Held*, that such assets are a trust fund for the benefit of creditors, which no subsequent legislation could otherwise appropriate, and if the legislature fails to direct the mode of distributing them among the creditors, the court of chancery will execute the trust. *Miss. Ct. of Errors*, 1846, *Nevitt v. Bank of Port Gibson*, 6 *Smedes & M.* 513.

97. Where a company has ceased to have a corporate existence, as a legal consequence of certain acts, and a party claims that he has been injured or benefited thereby, he may, by averring these facts, have his remedy, and need not, in the first instance, institute a proceeding, and have it declared, that the existence of the corporation has terminated. *Iowa Supreme Ct.* 1857, *Carey v. Cincinnati & C. R. R. Co.* 5 *Clarke*, 387.

98. Priority among creditors. Where there are several creditors, the fund made liable for debts, if insufficient to discharge the whole, should be distributed ratably.* And a stockholder who is also a creditor, stands on the same ground with a creditor who is not a stockholder. *N. Y. Ct. of Errors*, 1826, *Briggs v. Penniman*, 8 *Cow.* 387.

99. A creditor of a corporation has no claim, arising out of the mere fact that the corporation was regularly organized, to priority over a creditor of the president, who first levies and sells the property nominally held by the corporation, claiming to do so on the ground that the company was organized, and its business carried on, for

the purpose of defrauding him and other creditors of its president. *N. Y. Ct. of Appeals*, 1862, *Booth v. Bunce*, 24 *N. Y.* 592.

100. Creditors of a corporation which was formed in order to defraud the creditors of its promoters, have no priority over the latter creditors. *Ib.*

101. A surety for the corporation, who pays money as such surety, is only entitled to come in ratably with the other creditors of the corporation. *It seems*, that it would be otherwise in the case of a surety of the receiver, or of a payment for the benefit of the estate. *N. Y. Chancery*, 1847, *Matter of Croton Ins. Co.* 2 *Barb. Ch.* 360.

102. The officers of an insolvent corporation are not entitled to have their salaries paid in full, in preference to the debts of other creditors; they are only entitled to be paid their ratable proportion of the assets of the company as between them and other creditors.* *N. Y. Chancery*, 1847, *Matter of Croton Ins. Co.* 3 *Barb. Ch.* 642.

103. But if one of them is indebted to the corporation, he can have his salary set off against that debt. *Ib.*

104. The officers of an insurance company had been employed with an understanding that only half their salaries should be paid until such time as it might be convenient for the company to pay the whole. *Held*, that upon winding up the company the full amount of the salaries must be paid. *Vies Chan. Ct.* 1850, *Exp. Cope*, 1 *Eng. L. & Eq.* 87; 20 *Law J. N. S.* 28.

105. Equities of stockholders. Upon dissolution, the interests of the several stockholders become equitable rights to proportionate shares of the corporate property after payment of the debts; and in the adjustment, each stockholder is chargeable with his debts to the corporation. *N. Y. Chancery*, 1844, *James v. Woodruff*, 10 *Paige*, 541.

106. Upon winding up the affairs of a corporation and dividing its assets, stockholders, whose stock is fully paid, have a right to a return of the excess paid by them above the others, who have paid but in part, before any division of balance takes place. *U. S. Circ. Ct. (Pa.)* 1850, *Krebs v. Carlisle Bank*, 2 *Wall. C. Ct.* 88.

* Under the provisions of the New York Revised Statutes, however, creditors who, by legal diligence, obtain judgments and issue executions against a corporation after the filing of a petition for a voluntary dissolution, and before the petition is granted, acquire a lien upon the property levied on. *Matter of Waterbury*, 8 *Paige*, 380.

* That in New York neither a cashier nor a depositor has any lien on the funds of an insolvent bank for salary or deposits, but must come in as ordinary creditors,—see *Bruyn v. Receiver &c.* 9 *Cow.* 412, note.

107. A shareholder in a limited liability company, who is also a creditor of the company, is not entitled to set off so much of his debt as is equal to the amount of calls which have been made upon but not paid by him, and to receive a dividend for the balance; nor is he entitled to have the dividend calculated upon the entire debt, and to be paid the balance of dividend after deducting the amount of the call; but he must first pay the call, and he will then be entitled to a dividend *pari passu* with the other creditors who are not shareholders.* *Chancery*, 1866, *Re Overend (Exp. Grissell)*, 35 *Law J. N. S.* 753; 1 *Law Rep. Ch. App.* 528.

108. Where a tontine scheme was set on foot, and a prospectus issued, stating that all money deposited would be laid out at interest, and after some subscriptions had been paid to the directors, who had the management of the concern, but before any money was laid out, the directors resolved to abandon the concern,—*Held*, that each subscriber might recover the whole sum paid in, by him, of the directors, in an action for money had and received, without the deduction of any part towards the expense of the concern. *K. B.* 1825, *Nockells v. Crosby*, 3 *Barn. & Cr.* 814; 5 *Dowl. & R.* 751.

109. A claim against a president and director of an insolvent bank for dividends improperly declared, belongs to creditors, and the receiver cannot collect it for the benefit of stockholders. *N. Y. Supreme Ct. Butterworth v. O'Brien*, 24 *How Pr.* 488.

* By their articles of agreement, the stockholders of a mining corporation provided that nineteenth of the stock, representing the property, should be liable to assessments for the purpose of developing mines, &c., the balance of the stock to remain the property of the corporation until sold, and to "be and remain forever unassessable;" that dividends of profits should be paid, after the whole amount of assessments on assessed shares was reimbursed to the holders; and that the directors should, as soon as the condition of the funds and the interest of the company would permit, reimburse said assessed shareholders out of any surplus money on hand, &c.; no provision was made for dissolution and division of the corporate property. The business being unprofitable, the stockholders voted to dispose of their property and distribute the proceeds; on sale and division, the holders of assessed shares claimed that their assessments were to be repaid before any dividend was applied to the unassessed stock. *Held*, that each class were to have an equal proportionate share in the distribution, as the preference given to the holders of assessed stock was in carrying on the business, and to be "out of the profits," or "arising from surplus funds;" and as there were no profits or excess above the capital stock, that they were not entitled to any preference in closing up the affairs of the corporation. *North American Mining Co. v. Clarke*, 40 *Pa. St.* 482.

DIVIDENDS.

1. The power to declare dividends, discretionary. The directors of a board are the sole judges of what portion of the profits they ought from time to time to divide; and their judgment upon the matter, if honest, will not be controlled by the courts, even though they may deem it erroneous. *La. Supreme Ct.* 1834, *State of Louisiana v. Bank of Louisiana*, 6 *La.* 745. And see *Brown v. Monmouthshire Railway &c. Co.* 4 *Eng. L. & Eq.* 118; 15 *Jur.* 475.

2. The articles of association of a bank (formed under the New York act of 1838) provided that there should be a semi-annual dividend, and also vested all the powers and privileges of the associates in a board of directors. *Held*, that it was competent for the board to determine, in any year, not to declare a dividend, and that a shareholder could not maintain a bill to restrain the collection of the securities he had given to the association in consideration of his shares, because they so determined.* *N. Y. V. Chan. Ct.* 1840, *Ely v. Sprague, Clarke*, 351.

3. Dividends not compellable. An actionable promise arises by implication in all cases in which the duty is definite and due to the individual; but when such duties are indefinite or are due to the members in their collective capacity, no such promise can be inferred. Thus the duty resting upon a corporation, where profits are in hand, to declare dividends, is indefinite and discretionary in its nature, and due, in no sense to any particular member, but to the community of members, for the performance of which no promise can be implied in favor of the separate stockholder. But after a dividend is declared, the right to the profits becomes individualized, and the duty to distribute in certain proportions becomes attached as a right to each member distributively, from which arises the promise by implication. *N. J. Supreme Ct.* 1865, *Jackson v. Newark Plank Road Co.* 81 *N. J. Law* (2 *Vroom*), 277.

4. No equitable relief can be granted in Massachusetts against a foreign corporation having neither officers nor a place of busi-

* In New York it has been *Held* that the directors of a banking association have no authority to declare a dividend payable otherwise than in cash. They cannot make one payable in bills of country banks, solvent, but quoted below par in the city of New York. *Khle v. Chittengo Bank*, 24 *N. Y.* 548.

ness in that State, for a failure to declare and pay dividends according to the stipulations of their certificates of guaranteed stock. *Mass. Supreme Ct.* 1866, *Williston v. Michigan Southern &c. R. R. Co.* 13 *Allen*, 400.

5. A mandamus will not lie to a trading corporation, at the instance of one of its members, to compel them to produce their accounts for the purpose of declaring a dividend of the profits. *K. B.* 1819, *Rex v. Bank of England*, 2 *Barn. & Ald.* 620.

6. Must be made impartially. The officers of a corporation, when they undertake to declare a dividend, are bound to make it equal and just among all those who are interested. If they attempt to make an unjust discrimination, giving one class of stockholders an unfair advantage over another, a court of equity has power to interfere to correct the wrong. *N. Y. Supreme Ct. Sp. T.* 1865, *Luling v. Atlantic Mutual Ins. Co.* 45 *Barb.* 510; 30 *How. Pr.* 69.

7. A dividend adjusted upon an inequitable basis, decreed to be readjusted upon a different and more equitable footing. *Ib.*

8. Dividends declared by a corporation must be general on all the stock. *Ill. Supreme Ct.* 1851, *Ryder v. Alton & Sangamon R. R. Co.* 13 *Ill.* 516.

9. The dividends of passenger railway companies are distributable upon the capital stock paid in; and the annual official reports made to the auditor general of the State by the company, are the best evidence of the amount of such stock. *Pa. Supreme Ct.* 1865, *Citizens' Passenger Railway Co. v. City of Philadelphia*, 49 *Pa. St.* 251.

10. When dividends may be restrained. An action may be maintained by a stockholder in a moneyed corporation to enjoin the payment of a dividend, where the directors are about to misapply the funds of the corporation in paying such dividend, there being in fact no money earned for such a purpose. *N. Y. Supreme Ct. Sp. T.* 1857, *Carpenter v. N. Y. & New Haven R. R. Co.* 5 *Abb. Pr.* 277.

11. After a dividend has been declared, the right of each shareholder in the dividend payable to him is separate and independent of that coming to other shareholders, and he cannot file a bill in behalf of such others to restrain the payment of the dividend. *Ib.*

12. After an issue of spurious stock by an officer of a corporation, the corporation may be enjoined, at suit of a genuine stockholder, from paying a dividend declared by them, to any stockholders except such as can be ascertained to hold none of the spurious stock, and from making any future dividend on the stock, until it be established who are the genuine stockholders. *N. Y. Supreme Ct. Sp. T.* 1859, *Underwood v. N. Y. & New Haven R. R. Co.* 17 *How. Pr.* 537.

13. Where a bill was filed to restrain a railway company from paying any dividend, either declared or to be declared, contrary to the provisions of an act of Parliament,—*Held*, that an injunction would lie as to future dividends; but not as to a dividend declared, it appearing that the plaintiff failed to show a title to share in such dividend, and that the general body of the shareholders, who were interested in the dividend, was not adequately represented. *Chancery*, 1850, *Carlisle v. South Eastern Railway Co.* 4 *Eng. Railw. Cas.* 366; 1 *Mac. & G.* 689; 2 *Hall & T.* 866; 14 *Jur.* 535.

14. Shareholder's right to receive dividend. Ownership of stock is essential to a recovery from a corporation, of dividends. Mere possession of the stock or a special property therein is not sufficient. *Cal. Supreme Ct.* 1867, *Dow v. Gould & Curry Silver Mining Co.* 31 *Cal.* 629.

As to the Right to dividends arising incidentally to questions of title to the stock on which it is declared,—see *Strock*.

15. The purchaser of a share of stock in a corporation takes the share with all its incidents, one of which is the right to receive all future dividends declared on such shares. And it is immaterial at what times or from what sources such undivided profits have accrued; they are an incident to the share, to which a purchaser becomes at once entitled, provided he remains a member of the corporation until a dividend is made. *N. H. Supreme Ct.* 1862, *March v. Eastern R. R. Co.* 43 *N. H.* 515.

16. Certain shares in a mining company were assigned with all the dividends to be declared after a specified day. Both par-

* That unpaid dividends upon bank stock held by a wife before her marriage, or bequeathed to her afterwards, will not pass by an assignment executed by the husband, which is not capable of passing her choses in action,—see *Slaymaker v. Bank of Gettysburg*, 10 *Pa. St.* 373.

ties expected a dividend on that day; but it was not declared until the following day. —*Held*, that the title to the dividend which thus accrued after the assignment, and subsequent to the day specified, belonged to the assignor. *Cal. Supreme Ct.* 1860, *Brewster v. Lathrop*, 15 *Cal.* 21.

17. The charter of a bank provided that charitable societies might, from time to time, subscribe for stock of the bank in addition to its fixed capital, provided that the shares so subscribed should not be transferable and might be withdrawn at par on certain notice. Under this provision certain charitable corporations subscribed for shares in the bank, from time to time, down to a certain date. A few years afterwards, the bank declared a dividend out of its surplus funds, mostly earned before these subscriptions were made. *Held*, that the societies subscribing were shareholders, with all the rights of individual shareholders, and entitled to receive their proportion of the dividend, although the fund from which it was declared was earned in great part before they became stockholders. *Conn. Supreme Ct.* 1857, *Phelps v. Farmers & Mechanics' Bank*, 26 *Conn.* 269.

18. The complainant engaged in the service of a joint stock partnership, upon an agreement that he was to receive a salary, and the net profits or dividends upon ten shares of its capital; but no dividend was declared during the several years that he remained in their service. *Held*, that he could not, even in equity, recover a proportion of a dividend declared shortly thereafter. In general cases of periodical payments becoming due at intervals, and not accruing *de die in diem*, there can be no apportionment. [3 *Atk.* 261, 502; 2 *Ves.* 672; *S. C. Ambl.* 279; 3 *Bro. C. C.* 101.] *N. Y. V. Chan. Ct.* 1835, *Clapp v. Astor*, 2 *Edw.* 379.

19. — as against creditors. An insurance company declared a dividend out of a clear surplus, carried it to profit and loss on their books, and ordered checks for the shares of the stockholders to be drawn by its officer upon a bank in which its deposits were kept; and some time after the day when the dividend was payable, the company was rendered insolvent by a great fire. *Held*, that the fund in bank was equitably appropriated to the amount of the dividend, and that the stockholders were entitled to

it as against creditors.* *N. Y. V. Chan. Ct.* 1836, *Le Roy v. Globe Ins. Co.* 2 *Edw.* 657.

20. Necessity of demand. An action will not lie against an incorporated company, for dividends declared, without demand being made, either of the corporation or its authorized agents, for payment; nor will interest accrue, or the statute of limitations begin to run, until demand is made. The establishment of a rule that suits could be instituted without demand, for dividends declared by banking and other corporations, would greatly impair the value of stocks therein. *Md. Ct. of Appeals*, 1847, *State v. Baltimore & Ohio R. R. Co.* 6 *Gill*, 863; *S. P. Pa. Supreme Ct.* 1857, *Philadelphia & C. R. R. Co. v. Hickman*, 28 *Pa. St.* 329.

21. A dividend once declared becomes a debt due from the corporation to the individual stockholder, and is strictly demandable, and to be paid at the office of the corporation. If a dividend is declared payable elsewhere, the party through whom it is paid becomes an agent of the company; and, failing to pay it over to the stockholder, an action may be maintained against the corporation for the amount. *N. J. Ct. of Errors*, 1861, *King v. Paterson & Hudson River R. R. Co.* 5 *Dutch.* 504.

22. Right of corporation to retain dividend. That a bank has no right to retain, out of dividends upon the stock, a debt due from the stockholder,—see *Attorney General v. State Bank*, 1 *Dev. & B. (Ch.)* 545.

23. The dividends which are divisible among the shareholders of a corporation must be considered as their own property, and cannot be applied by the directors to any purpose not included in their charter or fundamental contract, without the consent of such shareholders. *N. H. Supreme Ct.* 1862, *March v. Eastern R. R. Co.* 43 *N. H.* 515.

24. B being indebted to a bank for a loan, and being the owner of three hundred and eighty shares of its stock, empowered the president to transfer the shares to himself in trust for the bank, to secure the payment of the debt and interest. The bank afterward called on each stockholder to pay an installment on each share, which B failed to do. After-

* It seems that the stockholders would not have been entitled, had no specific fund been appropriated. *Lowerre v. American Fire Ins. Co.* 6 *Puige*, 432.

ward the president re-transferred the stock, and B paid the loan with interest. Between the time for paying the installment and the re-transfer, the bank declared two dividends, to recover which B brought *assumpsit*. *Held*, that his neglect to pay the installment forfeited his claim to those dividends, and that the action could not be sustained. *Md. Ct. of Appeals*, 1818, *Marine Bank of Baltimore v. Biays*, 4 *Harr. & J.* 388.

25. A stockholder in an insurance company assigned his stock. The company were holders of notes made by the original stockholder, one of which became due before the company had notice of the assignment. *Held*, that the company might apply the dividends accruing on the stock until such time as the assignee was entitled to have a transfer made to him, to the payment of that note; but could not retain for notes falling due after notice of the assignment. *N. Y. Supreme Ct.* 1802, *Bates v. New York Ins. Co.* 3 *Johns. Cas.* 288.

26. The acceptance by a stockholder of a dividend upon his stock, can be no ratification of the illegal conduct of the directors. *N. J. Chancery*, 1862, *Hilles v. Parrish*, 14 *N. J. Eq.* (1 *McCart.*) 380.

27. Stock dividends. Under a statute authorizing a bank to retain a certain share of the "dividends" upon the stock owned by the State, towards certain unpaid stock of the State, it was *Held*, that a portion of the capital stock, divided among the stockholders, was not dividends within the act. *N. C. Supreme Ct.* 1837, *Attorney General v. State Bank*, 1 *Dev. & B. (Ch.)* 545.

28. A corporation, restricted to six per cent. dividends, out of profits, to stockholders, issued, on the basis of an increased business and enhanced value of their works and property, in accordance with a resolution of stockholders, scrip certificates from time to time, entitling the holder to additional shares of stock; distributing them ratably among share and scrip holders in proportion to the amount held at the date of the issue. The resolution, embodied in the scrip, provided that the scrip should not be entitled to any cash dividend, until the funded debt of the company should be paid off, or adequate provision made for its discharge when due, and payment demanded; nor until the conversion of said scrip into stock. After such conversion certain of the scripholders demanded by

bill in equity the back dividends which had been declared on the stock from the issue to the date of conversion.

Held, 1. That the rights of the scripholders were measured by the contract under which the scrip was issued, and of which the scrip alone was the evidence.

2. That the contract being but an engagement that the holders of the scrip might become shareholders after payment of the funded debt, or provision made therefor, the scripholders were, therefore, not entitled to dividends upon the scrip or upon the stock into which it had been converted, except on such as had been declared subsequent to said conversion. *Pa. Supreme Ct.* 1865, *Brown v. Lehigh Coal and Navigation Co.* 49 *Pa. St.* 270.

ELECTIONS.

- I. HOW THEY SHOULD BE CONDUCTED.
- II. THE RIGHT TO VOTE.
- III. HOW REVIEWED AND VACATED.

I. HOW THEY SHOULD BE CONDUCTED.

1. Time of holding election. The mere failure of an electoral body of a corporation, *e. g.* a board of supervisors, to proceed to an election as directed by its ordinances, does not exhaust its power of election. The time mentioned is not of the essence of the power; it is a mere directory provision, which should be followed, but the omission to pursue which is not fatal. *Cal. Supreme Ct.* 1860, *Jacobs v. Murray*, 15 *Cal.* 221.

2. A charter provided that the directors should be chosen by the members of the corporation at their annual meeting, and that the annual meeting of the corporation for the choice of directors should be holden at such time and place as might be provided by the by-laws. The grantees met, and after voting to accept the charter, and after electing directors, adopted a code of by-laws. *Held*, that the election of the directors was valid, although it was before the adoption of the by-laws.* *N. H. Superior Ct.* 1848, *Hughes v. Parker*, 19 *N. H.* 181.

* In Indiana, directors of a plank road company may be elected before the articles of association are filed in the recorder's office. See *Covington & Plank Road Co. v. Moore*, 8 *Ind.* 510.

3. **Place.** When the usual place of meeting of an incorporated society has been changed, an election of officers at the old place is invalid. *N. J. Supreme Ct.* 1848, *Miller v. English*, 1 *Zabr.* 317.

4. **Compelling election.** If shareholders are dissatisfied with the proceedings of the company, on the ground that there is not a full board of directors, they may apply for a mandamus to compel the company to complete the number.* *C. P.* 1842, *Thames Haven Dock & Railway Co. v. Rose*, 3 *Eng. Railw. Cas.* 177; 4 *Mann. & G.* 552.

5. The effect of a neglect to hold an election, discussed. *Phillips v. Wickham*, 1 *Paige*, 590; *People v. Runkel*, 9 *Johns.* 147.

6. **Provisions regulating mode of election.** Where the time and manner of election of officers of a corporation are not fixed by charter or prescription, it is competent to a corporation to make regulations respecting them. *K. B.* 1789, *Newling v. Francis*, 8 *Durnf. & E.* 189.

7. Where a statute authorized a municipal corporation to elect commissioners, and the corporation appointed them by a resolution,—*Held*, that, as no mode of election was prescribed by the statute, the power was properly and legally exercised. *Ga. Superior Ct.* 1830, *Low v. Commissioners of Pilotage*, *R. M. Charlt.* 302.

8. Where a charter of a religious society enjoins an annual election of trustees, fixing the time at which it shall be held, but is silent as to the mode of conducting it, the corporation may provide by a by-law for the mode; but where no such by-law has been adopted, a long established usage will govern. *Pa. Supreme Ct.* 1858, *Juker v. Commonwealth*, 20 *Pa. St.* 484.

9. The usage of such a society had been to meet on a certain day before the election, and appoint officers to conduct it. Two elections for trustees were had on the same day. *Held*, that the legal election was the one held by officers duly chosen at the preliminary meeting, though a majority of the votes of the society were not cast at that election. *Id.*

10. The act of incorporation of a railroad

company required the directors to be chosen at the annual meetings of the corporation. *Held*, that this provision was directory only, not restrictive; and that its observance was not essential to the exercise of the power of election. The election of directors, and other suitable officers or agents, for the government of the affairs of the corporation, and the conduct of its business through the agency of such, pertain to the nature and condition of aggregate corporate bodies, without being expressly conferred by the act of incorporation. *N. H. Superior Ct.* 1849, *Hughes v. Parker*, 20 *N. H.* 58.

11. Where the charter of a railway company provided that its business should be carried on under the management of twelve directors, to be elected in a particular mode, pointed out, and that where vacancies occurred it should be lawful for the remaining directors to fill them,—*Held*, that this provision did not require that a board should be always full; but was merely directory as to the mode of filling vacancies. *C. P.* 1842, *Thames Haven Dock & Railway Co. v. Rose*, 3 *Eng. Railw. Cas.* 177; 4 *Mann. & G.* 552.

12. A corporation, empowered by charter "to make by-laws, &c., and to do all things needful for the good government and support of the congregation," may make a by-law giving the president thereof the power of appointing inspectors of the election of corporate officers; and may prescribe by by-laws, the nature of the tickets to be used, and the manner of voting. *Pa. Supreme Ct.* 1817, *Commonwealth v. Woelper*, 3 *Serg. & B.* 29.

13. A bank charter provided that directors might be chosen at "any time." A subsequent act enacted that, if they shall not be chosen on a day designated, the president and directors shall notify an election to be held within thirty days thereafter. *Held*, that the former act was not repealed by the latter, and that an election could be had even after the expiration of thirty days, it being intended, not to impair the charter right of holding an election at any time, but to quicken the directors in using it. *N. J. Supreme Ct.* 1888, *M'Neely v. Woodruff*, 1 *Green*, 352.

14. In an emergency and contingency in which the forms of procedure prescribed by the charter in respect to elections, fail to accomplish the purposes contemplated, so that

* That the command should not be to elect a particular person, but to proceed to the election of some one to supply the vacancy,—see *Rex v. Bridgewater*, 3 *Chitty*, 257; *Shutsworth v. Lincoln*, 3 *Bulstr.* 123; *Anon.* 3 *Barnard.* 237.

the necessary offices are vacant, it is competent for the corporators themselves to exercise the power of election and provide for the appointment of inspectors for that purpose. *N. Y. Supreme Ct. Sp. T. 1866, Matter of Wheeler, 2 Abb. Pr. N. S. 861.*

15. Who must be present. Where an integral part of a corporation, composed of a definite number, is required to vote at an election of a corporate officer, a majority of such integral definite part must attend, otherwise there can be no elective assembly, although other parts of the corporation also join in such election, and a majority of the whole existing body actually attend; but a majority of those present, when legally assembled, will bind the rest. *K. B. 1795, Rex v. Miller, 6 Durnf. & E. 268.*

16. When, by the charter of a municipal corporation, a particular officer is made an integral part of the elective assembly, his attendance is necessary to the validity of the election; and the election cannot be proceeded with in his absence, although he absents himself improperly. The charter of corporation conferred the power of election upon "the mayor, burgesses, and commonalty." A meeting was convened, and E. nominated for election; but before he was elected, the mayor departed; after which the burgesses and commonalty proceeded to elect E. Held, that the election was void for the absence of the mayor. *K. B. 1818, King v. Williams, 2 Mau. & S. 141.* See also *Rex v. Norris, 1 Barnard. 885; Machel v. Nevinson, 11 East, 84, n.; Rex v. Buller, 8 East, 389; Rex v. Gaborian, East, 77.*

Compare MUNICIPAL CORPORATIONS.

17. After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although the majority of the entire assembly altogether abstain from voting. If a majority, whose presence suffices to constitute the elective body, neglect to vote, it is their own fault, and will not invalidate the act of the others, but be construed as an acquiescence in the election made by those who do vote. And such an election is valid, though the majority of those whose presence is necessary to the assembly, protest against any election at that time, or even the election of the individual who has a majority of votes; the only manner in which they can effectually prevent his election, is by voting

for some other qualified person. *K. B. 1760, Oldknow v. Wainwright, 2 Burr. 1017.*

18. Inspectors. The appointment of inspectors of corporate elections (under the laws of New York), and their qualifications, powers, and duties—considered. *Matter of Mohawk & Hudson River R. R. Co. 19 Wend. 185; Matter of Chenango County Mut. Ins. Co. Id. 635; Matter of the Excelsior Fire Ins. Co. 16 Abb. Pr. 8.*

19. An election will not be vacated because the inspectors did not take the precise oath prescribed by the statute of the State governing corporate elections. If they are regularly appointed, they are inspectors *de facto*. *N. Y. Supreme Ct. 1838, Matter of Mohawk & Hudson R. R. Co. 19 Wend. 185; 1839, Matter of Chenango County Mut. Ins. Co. Id. 635.*

20. That inspectors of a corporate election may themselves be candidates for directorship,—see *Exp. Willcocks, 7 Cow. 402.*

21. That in judging of a claimant's right to vote, the inspectors are not, in general, to inquire beyond the transfer book,—see *Exp. Willcocks, 7 Cow. 402; Matter of Long Island R. R. Co. 19 Wend. 87.*

22. Where the act of incorporation provides that each stockholder shall be entitled to one vote on each share of the stock which he shall have held in his own name at least fourteen days previous to the time of voting, a by-law authorizing the inspectors to inquire into the question whether one who holds stock is the real owner, is void. *N. Y. Supreme Ct. 1822, People v. Kip, 4 Cow. 382, n.; U. S. Law Jour. 286; S. P. 1825, People v. Tibbets, 4 Cow. 358.*

23. In an election in a religious corporation, after the ballots have been received by the inspectors without challenge or objection, their right to inquire into the character of the voters ceases. The only duty that remains for them to perform is to count the ballots, and return the number of votes received, and the names of those having the greatest number. *N. Y. Supreme Ct. Sp. T. 1860, People v. White, 11 Abb. Pr. 168; Hartt v. Harvey, 32 Barb. 55; 10 Abb. Pr. 321; 19 How. Pr. 245.*

24. The certificate of the judges of an election set forth that one set of candidates had a majority of the votes cast, but that, after the result had been declared, satisfactory evidence was produced to the judges

that a part of the votes for such candidates were illegal, and that, setting these aside, the other set of candidates were elected; which, the certificate therefore declared to be the result of the election. *Held*, that the certificate destroyed itself, and the former set of candidates were to be deemed elected. *N. Y. Supreme Ct. Sp. T. 1860, Hartt v. Harvey, 32 Barb. 55; 10 Abb. Pr. 321; 19 How. Pr. 245.*

25. What vote is sufficient. In corporations aggregate, the principle of an election is a majority, and not a plurality, unless otherwise specified. *Del. Superior Ct. 1840, State v. Wilmington City Council, 3 Harring. 294.*

26. A majority of the directors of a bank constitute a board to transact business; and if, in the election of a president, a majority being present and qualified to vote, vote, the person receiving a majority of the votes cast is elected, although such votes do not constitute a majority of the whole board. *Va. Ct. of Appeals, 1855, Booker v. Young, 12 Gratt. 303.*

27. Ballots. Ballots which contain less than the full number of directors required to be elected, are not therefore void. Those who vote for a part of the directors only, virtually acquiesce, as to the residue, in what was done by the other stockholders. *N. Y. Supreme Ct. 1840, Matter of Union Ins. Co. 22 Wend. 591.*

28. A bank was authorized to choose three directors. Some of the stockholders being of the opinion that five was the number, voted a ticket having on it the names of five persons. There was also another ticket with the names of three persons. *Held*, that the persons whose names were upon the latter ticket were rightfully elected, although this ticket received a less number of votes than the other. *Mo. Supreme Ct. 1858, State v. Thompson, 27 Mo. 365.*

29. It having appeared that, at elections of officers of a corporation, tickets were inscribed with witticisms, the names of lewd women, &c., a by-law prohibiting the counting of tickets which had on them other things besides the names of the voters, was *Held* reasonable; and an eagle printed on the tickets, as a party badge, was adjudged a violation of this by-law, since it deprived a voter of that secrecy to which he was entitled in the exercise of his franchise, so as to

avoid the odium and violence of party prejudice. *Pa. Supreme Ct. 1817, Commonwealth v. Woelper, 3 Serg. & R. 29.*

30. Adjournment. It is no objection to the legality of the election of a board of directors that an adjournment was had during the process of balloting. *Id. Me. Supreme Ct. 1855, Penobscot & Kennebec R. Co. v. Dunn, 39 Me. 587.*

II. THE RIGHT TO VOTE.

31. The corporation cannot alter qualifications of electors. The qualifications prescribed by the statute of incorporation for electors of trustees, cannot be abridged or extended by act of the trustees or corporators. *N. Y. Supreme Ct. 1845, People v. Phillips, 1 Den. 388.*

32. Every person qualified under the statute has a right to vote for trustees. No additional qualification can be imposed by by-laws.* *Id.*

33. In general, where the charter vests the admission of members in the body at large, a power vested in the directors, to provide for the admission of members, gives them only a right to prescribe in their by-laws, the time, place, and manner of holding the election of members, and not the right to pass a by-law imposing a test of membership not contemplated by the charter. Thus, where one section of an act incorporating a savings institution, provided that there should be a meeting of the members, annually, for the choice of directors from among the members; and a following section provided that the directors should have power to provide for the admission of members; and a subsequent legislative act declared that stockholders should have a right of voting for directors, and that they should be eligible for directors; and a by-law was passed, by the directors, elected in pursuance of this last act, providing that every person

* Thus a by-law of the Passaic & Hackensack Bridge Company, declaring each proprietor entitled to as many votes as he has shares of stock was *Held* contrary to the charter of the company, and void. The claim of having one vote for each share does not rest on the common law or any of its principles. It wholly depends on the grant of the legislature. *Taylor v. Griswold, 2 Green, 222.*

A corporation has no power to exclude an integral part of the body, where a charter gives them a right of election. *Rex v. Spencer, 3 Burr. 1827; Newling v. Francis, 3 Durnf. & E. 189; Rex v. Head, 4 Burr. 2515.*

But compare Case of Corporations, 4 Co. 78.

holding one share of the stock should be a member of the institution, and that, upon a transfer of his stock, such person should cease to be a member.—*Held*, that the directors had not the power to elect members, but merely to provide for their admission; that, if they had the power, the by-law was an unreasonable exercise of it, and inconsistent with the design of the charter, and therefore invalid. *Pa. Supreme Ct. 1837, Commonwealth v. Gill, 3 Whart. 228.*

34. A religious corporation cannot add to the qualifications prescribed by the statute as conferring the right to vote at a corporate election. They cannot forbid persons from voting who are qualified within the statute, upon the ground that they do not adhere to the peculiar faith of the society. Every election at which persons are prohibited from voting upon any such ground is illegal. *N. Y. Ct. of Appeals, 1860, Petty v. Tooker, 21 N. Y. 267.*

35. Where a statute has pointed out the manner in which the election of church officers shall be made, a by-law made by the vestry of a church, varying the manner of election by requiring from electors a property qualification, is invalid. *S. C. Chancery, 1815, Vestry of St. Luke's Church v. Matthews, 4 Desaus. 578.*

36. Aliens. Under the charter of a religious corporation, aliens, who were otherwise qualified, were permitted to vote at an election of the corporate officers; it appearing that the charter, which fixed the qualifications of membership, made no mention of citizen or subject. *Pa. Supreme Ct. 1817, Commonwealth v. Woelper, 3 Serg. & R. 29.*

37. But it seems, that where the charter provides that each stockholder, being a citizen, may vote by proxy, an alien is excluded. *Matter of Barker, 6 Wend. 509.*

38. Stockholders. A subscriber to stock, to whom regular certificates therefor have been issued, is entitled to vote at elections, although he has paid nothing for his stock.* *N. J. Supreme Ct. 1851, Downing v. Potts, 3 Zab. 66.*

39. The act of incorporation of a gas company provided that the commissioners therein named should open books for subscription, on three weeks' notice; and that as soon as

the minimum amount of stock should be subscribed, the stockholders should be convened by public notice to choose directors, each stockholder to be allowed one vote for each share held in his or her name fourteen days before election. The act gave no authority to the commissioners to apportion the stock, if more was subscribed than the act allowed. The minimum amount of stock named in the charter having been subscribed for, the commissioners gave the requisite notice of a meeting of the stockholders for the election of directors. *Held*, that shares subscribed on the day of the election could not be voted upon, the fourteen days not having elapsed as directed by the charter; and that an apportionment of shares subscribed in excess of the amount provided by charter could not affect the right of shareholders to vote upon each share of stock held by them. *N. J. Chancery, 1850, Van Dyke v. Stout, 4 Halst. Ch. 883.*

40. On the day prior to the time appointed for the election of directors, the commissioners, without having given a second notice, opened the books for further subscriptions, and a person having subscribed a greater number of shares than remained open for subscription, the commissioners, by an apportionment made by them, reduced equally the number of shares so subscribed, and an equal number of shares subscribed by the complainant before the minimum amount was taken, and allowed the number of shares so apportioned to him who had subscribed on the day before the election to be voted upon, and refused to permit the complainant to vote on more than the reduced number of shares so apportioned to him. Whereupon the complainant refused to vote at all; and one of the commissioners, and the person who had subscribed on the day prior to the election, with three others, received the majority of the votes cast, and assumed to act as directors. *Held*, that an injunction would be granted restraining the persons who assumed to act as directors from proceeding with the works contemplated by the charter. *Id.*

41. Any transfer of stock sufficient to pass the property is sufficient to entitle the transferee to vote in the election of directors, unless some specific mode of transfer is made necessary by statute or the by-laws of the company. *Ill. Supreme Ct. 1855, People v. Devin, 17 Ill. 84.*

* As to the right of voting in corporations on stock irregularly issued,—see *Matter of Wheeler, 2 Abb. Pr. N. S. 361.*

42. The right of voting at elections for corporate officers, conferred by the charter, is not to be tested by the mere ownership of stock, but the transfer of it must be patent upon the stock book. The registry alone confers the right to vote. And stock standing upon the books of a company in the name of an individual, as president, cannot be voted upon, by him, at an election of officers, if, at the time, he has severed his connection with the company, and is not individually the registered transferee of the stock. *La. Supreme Ct. 1867, Mousseaux v. Urquhart, 19 La. Ann. 483.*

43. A person has a right to vote on stock standing in his name as trustee for another. *N. Y. Supreme Ct. 1830, Matter of Barker, 6 Wend. 509.*

44. Though stock be hypothecated, if it stand in the pledger's name on the books, he may vote on it. *N. Y. Supreme Ct. 1827, Exp. Willcocks, 7 Cow. 402; 1830, Matter of Barker, 6 Wend. 509.*

45. Stockholders, whose shares of stock are pledged to the bank as collateral security for notes not yet due, may vote at elections. *Circ. Ct. D. C. 1815, Scholfield v. Union Bank, 2 Cranch C. Ct. 115.*

46. The mortgagor of stock in a corporation, until foreclosure and sale, is entitled to vote upon the stock at elections [2 Ves. Jr. 433; 1 Atk. 603, 605; Comyn's Rep. 609; 2 Vern. 401; 3 Atk. 559; Pr. Ch. 71], and the court will compel the mortgagee, or his trustee, to give a power of attorney to the mortgagor to vote at such election. *Circ. Ct. D. C. 1829, Vowell v. Thompson, 3 Cranch C. Ct. 428.*

47. Where stock is held by an individual as trustee for the corporation, such trustee cannot vote upon it. *Circ. Ct. D. C. 1821, United States v. Columbian Ins. Co. 3 Cranch C. Ct. 266; N. Y. Supreme Ct. 1826, Exp. Holmes, 5 Cow. 426.**

48. Where stock stands in the name of A. "cashier," the latter word is mere description; and B. is not entitled to vote thereon on proof that he is A.'s successor as such cashier. *N. Y. Supreme Ct. 1838, Matter of Mohawk & Hudson River R. R. Co. 19 Wend. 185.*

49. Stock, or shares standing on the books

of a company, in the name of the corporation itself, cannot be voted upon by one of its officers. [5 Cowen, 434.] *La. Supreme Ct. 1867, Mousseaux v. Urquhart, 19 La. Ann. 483.*

50. An act incorporating a bank established a scale of votes to which stockholders were to be entitled in the election of officers, so that no one should have more than thirty votes, however large his amount of stock, and whether a single person, copartnership, or body politic. A subsequent statute authorizing an assignment by the bank, and directing the election of assignees, provided that, in such election, the State should have as many votes as though the same were held by individuals, as the law now limits in relation to the election of officers. The commonwealth owned 3750 shares and claimed 3750 votes. The other stockholders contended that the commonwealth was entitled to but thirty votes. *Held*, that the proviso was too uncertain for the court to interpret and decide upon, without assuming a power to control the event, and therefore that an election in which the commonwealth was allowed but thirty votes was invalid, and no election could be held without further legislation. *Pa. Supreme Ct. 1842, Commonwealth v. Bank of Pennsylvania, 3 Watts & S. 173.*

51. How the right to vote may be ascertained. A requirement in an act to prevent fraudulent elections by incorporated companies, directed that a list of the stockholders entitled to vote, with the shares held by each, should be made out ten days prior to the election. *Held*, that this provision was directory only, and that a non-compliance with its terms did not of itself avoid the election. *N. J. Supreme Ct. 1851, Downing v. Potts, 3 Zab. 66.*

52. The moderator of a parish meeting can govern himself only by the assessment list, in receiving or rejecting the vote of a member of a parish. See *Sparrow v. Wood, 16 Mass. 457.*

53. The evidence of being a stockholder, to be produced at elections by incorporated companies, comprises the stock ledger, as well as the certificate book and transfer book; but the ledger is evidence only as subordinate to, and as supported by, the other books. In case of dispute, the transfer book must control the rest. *N. J. Supreme Ct. 1851, Downing v. Potts, 3 Zab. 66.*

* As explained in *Matter of Barker, 6 Wend. 509*. See also *Exp. Dendolty, 1 Wend. 98*.

III. HOW REVIEWED AND VACATED.

54. Presumptions as to elections. Where an election for officers of a corporation is had, and officers *de facto* are elected, and act, they are presumed to pursue the legal preparatory measures for an election for the next year; which, when had, makes the successors officers *de jure*. Thus, where in 1843, two sets of officers of a religious corporation were elected, and the set adhering to the minister and president were elected with his nomination, as required by the charter of the corporation, and kept up a succession since that time, and the other set, appointing afterwards, in 1843, another minister and president, had also kept up a succession,—*Held*, that the latter set were not entitled, upon a petition filed in 1845, to a *mandamus*, to restore to them the offices of the church, on account of an irregularity in the election, in 1843, of the other set of officers. *Md. Ct. of Appeals*, 1846, *Smith v. Erb*, 4 *Gill*, 437.

55. Where an officer of a corporation is required to be chosen by ballot, and the record of his election does not specify the mode, the legal presumption is, that he was chosen by ballot. *Ma. Supreme Ct.* 1851, *Blanchard v. Dow*, 32 *Me.* 557.

56. Where it is averred in a petition that directors of a railroad company were duly elected by the stockholders, in pursuance of notice, it is to be presumed that the requisite amount of stock had been subscribed, to authorize such election, and their action in the location of the road. *Ohio Supreme Ct.* 1864, *Ashtabula & New Lisbon R. R. Co. v. Smith*, 15 *Ohio St.* 328.

57. Parties complaining of a fraud in an election, where the question to be decided was whether the county should take stock of a railroad company, must do so in reasonable time. Four months after the election is too late, for it is to be presumed that the railroad has acquired credit from individuals on the faith that the county would aid in the construction of the road. *Ill. Supreme Ct.* 1853, *Prettyman v. Supervisors of Tazewell County*, 19 *Ill.* 406.

58. Who cannot impeach election. A corporator who, with a full knowledge of the objections to the legality of a certain class of votes, attends a meeting of the corporation, participates in its deliberations, and acquiesces in its decisions, by canvassing and voting in the election of officers, cannot

question the title of the officers elected, on the ground that such class of votes was illegal. *S. C. Ct. of Appeals*, 1854, *State v. Lehre*, 7 *Rich.* 234.

59. It is a bar to the application of a relator, for a *quo warranto*, that he was present, and concurred at the time of the objectionable election, notwithstanding that at that time he was ignorant of the objection; for a corporator must be presumed to be cognizant of the contents of his own charter, and of the law applying thereto. *K. B.* 1819, *Rex v. Trevenen*, 2 *Barn. & Ald.* 339.

60. A company cannot object that its directors, who have acted as such, were not elected at a meeting properly notified.* *Ma. Supreme Ct.* 1853, *Sampson v. Bowdoinham Steam Mill Corp.* 36 *Me.* 78; *S. P. N. Y. Supreme Ct.* 1857, *Partridge v. Badger*, 25 *Barb.* 146.

61. Irregular election only voidable. If the charter of a corporation do not so declare, an irregular election, as in case of the election of an unqualified person, is voidable only, and not actually void. *K. B.* 1760, *Crawford v. Powell*, 2 *Burr.* 1018; 1813, *Rex v. Bridge*, 1 *Maule & S.* 76.

62. *Quo warranto* the proper proceeding. It is an inflexible rule that where a person has been *de facto* elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a *quo warranto* information. A *mandamus* will not lie, unless the election can be shown to be merely colorable. *Q. B.* 1855, *Regina v. Mayor &c. of Chester*, 34 *Eng. L. & Eq.* 59; 25 *Law J. N. S.* 61; *S. P. N. Y. Supreme Ct. Sp. T.* 1861, *Hart v. Harvey*, 18 *Abb. Pr.* 332; 21 *How. Pr.* 382.

63. That chancery will not entertain a bill to try the validity of the election of corporate officers who are *de facto* exercising corporate functions, especially where nothing appears to prevent seeking redress at law,—see *Mozley v. Alston*, 1 *Phill.* 790; *Lord v. Copper Miners' Co.* 2 *Phill.* 740; *Bailey v. Birkenhead, Lancashire &c. Railway*, 6 *Eng. Railw. Cas.* 256.

64. Where persons have acted as directors of a railway company, the court will not sum-

* That if a person, though irregularly chosen, is afterward regularly entered in the books, or elected to a superior dignity, his election cannot be controverted,—see *Lord v. Francis*, 13 *Mod.* 408; *Holt*, 170.

marily inquire into the validity of their appointment. See *Thames Haven Dock & Co. v. Hall*, 5 *Mann. & G.* 274.

65. In a suit by trustees of a religious corporation—*e. g.* on a subscription—defendant cannot set up that they were irregularly elected, or that the corporate powers have been lost by nonuser. The acts of trustees *de facto* are valid until they are ousted at suit of the People. *N. Y. Supreme Ct.* 1826, *Trustees of Vernon Society v. Hills*, 6 *Cow.* 23; *N. Y. Superior Ct.* 1828, *All Saints Church v. Lovett*, 1 *Hall*, 191. And see *Jackson v. Nestles*, 3 *Johns.* 115, 188.

66. A proceeding on the part of the People of the State is the only one in which the legality of an election to the office of trustee in a religious corporation can be determined. It is not competent to submit that question to arbitration. *N. Y. Supreme Ct. Sp. T.* 1857, *Wyatt v. Benson*, 23 *Barb.* 327; 4 *Abb. Pr.* 182.

67. Vacating for informality. Where no particular mode of proceeding in the election of officers of a corporation is prescribed by law, an election conducted in good faith ought not to be set aside for informality. *N. Y. Chancery*, 1829, *Phillips v. Wickham*, 1 *Paige*, 590.

68. Mere irregularities in an election of officers, or the fact that the expenses of the commissioners who were appointed to conduct the affairs preliminary to the organization have not been paid, will not be ground for the court to avoid an election of officers. *N. J. Chancery*, 1834, *Hardenbergh v. Farmers & Mechanics' Bank*, 2 *Green*, 68.

69. The neglect of an officer to perform a merely ministerial act will not defeat an election where there was actual notice, and no fraud or surprise. *Cal. Supreme Ct.* 1852, *Gorham v. Campbell*, 2 *Cal.* 185; *S. P. N. Y. Supreme Ct. Sp. T.* 1866, *Matter of Wheeler*, 2 *Abb. Pr. N. S.* 361.

70. The New York statute (Act of 1825, § 9; similar provision 1 *Rev. Stat.* 603, § 5), which authorizes the supreme court, on motion, to set aside a corporate election, and make such order and give such relief as right and justice may require, does not empower the court to establish an election illegally conducted, even though the objection be merely technical, and though the result be satisfactory to a majority of the legal voters.

N. Y. Supreme Ct. 1827, *Exp. Wilcocks*, 7 *Cow.* 402.

71. — of collusion. Election means due election; a merely colorable and elusive election, *e. g.* the election to an annual office of a person who was absent beyond seas, and who, it was known, would not return in time to discharge the duties of the office, is absolutely null and void; and upon such facts appearing to the court, they will declare it to be so, and issue a mandamus to the corporation to proceed to a fresh election. *K. B.* 1767, *Rex v. Mayor &c. of Cambridge*, 4 *Burr.* 2008; *S. P. Rex v. Bankes*, 8 *Id.* 1452; *Rex v. Corporation of Bedford*, 1 *East*, 79; *Reg. v. Corporation of Pembroke*, 8 *Doul. Pr. Cas.* 302.

72. — for reception of illegal votes. The reception of illegal votes does not necessarily vitiate an election. To warrant setting it aside, it must appear affirmatively that the successful ticket received illegal votes, the rejection of which would have brought the vote for it down to a minority. *Mass. Supreme Ct.* 1838, *First Parish in Sudbury v. Stearns*, 21 *Pick.* 148; 1848, *Trustees of Third School District in Blandford v. Gibbs*, 2 *Cush.* 39; 1857, *Wardens of Christ Church v. Pope*, 8 *Gray*, 140; *N. Y. Supreme Ct.* 1827, *Exp. Murphy*, 7 *Cow.* 153; 1839, *Matter of Chenango County Mut. Ins. Co.* 19 *Wend.* 635; *S. C. Ct. of Appeals*, 1854, *State v. Lehre*, 7 *Rich.* 284; *K. B.* 1833, *Rex v. Jefferson*, 3 *Nov. & M.* 487.

73. Though, in the election of directors, illegal votes may have been cast, and legal votes rejected, yet, if a majority of legal votes still appear for those who are returned, the election shall be established. *N. J. Supreme Ct.* 1833, *M'Neely v. Woodruff*, 1 *Green*, 352.

74. An election of officers of an incorporated company will be set aside if it can be made to appear that the legal votes, which were rejected, and the illegal votes, which were received, were sufficient to change the result of the election. *N. J. Supreme Ct.* 1851, *Downing v. Potts*, 3 *Zabr.* 66.

75. Whether, when an election is shown to have been illegal through the receipt of illegal votes, the court must set it aside, and order a new election, or whether the party for whom the highest number of lawful votes were thrown, may be declared elected,—see *State v. Swearingen*, 12 *Ga.* 28; *Mousseau*

v. Urquhart, 19 *La. Ann.* 482; *Matter of Desdoity*, 1 *Wend.* 98; *Matter of Long Island R. R. Co.* 19 *Wend.* 87.

76. Election of less than full board. The charter fixed the number of directors, and made a majority a quorum. At an election, a number, one less than the full number, were elected; and the former directors, considering the election null, ordered a new one, and resolved to hold over meanwhile. *Held*, that the first election was valid, and superseded the whole of the former board; and that the court should set aside the new election, and order an election of one director. *N. Y. Supreme Ct.* 1840, *Matter of Union Ins. Co.* 23 *Wend.* 591. And see *People v. Jones*, 17 *Wend.* 81.

77. Where an act authorizing the election of trustees was silent in regard to the number to be chosen, and ten were elected, six of whom, being a majority, were recognized by the legislature as a competent board,—*Held*, that the organization was sufficient. *Ga. Supreme Ct.* 1857, *Dart v. Houston*, 23 *Ga.* 506.

78. — for neglect to give certificate. An election of trustees is not invalidated by the neglect or delay of the inspectors to give the proper certificate. *Supreme Ct.* 1894, *People v. Peck*, 11 *Wend.* 604.

ELEEMOSYNARY CORPORATIONS.

1. What are. A corporation for religious and charitable purposes, which is endowed solely by private benefactions, is a private eleemosynary corporation, although it was created by a charter from the government. *U. S. Supreme Ct.* 1823, *Society for the Propagation of the Gospel v. Town of New Haven*, 8 *Wheat.* 464, 480.

2. A corporation formed by a territorial legislature, for the purpose of receiving and administering a donation of land made by the government of the United States for the establishment of a seminary of learning, is not a public corporation, and is no more subject to the power of the State, than if the fund had been given by an individual for the same purpose. The corporation is an eleemosynary corporation in which the State has no property, and the State cannot exercise its powers to defeat the trust. *U. S. Su-*

preme Ct. 1852, *Vincennes University v. Indiana*, 14 *How.* 268.

3. A corporation which has for its sole object the instruction of the deaf and dumb; supporting and instructing indigent persons of that class gratuitously, and receiving a pecuniary compensation from pupils of ability to make it; deriving its means of dispensing charity from the donations of individuals and of the public; and applying its funds exclusively to the general object of its institution, is an incorporated school for charitable purposes. *Conn. Supreme Ct.* 1822, *Asylum v. Phoenix Bank*, 4 *Conn.* 172.

4. How they are regulated. That eleemosynary corporations are distinguished from others in this, that they have no incidental power of legislation; they are the mere creatures of their founder, and he alone has a right to prescribe the regulations according to which his charity shall be applied.* *Phillips v. Bury*, 1 *Ld. Raym.* 8; *Bentley v. Bishop of Ely*, *Fitzgib.* 305; *Stra.* 912; *St. John's College v. Todington*, 1 *Burr.* 158, 201; 1 *Ld. Ken.* 441; 1 *W. Black.* 71; *Green v. Rutherford*, 1 *Ves. sr.* 462; *Trustees of Phillips Academy v. King*, 12 *Mass.* 546; *Dartmouth College v. Woodward*, 4 *Wheat.* 660.

*The numerous English cases upon the peculiar nature and government of eleemosynary corporations, have but little general importance in the United States. They proceed chiefly upon the idea of recognizing the right of a founder of a charity to direct the mode of its administration, and enforcing within certain limits his regulations.

In respect to the founder's authority, it is *Held*, that a founder of a charity, upon whom the power is conferred by charter to make statutes and ordinances for the regulation thereof, is not deprived of such privilege by a delay of a few years, after the foundation, to make them. He is not bound to exercise such power at once. He cannot, however, by his statutes, alter the constitution of the charity as fixed in the charter granted to him; but may do what is necessary, by regulation, for the maintenance of the charity he has founded. *Regina v. Dulwich College*, 8 *Eng. L. & Eq.* 335; 21 *Law J. N. S.* 36; 17 *Q. B.* 600.

The by-laws or statutes granted by a founder of an ecclesiastical or eleemosynary corporation for its government cannot be repealed or altered even by the founder himself or his heirs, unless he has reserved power to do so in the statutes. *Phillips v. Bury*, *Skln.* 447, 512.

Where a body of statutes is given by the founder, of an eleemosynary corporation, and a visitor is appointed, the latter cannot give new laws or injunctions, without an express reservation of power to that effect. *St. John's College v. Todington*, 1 *Burr.* 158; 1 *Ld. Ken.* 441; 1 *W. Black.* 71.

Where a new donation is made to, or a new fellowship engrafted on, an existing eleemosynary corporation, it is subject to the statutes or rules of the old foundation, unless the new founder prescribe rules of his own. *Attorney General v. Talbot*, 1 *Ves. Sr.* 73; 5 *Atk.* 663; *Green v. Rutherford*, 1 *Ves. Sr.* 462, 472; *K. B.* 1757, *St. John's College, Cambridge, v. Todington*, 1 *Burr.* 158.

5. Chancery does not exercise a general regulating and controlling power over eleemosynary corporations constituted by charter, unless the governors, established for its regulation, have also the management of its revenues. If they abuse that trust, the court assumes jurisdiction. *Chancery*, 1793, Attorney General *v.* Governors of Foundling Hospital, 2 *Ves. jr.* 48.

6. A State legislature is not prohibited by any provisions of the federal constitution from passing laws to control the affairs of public educational institutions. Thus, where an incorporated academy was endowed exclusively by the State, and subsequently an act was passed by the legislature, requiring the appointment of a board of trustees annually by the grand jury of the county, and that the old board, who had before filled the vacancies occurring in their number, should surrender all authority and control to the new board,—*Held*, that, as the corporation was a public one, the act was constitutional. *Ga. Supreme Ct.* 1857, *Dart v. Houston*, 22 *Ga.* 506.

EMINENT DOMAIN.

[The right conferred by law upon a corporation to take private property for the uses of the corporate enterprise being considered in the light of a delegation to the corporation of the right of eminent domain originally inhering in the sovereign power, is treated under this title;—including the nature of the right, and the grounds upon which, and cases in which, it may be delegated. But the right of the owner of property taken for the use of a corporation to receive compensation, with the mode of ascertaining the amount and the peculiar remedies for enforcing payment, are under COMPENSATION. And the modes in which corporations are to proceed in taking property, being differently regulated with different classes of corporations, are considered under the titles of the corporations, particularly RAILROAD COMPANIES.]

I. AUTHORITY OF THE STATE.

II. RIGHTS GIVEN TO CORPORATIONS.

1. *Construction and extent of rights to take property for corporate uses.*
2. *What property may be taken.*
3. *What constitutes a "taking."*
4. *The title acquired.*

III. COMPENSATION A CONDITION.

I. AUTHORITY OF THE STATE.

1. General nature of the right of eminent

domain.* The right of eminent domain, by which the State is authorized to take private property for public use, when the necessities of the country require it, is an inherent right of the State government; although, under the constitution, compensation must be made to the owner of property so taken. *Ga. Supreme Ct.* 1849, *Young v. Harrison*, See *Ga.* 180.

2. When a State grants a tract of land, an estate in fee passes as much as if a private individual grants it; but, in each case, it is subject to the power of being retaken for public use on compensation being made. The right rests upon the principle, that individual interests must be subservient to those of the public, and must yield when the public exigency requires, but then only upon ample compensation. This doctrine holds in respect to a corporate franchise. *Conn. Supreme Ct.* 1845, *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.* 17 *Conn.* 40.

8. All grants of land made by a State, although irrevocable, are subject to the right of eminent domain, unless it is expressly relinquished. A grant to a railroad corporation of the right of way over lands before granted to the trustees of a canal company, does not violate the grant made by the State to those trustees. The effect likely to be produced by the opening of the railroad, in diminishing the revenues of the canal, is no violation of the contract between the State and the trustees. *Ill. Supreme Ct.* 1853, *Illinois & Michigan Canal v. Chicago & Rock Island R. R. Co.* 14 *Ill.* 814.

Compare GRANTS.

* That the right of *eminent domain* is a power essentially different from that of *taxation*, in regard to which there is no constitutional restriction, and no guarantee for its just exercise, except in the discretion of the legislature,—see *People v. Mayor of Brooklyn*, 4 *N. Y. (4 Comst.)* 419; *Cincinnati & Co. Railway v. Clinton County Commissioners*, 1 *Ohio St.* 77; *Cheaney v. Hooser*, 9 *R. Monr.* 380.

For cases in which the right of eminent domain has been asserted, and its nature and limits discussed and explained,—see *Richardson v. Vermont Central R. R. Co.* 25 *Vt.* 465; *Young v. Harrison*, 5 *Ga.* 180; *Bennett v. Boyle*, 40 *Barb.* 551; *Young v. Buckingham*, 5 *Ham.* 485; *Works v. Junction Railroad*, 5 *McLean*, 425; *Bailey v. Philadelphia & Wilmington Railway*, 4 *Harring.* 389; *People v. City of St. Louis*, 5 *Gilm.* 351; *Spooner v. McConnell*, 1 *McLean*, 337; *State of Pennsylvania v. Wheeling Bridge Co.* 18 *How.* 518; *Wilson v. Blackbird Creek Marsh Co.* 3 *Pet.* 245; *Hogg v. Zanesville Canal Co.* 5 *Ham.* 410; *Attorney General v. Hudson River R. R. Co.* 1 *Stock.* 596; *American Print Works v. Lawrence*, 3 *Zabr.* 9. The scope of this work limits our text to the presentation of cases illustrating the delegation of this right to, and its exercise by, *Corporations*.

ward the president re-transferred the stock, and B paid the loan with interest. Between the time for paying the installment and the re-transfer, the bank declared two dividends, to recover which B brought *assumpsit*. *Held*, that his neglect to pay the installment forfeited his claim to those dividends, and that the action could not be sustained. *Md. Ct. of Appeals*, 1818, *Marine Bank of Baltimore v. Biays*, 4 *Harr. & J.* 338.

25. A stockholder in an insurance company assigned his stock. The company were holders of notes made by the original stockholder, one of which became due before the company had notice of the assignment. *Held*, that the company might apply the dividends accruing on the stock until such time as the assignee was entitled to have a transfer made to him, to the payment of that note; but could not retain for notes falling due after notice of the assignment. *N. Y. Supreme Ct.* 1802, *Bates v. New York Ins. Co.* 8 *Johns. Cas.* 238.

26. The acceptance by a stockholder of a dividend upon his stock, can be no ratification of the illegal conduct of the directors. *N. J. Chancery*, 1862, *Hilles v. Parrish*, 14 *N. J. Eq.* (1 *McCart.*) 880.

27. Stock dividends. Under a statute authorizing a bank to retain a certain share of the "dividends" upon the stock owned by the State, towards certain unpaid stock of the State, it was *Held*, that a portion of the capital stock, divided among the stockholders, was not dividends within the act. *N. C. Supreme Ct.* 1887, *Attorney General v. State Bank*, 1 *Dev. & B. (Ch.)* 545.

28. A corporation, restricted to six per cent. dividends, out of profits, to stockholders, issued, on the basis of an increased business and enhanced value of their works and property, in accordance with a resolution of stockholders, scrip certificates from time to time, entitling the holder to additional shares of stock; distributing them ratably among share and scrip holders in proportion to the amount held at the date of the issue. The resolution, embodied in the scrip, provided that the scrip should not be entitled to any cash dividend, until the funded debt of the company should be paid off, or adequate provision made for its discharge when due, and payment demanded; nor until the conversion of said scrip into stock. After such conversion certain of the scripolders demanded by

bill in equity the back dividends which had been declared on the stock from the issue to the date of conversion.

Held, 1. That the rights of the scripolders were measured by the contract under which the scrip was issued, and of which the scrip alone was the evidence.

2. That the contract being but an engagement that the holders of the scrip might become shareholders after payment of the funded debt, or provision made therefor, the scripolders were, therefore, not entitled to dividends upon the scrip or upon the stock into which it had been converted, except on such as had been declared subsequent to said conversion. *Pa. Supreme Ct.* 1865, *Brown v. Lehigh Coal and Navigation Co.* 49 *Pa. St.* 270.

ELECTIONS.

I. HOW THEY SHOULD BE CONDUCTED.

II. THE RIGHT TO VOTE.

III. HOW REVIEWED AND VACATED.

I. HOW THEY SHOULD BE CONDUCTED.

1. Time of holding election. The mere failure of an electoral body of a corporation, *e. g.* a board of supervisors, to proceed to an election as directed by its ordinances, does not exhaust its power of election. The time mentioned is not of the essence of the power; it is a mere directory provision, which should be followed, but the omission to pursue which is not fatal. *Cal. Supreme Ct.* 1860, *Jacobs v. Murray*, 15 *Cal.* 221.

2. A charter provided that the directors should be chosen by the members of the corporation at their annual meeting, and that the annual meeting of the corporation for the choice of directors should be holden at such time and place as might be provided by the by-laws. The grantees met, and after voting to accept the charter, and after electing directors, adopted a code of by-laws. *Held*, that the election of the directors was valid, although it was before the adoption of the by-laws.* *N. H. Superior Ct.* 1848, *Hughes v. Parker*, 19 *N. H.* 181.

* In Indiana, directors of a plank road company may be elected before the articles of association are filed in the recorder's office. See *Covington & Co. Plank Road Co. v. Moore* 8 *Ind.* 510.

3. Place. When the usual place of meeting of an incorporated society has been changed, an election of officers at the old place is invalid. *N. J. Supreme Ct.* 1848, *Miller v. English*, 1 *Zabr.* 317.

4. Compelling election. If shareholders are dissatisfied with the proceedings of the company, on the ground that there is not a full board of directors, they may apply for a mandamus to compel the company to complete the number.* *C. P.* 1842, *Thames Haven Dock & Railway Co. v. Rose*, 3 *Eng. Railw. Cas.* 177; 4 *Mann. & G.* 552.

5. The effect of a neglect to hold an election, discussed. *Phillips v. Wickham*, 1 *Paige*, 590; *People v. Runkel*, 9 *Johns.* 147.

6. Provisions regulating mode of election. Where the time and manner of election of officers of a corporation are not fixed by charter or prescription, it is competent to a corporation to make regulations respecting them. *K. B.* 1789, *Newling v. Francis*, 3 *Durnf. & E.* 189.

7. Where a statute authorized a municipal corporation to elect commissioners, and the corporation appointed them by a resolution,—*Held*, that, as no mode of election was prescribed by the statute, the power was properly and legally exercised. *Ga. Superior Ct.* 1880, *Low v. Commissioners of Pilotage*, *R. M. Charlt.* 302.

8. Where a charter of a religious society enjoins an annual election of trustees, fixing the time at which it shall be held, but is silent as to the mode of conducting it, the corporation may provide by a by-law for the mode; but where no such by-law has been adopted, a long established usage will govern. *Pa. Supreme Ct.* 1858, *Juker v. Commonwealth*, 20 *Pa. St.* 484.

9. The usage of such a society had been to meet on a certain day before the election, and appoint officers to conduct it. Two elections for trustees were had on the same day. *Held*, that the legal election was the one held by officers duly chosen at the preliminary meeting, though a majority of the votes of the society were not cast at that election. *Id.*

10. The act of incorporation of a railroad

company required the directors to be chosen at the annual meetings of the corporation. *Held*, that this provision was directory only, not restrictive; and that its observance was not essential to the exercise of the power of election. The election of directors, and other suitable officers or agents, for the government of the affairs of the corporation, and the conduct of its business through the agency of such, pertain to the nature and condition of aggregate corporate bodies, without being expressly conferred by the act of incorporation. *N. H. Superior Ct.* 1849, *Hughes v. Parker*, 20 *N. H.* 58.

11. Where the charter of a railway company provided that its business should be carried on under the management of twelve directors, to be elected in a particular mode, pointed out, and that where vacancies occurred it should be lawful for the remaining directors to fill them,—*Held*, that this provision did not require that a board should be always full; but was merely directory as to the mode of filling vacancies. *C. P.* 1842, *Thames Haven Dock & Railway Co. v. Rose*, 3 *Eng. Railw. Cas.* 177; 4 *Mann. & G.* 552.

12. A corporation, empowered by charter "to make by-laws, &c., and to do all things needful for the good government and support of the congregation," may make a by-law giving the president thereof the power of appointing inspectors of the election of corporate officers; and may prescribe by by-laws, the nature of the tickets to be used, and the manner of voting. *Pa. Supreme Ct.* 1817, *Commonwealth v. Woelper*, 3 *Serg. & R.* 29.

13. A bank charter provided that directors might be chosen at "any time." A subsequent act enacted that, if they shall not be chosen on a day designated, the president and directors shall notify an election to be held within thirty days thereafter. *Held*, that the former act was not repealed by the latter, and that an election could be had even after the expiration of thirty days, it being intended, not to impair the charter right of holding an election at any time, but to quicken the directors in using it. *N. J. Supreme Ct.* 1838, *M'Neely v. Woodruff*, 1 *Green*, 352.

14. In an emergency and contingency in which the forms of procedure prescribed by the charter in respect to elections, fail to accomplish the purposes contemplated, so that

* That the command should not be to elect a particular person, but to proceed to the election of some one to supply the vacancy,—see *Rex v. Bridgewater*, 3 *Chitty*, 257; *Shuttleworth v. Lincoln*, 3 *Bulstr.* 123; *Anon.* 3 *Barnard.* 237.

the necessary offices are vacant, it is competent for the corporators themselves to exercise the power of election and provide for the appointment of inspectors for that purpose. *N. Y. Supreme Ct. Sp. T. 1866, Matter of Wheeler, 2 Abb. Pr. N. S. 361.*

15. Who must be present. Where an integral part of a corporation, composed of a definite number, is required to vote at an election of a corporate officer, a majority of such integral definite part must attend, otherwise there can be no elective assembly, although other parts of the corporation also join in such election, and a majority of the whole existing body actually attend; but a majority of those present, when legally assembled, will bind the rest. *K. B. 1795, Rex v. Miller, 6 Durnf. & E. 268.*

16. When, by the charter of a municipal corporation, a particular officer is made an integral part of the elective assembly, his attendance is necessary to the validity of the election; and the election cannot be proceeded with in his absence, although he absents himself improperly. The charter of corporation conferred the power of election upon "the mayor, burgesses, and commonalty." A meeting was convened, and E. nominated for election; but before he was elected, the mayor departed; after which the burgesses and commonalty proceeded to elect E. *Held*, that the election was void for the absence of the mayor. *K. B. 1818, King v. Williams, 3 Mau. & S. 141.* See also *Rex v. Norris, 1 Barnard. 385; Machel v. Nevinson, 11 East, 84, n.; Rex v. Buller, 8 East, 389; Rex v. Gaborian, East, 77.*

Compare MUNICIPAL CORPORATIONS.

17. After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although the majority of the entire assembly altogether abstain from voting. If a majority, whose presence suffices to constitute the elective body, neglect to vote, it is their own fault, and will not invalidate the act of the others, but be construed as an acquiescence in the election made by those who do vote. And such an election is valid, though the majority of those whose presence is necessary to the assembly, protest against any election at that time, or even the election of the individual who has a majority of votes; the only manner in which they can effectually prevent his election, is by voting

for some other qualified person. *K. B. 1760, Oldknow v. Wainwright, 2 Burr. 1017.*

18. Inspectors. The appointment of inspectors of corporate elections (under the laws of New York), and their qualifications, powers, and duties—considered. *Matter of Mohawk & Hudson River R. R. Co. 19 Wend. 135; Matter of Chenango County Mut. Ins. Co. Id. 635; Matter of the Excelsior Fire Ins. Co. 16 Abb. Pr. 8.*

19. An election will not be vacated because the inspectors did not take the precise oath prescribed by the statute of the State governing corporate elections. If they are regularly appointed, they are inspectors *de facto*. *N. Y. Supreme Ct. 1838, Matter of Mohawk & Hudson R. R. Co. 19 Wend. 135; 1839, Matter of Chenango County Mut. Ins. Co. Id. 635.*

20. That inspectors of a corporate election may themselves be candidates for directorship,—see *Exp. Willcocks, 7 Cow. 402.*

21. That in judging of a claimant's right to vote, the inspectors are not, in general, to inquire beyond the transfer book,—see *Exp. Willcocks, 7 Cow. 402; Matter of Long Island R. R. Co. 19 Wend. 87.*

22. Where the act of incorporation provides that each stockholder shall be entitled to one vote on each share of the stock which he shall have held in his own name at least fourteen days previous to the time of voting, a by-law authorizing the inspectors to inquire into the question whether one who holds stock is the real owner, is void. *N. Y. Supreme Ct. 1822, People v. Kip, 4 Cow. 382, n.; U. S. Law Jour. 286; S. P. 1825, People v. Tibbets, 4 Cow. 358.*

23. In an election in a religious corporation, after the ballots have been received by the inspectors without challenge or objection, their right to inquire into the character of the voters ceases. The only duty that remains for them to perform is to count the ballots, and return the number of votes received, and the names of those having the greatest number. *N. Y. Supreme Ct. Sp. T. 1860, People v. White, 11 Abb. Pr. 168; Hartt v. Harvey, 32 Barb. 55; 10 Abb. Pr. 331; 19 How. Pr. 245.*

24. The certificate of the judges of an election set forth that one set of candidates had a majority of the votes cast, but that, after the result had been declared, satisfactory evidence was produced to the judges

that a part of the votes for such candidates were illegal, and that, setting these aside, the other set of candidates were elected; which, the certificate therefore declared to be the result of the election. *Held*, that the certificate destroyed itself, and the former set of candidates were to be deemed elected. *N. Y. Supreme Ct. Sp. T. 1860, Hartt v. Harvey, 32 Barb. 55; 10 Abb. Pr. 821; 19 How. Pr. 245.*

25. What vote is sufficient. In corporations aggregate, the principle of an election is a majority, and not a plurality, unless otherwise specified. *Del. Superior Ct. 1840, State v. Wilmington City Council, 8 Harring. 394.*

26. A majority of the directors of a bank constitute a board to transact business; and if, in the election of a president, a majority being present and qualified to vote, vote, the person receiving a majority of the votes cast is elected, although such votes do not constitute a majority of the whole board. *Va. Ct. of Appeals, 1855, Booker v. Young, 12 Gratt. 303.*

27. Ballots. Ballots which contain less than the full number of directors required to be elected, are not therefore void. Those who vote for a part of the directors only, virtually acquiesce, as to the residue, in what was done by the other stockholders. *N. Y. Supreme Ct. 1840, Matter of Union Ins. Co. 22 Wend. 591.*

28. A bank was authorized to choose three directors. Some of the stockholders being of the opinion that five was the number, voted a ticket having on it the names of five persons. There was also another ticket with the names of three persons. *Held*, that the persons whose names were upon the latter ticket were rightfully elected, although this ticket received a less number of votes than the other. *Mo. Supreme Ct. 1858, State v. Thompson, 37 Mo. 865.*

29. It having appeared that, at elections of officers of a corporation, tickets were inscribed with witticisms, the names of lewd women, &c., a by-law prohibiting the counting of tickets which had on them other things besides the names of the voters, was *Held* reasonable; and an eagle printed on the tickets, as a party badge, was adjudged a violation of this by-law, since it deprived a voter of that secrecy to which he was entitled in the exercise of his franchise, so as to

avoid the odium and violence of party prejudice. *Pa. Supreme Ct. 1817, Commonwealth v. Woelper, 8 Serg. & R. 29.*

30. Adjournment. It is no objection to the legality of the election of a board of directors that an adjournment was had during the process of balloting. *Id. Me. Supreme Ct. 1855, Penobscot & Kennebec R. Co. v. Dunn, 39 Me. 587.*

II. THE RIGHT TO VOTE.

31. The corporation cannot alter qualifications of electors. The qualifications prescribed by the statute of incorporation for electors of trustees, cannot be abridged or extended by act of the trustees or corporators. *N. Y. Supreme Ct. 1845, People v. Phillips, 1 Den. 388.*

32. Every person qualified under the statute has a right to vote for trustees. No additional qualification can be imposed by by-laws.* *Id.*

33. In general, where the charter vests the admission of members in the body at large, a power vested in the directors, to provide for the admission of members, gives them only a right to prescribe in their by-laws, the time, place, and manner of holding the election of members, and not the right to pass a by-law imposing a test of membership not contemplated by the charter. Thus, where one section of an act incorporating a savings institution, provided that there should be a meeting of the members, annually, for the choice of directors from among the members; and a following section provided that the directors should have power to provide for the admission of members; and a subsequent legislative act declared that stockholders should have a right of voting for directors, and that they should be eligible for directors; and a by-law was passed by the directors, elected in pursuance of this last act, providing that every person

* Thus a by-law of the Passaic & Hackensack Bridge Company, declaring each proprietor entitled to as many votes as he has shares of stock was *Held* contrary to the charter of the company, and void. The claim of having one vote for each share does not rest on the common law or any of its principles. It wholly depends on the grant of the legislature. *Taylor v. Griswold, 2 Green, 222.*

A corporation has no power to exclude an integral part of the body, where a charter gives them a right of election. *Rex v. Spencer, 3 Burr. 1827; Newling v. Francis, 3 Durnf. & E. 189; Rex v. Head, 4 Burr. 2515.*

But compare Case of Corporations, 4 Co. 73.

quired for the purpose of effecting the improvements specified in their act, with certain powers of disposing of superfluous lands,—*Held*, that they were entitled to take the whole of the lands scheduled in their act, even though with the avowed object of reselling a portion of such lands to a railway company (one of the purposes of their act being to obtain money for the improvements), and that they were not incapacitated from taking the whole of the lands comprised in the schedule, although before they obtained their power to take land they had contracted, conditionally upon their obtaining such power, to sell the lands for a certain sum. *Id.*

For cases illustrating the powers conferred on Particular corporations to take lands, and how they are to be exercised, which depend at all upon the distinctive purpose or character of the corporation, see the titles of the various corporations, particularly RAILROAD COMPANIES.

2. *What property may be taken.*

35. Buildings. Where a railroad company was authorized to enter upon and appropriate land necessary for the purposes of their road,—*Held* that they had the right to remove a dwelling house on their route. *Pa. Supreme Ct.* 1850, *Brocket v. Ohio & Pennsylvania R. R. Co.* 14 *Pa. St.* 241.

36. Where a railway company were restrained by charter from taking any house, yard, garden, &c., unless they purchased the whole premises,—*Held*, that a yard for bonding foreign timber was not within the proviso. *Chancery*, 1839, *Stone v. Commercial Railway Co.* 9 *Sim.* 621; 1 *Eng. Railw. Cas.* 875.

37. Right of way. A right to enter upon land, conferred upon a corporation for the purposes of constructing their works, cannot be arrested by the existence of an incorporeal hereditament issuing or served out of it; and a railroad company, therefore, under power to take land may appropriate a right of way over it, under the maxim, *omne majus continet in se minus*. *Pa. Supreme Ct.* 1867, *Philadelphia &c. R. R. Co. v. Williams*, 54 *Pa. St.* 108.

38. Under a provision in the charter of a railroad company empowering the company, when it shall be necessary, in the construction of the road, to cross streams of water, roads or ways, provided such roads, &c., shall be re-

stored, as near as practicable, to their former state and usefulness, a turnpike road may be entered upon in the same manner as any other highway, upon compensation being made to the corporation for injury sustained. *Vt. Supreme Ct.* 1849, *White River Turnpike Co. v. Vermont Central R. R. Co.* 21 *Vt.* 590.

39. That a turnpike road comes within the description of a public road or highway in a statute authorizing a corporation, in constructing a canal, to occupy roads and highways,—see *Rogers v. Bradshaw*, 20 *Johns.* 785.

40. Land of another company. That a corporation, authorized to have land condemned to its use, may take the land of an incorporated powder manufacturing company,—see *Bellona Company's Case*, 8 *Bland*, 442.

41. Franchise. The principle that the charter of a corporation is a contract which the legislature cannot impair, against their assent, does not preclude the legislature from taking their franchise and property for public use upon making compensation. Their powers and privileges, including everything which constitutes their franchise, are held and enjoyed in the same manner and by the like tenure as all other property and rights under our constitution and laws. They can claim no special exemption or privilege for their franchise. It is subject to the same sovereign right of eminent domain, by which the property and rights of all subjects and individuals are liable to be taken and appropriated to a public use, in the manner provided in the constitution, whenever the legislature shall deem that the public exigencies require it. Thus a franchise to build and maintain a bridge may be taken and appropriated to a public use, and the right of a corporation, under a charter from a State legislature, to erect and keep up a bridge and take tolls thereon, may be taken for a highway. *U. S. Supreme Ct.* 1847, *West River Bridge Co. v. Dix*,* 6 *How.* 507; 1851, *Richmond &c. R. R. Co. v. Louisa R. R. Co.* 18 *How.* 71; *S. P. Mass. Supreme Ct.*

* See also, in support of the general proposition that a franchise may be taken in virtue of eminent domain,—*Pierce v. Somersworth*, 10 *N. H.* 870; 11 *N. H.* 20; *Crosby v. Hanover*, 36 *N. H.* 404; 20 *Law Rep.* 646; *James River & Kansas Co. v. Thompson*, 8 *Gratt.* 270; *Newcastle Railway v. P. & J. Railway*, 8 *Ired.* 461; *Tuckahoe Canal Co. v. T. & James River Railway*, 11 *Leigh*, 42; *Bonsaparte v. Camden & Amboy R. R. Co.* 1 *Baldw.* 205.

1854, *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.* 2 *Gray*, 1, 85; *Springfield v. Connecticut River R. R. Co.* 4 *Cush.* 68; 1855, *Central Bridge Co. v. City of Lowell*, 4 *Gray*, 474; *Conn. Supreme Ct.* 1845, *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.* 17 *Conn.* 40; *The Same v. The Same*, *Id.* 454.

As to the general nature and transferability of franchises, see FRANCHISES.

42. It is now well settled that there is no implied contract by the State in a charter of a turnpike or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for the public use; that it may be taken, on proper compensation being made; that a railroad is an improved highway, and that property taken for its use, by authority of the legislature, is property taken for the public use, as much as if taken for any other highway; and that the legislature may delegate its power to a railroad corporation, to take private property for public use in the construction of their railroad, as well as to a turnpike corporation to take the like property for the public use in the construction of a turnpike road. *Vt. Supreme Ct.* 1849, *White River Turnpike Co. v. Vermont Central R. R. Co.* 21 *Vt.* 590.

43. The legislature may authorize the laying out of a common public highway over a road made by a turnpike corporation, and the taking of the franchise of the corporation for that purpose, notwithstanding the charter of the corporation is still in force, and the corporation in possession of the road constructed by virtue of it; provided compensation is made to the corporation for their property thus taken. *N. H. Superior Ct.* 1886, *Barber v. Andover*, 8 *N. H.* 398; *Vt. Supreme Ct.* 1843, *Armington v. Town of Barnet*, 15 *Vt.* 745.

44. An exclusive right to maintain a toll bridge within certain limits, is a franchise which may be appropriated for the public good upon just compensation being made therefor. *Tenn. Supreme Ct.* 1853, *Red River Bridge Co. v. Mayor &c. of Clarksville*, 1 *Sneed*, 176.

45. Under the general railroad law of New Hampshire of 1844 (*Comp. Stat. ch. 52, § 11*), providing that any real estate, franchise, or easement of any corporation

may be taken for a highway, in the same manner as the real estate of individuals, the track or other property of one railroad company may be taken by another, if it appear that the public good requires such taking. *N. H. Superior Ct.* 1853, *Northern Railroad v. Concord & Claremont Railroad*, 7 *Post*, 188.

46. Whether, if the charter of a corporation contain an express stipulation against its property being taken away by the right of eminent domain this would secure it,—see *West River Bridge v. Dix*, 6 *How. (U. S.)* 507; *Piscataqua Bridge Co. v. New Hampshire Bridge Co.* 7 *N. H.* 85; *Washington Bridge v. State*, 18 *Conn.* 53; *Washington & Baltimore Turnpike Co. v. Baltimore & Ohio Railway Co.* 10 *Gill & J.* 392; *Harvey v. Thomas*, 10 *Watts*, 63; *Harvey v. Lloyd*, 8 *Barr*, 331; *Shoenberger v. Mulhollan*, 8 *Barr*, 134.

47. A stipulation that the property or franchises of a corporation shall not be taken for public use upon just compensation, if required by the public exigencies, cannot be implied or inferred from the grant of the right to organize as a corporation, or to acquire property for a particular use, and to take a compensation in tolls for the use of it. Nor can it be inferred from the fact that the property is, in its nature, an incorporeal hereditament,—*e. g.* a right of way. The fact that the corporation does not own the fee of the land over which their road is constructed, does not imply any such stipulation, nor the fact that a part of the property is a franchise. Incorporeal hereditaments, as well as a fee, may be taken, and this whether the property of an individual or a corporation. *N. H. Superior Ct.* 1840, *Backus v. Lebanon*, 11 *N. H.* 19; followed 1853, *Northern R. R. v. Concord &c. R. R.* 7 *Post*, 183.

48. Even if the taking of the property may, incidentally, put an end to the exercise of the corporate powers because nothing is left for their exercise, this is no objection. There is no implied contract that the corporation may not be dissolved, or its operation be suspended by a subsequent exercise of the right of eminent domain, if their property, franchise included, is of such a nature that that power may operate upon it. [7 *N. H.* 35; 8 *Id.* 398; 10 *Id.* 369.] *N. H. Superior Ct.* 1840, *Backus v. Lebanon*, 11 *N. H.* 19.

49. A provision in the charter of a corporation by which the State reserves the right to purchase the property after a certain period, does not imply in any manner a relinquishment of the right to take the property of the corporation, or any part of it, if required for public use, upon making just compensation. *Id.*

50. Where a corporation created by the legislature was authorized to erect a toll bridge; and in the charter it was provided, that "no person or persons shall have liberty to erect another bridge" within certain limits,—*Held*, that this was not a contract, beyond the grant of a franchise, which precluded the State from authorizing another bridge to be made within the limits, on compensating the first company for the injury to them. *Conn. Supreme Ct.* 1846, *Enfield Toll Bridge Co. v. Hartford & New Haven R. R. Co.* 17 *Conn.* 454.

8. *What constitutes a "taking."*

51. **Temporary user.** The constitutional provision declaring that "private property shall not be taken for public uses without just compensation" does not prohibit the legislature from authorizing a temporary exclusive occupation of the land of an individual, during incipient proceedings to the acquisition of a title to it, or an easement in it, for a public use, although such occupation may be more or less injurious to the owner; but precludes the acquisition of any title, easement, or permanent appropriation of the land, from the owner, without an actual payment or tender of a just compensation. Such occupation becomes unlawful, unless the title or the easement is acquired within a reasonable time; otherwise the occupiers become trespassers *ab initio*. *Me. Supreme Ct.* 1852, *Cushman v. Smith*, 34 *Me.* 247; 1857, *Nichols v. Somerset & Kennebec R. R. Co.* 43 *Me.* 356.

52. A law which authorizes an entry upon another man's land, for the purpose of making the preliminary or final surveys for a corporate work, before compensation is made, is constitutional, if it makes suitable provision for compensation in case the land is subsequently taken therefor. Unless the legislature possess power to authorize an entry for this purpose, a clause of the constitution permitting private property to be taken for public use, upon making just compensation would be nugatory. A constitutional provision that

private property shall not be taken for public use, &c., does not prohibit the legislature from permitting an entry to be made upon the property of an individual, for the purpose of a preliminary examination. The prohibition relates only to the *taking* it for public use without just compensation. *N. Y. Supreme Ct.* 1850, *Polly v. Saratoga & Washington R. R. Co.* 9 *Barb.* 449.

53. The use by a company, of land adjoining their railroad, for a cartway, while constructing their road, is not within the limits of the commissioner's appraisal, especially when it appears that the land taken for the road is sufficiently ample in width for cartways. Such use is *prima facie* for the purposes of convenience, not of necessity, and without the consent of the owner of the land, is ordinarily, a mere trespass. The only use of adjoining lands, for passage during the construction of a railroad, that can come within the limits of the appraisal, extends to gaining access to the land taken. *Vt. Supreme Ct.* 1853, *Sabin v. Vermont Central R. R. Co.* 25 *Vt.* 368.

54. A corporation having, under the act of Parliament, right to take land for certain public works, gave notice to the owner of the inheritance, of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c. and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some wagons, and rails, and other implements on the land, and there left them, but did not commence the works, or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the wagons, &c., to remain on the land, and from taking possession of the land until they had complied with the provisions of the lands clauses consolidation act. *Held*, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the act, and that the bill was improperly filed. *V. Chan. Ct.* 1852, *Standish v. Mayor &c. of Liverpool*, 15 *Eng. L. & Eq.* 255; 1 *Drew.* 1.

55. **Incidental injuries.** The making of a

public improvement in the vicinity of private property, which is incidentally injured thereby, but no part of which is taken or used for the construction of the work, is not a taking of private property for public use, within the constitutional provision requiring the payment of compensation. *Wis. Supreme Ct.* 1862, *Alexander v. City of Milwaukee*, 16 *Wis.* 247.

56. A corporation, in constructing their works, raised a high embankment near to, and in front of, the plaintiff's house, so that plaintiff could not pass and repass to and from the same, and for this injury the plaintiff claimed damages. *Held*, that as the charter of the company only required them to make compensation for lands which were taken for the corporate purposes, they were not liable for such consequential damages; that simply affecting land injuriously, by the construction of their works, was not a taking of it for public use, within the purview of the constitution; that the company were justified, under their charter, in building their road in a prudent and reasonable manner, and could not be subjected to damages resulting to individuals, whose lands had not been taken by them. *Vt. Supreme Ct.* 1858, *Richardson v. Vermont Central R. R. Co.* 25 *Vt.* 465.

57. Where a railroad company having power by charter to take land, and being made liable for all damages to any person or persons, excavated a lot adjoining plaintiff's, so as to weaken the foundations of his house, and erected an embankment in the highway opposite his house, so as to obscure the light, and render it otherwise unfit for use,—*Held*, that this did not constitute a taking of plaintiff's land within the meaning of the charter, and that the company were bound to make compensation for consequential damages. *Conn. Supreme Ct.* 1851, *Bradley v. New York & New Haven R. R. Co.* 21 *Conn.* 294.

58. Injury to a mill privilege upon a navigable stream, by a rise in the waters caused by improvements in the navigation,—*Held*, not a taking of private property, which is a subject of compensation. *N. Y. Ct. of Errors*, 1836, *Canal Appraisers v. Tibbits*, 17 *Wend.* 571.

59. Though a franchise—*e. g.* the right to maintain a toll bridge—is private property, a diminution of its productiveness, by means

of the opening of a free highway in the neighborhood, is not a taking of it, within the provision of the constitution. *N. Y. Supreme Ct. Sp. T.* 1852, *Matter of Hamilton Avenue*, 14 *Barb.* 405. Compare *Red River Bridge Co. v. Clarksville*, 1 *Sneed (Tenn.)*, 176.

60. Where a corporation located a plank road upon a county road,—*Held*, that the corporation was liable for damages caused by making such road,—*e. g.* by endangering the stability of houses along the line of the road by excavations. *Mo. Supreme Ct.* 1855, *Williams v. Natural Bridge Plank Road Co.* 21 *Mo.* 580.

61. The grant of the right of locating a plank road, upon a county road, does not exclude the idea, that the owner of the soil, over which the road passes, should have compensation, for any injury he may sustain, by changing a county road into a plank road. *Id.*

62. Effect of previous taking. It is not a good objection to a proceeding to ascertain the value of land taken for public use by authority of law and the constitution, that it had been previously taken possession of without authority. *Pa. Supreme Ct.* 1842, *Borough of Harrisburg v. Crangle*, 8 *Watts & S.* 460.

63. That a company will not be deprived of the power to take land for the necessary use of their works, when the emergency arises, by having previously attempted to take it, for other purposes, not warranted by their act,—see *Webb v. Manchester & Leeds Railw. Co.* 1 *Eng. Railw. Cas.* 576; *Simpson v. Lancaster & Carlisle Railway Co.* 4 *Eng. Railw. Cas.* 625; *Williams v. South Wales Railway Co.* 18 *Jur.* 448; 8 *De Gee & S.* 354.

64. That the power of taking land by a company is exhausted by a location; the company cannot be indulged with another choice,—see *Neal v. Pittsburgh & C. R. R. Co.* 2 *Grant's Cas.* 187.

65. Where a railway company has power to take a certain quantity of land, that power is not exhausted by their taking, in the first instance, a smaller quantity, if they subsequently find that the quantity comprised in their first purchase is not sufficient for their works. Thus, a railway company, having given notice of their intention to form a railway under an individual's land by means of a tunnel, and to treat with him for the

amount of compensation, are not thereby precluded from afterward giving notice of their intention to take, or from appropriating the surface of the same land, where they find that the making of the tunnel is impracticable or dangerous to the buildings on the surface. *Chancery*, 1848, *Stamps v. Birmingham &c. Railway Co.* 17 *Law J. N. S.* 481; 7 *Hare*, 251.

66. Where the legislature confer the power upon two railway companies to purchase compulsorily the same piece of land, and one company has taken the land and constructed their road upon it, equity will enjoin the other company from proceeding to take it compulsorily for their use, until the conflicting rights of the companies are determined, by a trial, at law. *V. Chan. Ct.* 1851, *Manchester &c. Railway Co. v. Great Northern Railway Co.* 12 *Eng. L. & Eq.* 216; 9 *Hare*, 284. Compare *Lancaster & Carlisle Railway Co. v. Maryport & Carlisle Railway Co.* *Eng. Railw. Cas.* 504.

4. *The title acquired.*

67. What right is obtained by the corporation. Where a statute authorizes a municipal corporation to take land and water, for the purpose of conveying water into the city, for the use of said city, a taking *in invitum* of the bed of a stream and the water, and paying the damages assessed, can only be for such a use as is necessary for the purpose specified in the act, as there is no authority to take more; and therefore the owner retains the right to make any use not interfering with the above purpose. *Md. Ct. of Appeals*, 1859, *Kane v. Mayor &c. of Baltimore*, 15 *Md.* 240.

68. The fee in land taken for the purpose of constructing a railroad, under the laws of New Hampshire, remains in the owner of the soil from whom the land is taken, subject to the easement of the corporation, as leased to them by the State. The exclusive right of property in the land,—in the trees and herbage upon its surface, and the minerals below it,—remains unchanged, subject, always, to the right of the corporation to construct and operate a railroad over and through it, as authorized by law.* *N. H.*

* In New York it has been decided that provision of 1 Rev. Stat. 840, § 5, subd. 11,—empowering the electors of each town to make rules and regulations for ascertaining the sufficiency

Supreme Ct. 1856, *Blake v. Rich*, 34 *N. H.* 282; 1859, *Chapin v. Sullivan* *R. R.* 89 *N. H.* 564.

69. *It seems*, that where land is taken for a railroad by the appraisal of the commissioners and selectmen, the corporation are entitled to employ the whole or any portion of the earth, stone and gravel, excavated on one portion of the line, in the proper construction of any other portion thereof. See *Chapin v. Sullivan* *R. R.* 89 *N. H.* 564.

70. A clause in the charter of a corporation, authorizing the company to take and hold land necessary for the construction of their road, and to remove thence earth, timber, and other material required for such construction, does not authorize the servants of the company to enter upon land, not so taken, for the construction of the road, and to remove materials therefrom against the will and without the consent of the owners of the land. *Me. Supreme Ct.* 1856, *Parsons v. Howe*, 41 *Me.* 218.

71. One whose land has been taken for a railroad, has no right to afterward enter thereupon, and dig and carry away the turf, or do any other act which in any degree interrupts or endangers its use by the railroad company; and for such entry he will be liable in trespass. *Vt. Supreme Ct.* 1859, *Connecticut &c. R. R. Co. v. Holton*, 32 *Vt.* 43.

72. Where, under the charter of a turnpike company, which requires the corporation to open a road not exceeding a certain width, the owner of land taken has been compensated by the assessment of damages, he has no further claim on the wood growing on the land, and cannot maintain an action against a contractor for cutting and selling the wood. *Ohio Supreme Ct.* 1841, *Prather v. Ellison*, 10 *Ohio*, 396.

73. *Obligation to repair.* A corporation diverting a stream from its natural channel are bound to restore it, and preserve it in its former state as nearly as possible, if so doing

of all fences in such town, and for determining the times and manner in which cattle, horses, or sheep shall be permitted to go at large on highways,—is not in conflict with the provision of art. 1, § 6, of the Constitution of 1846, against taking private property for public use without just compensation. One whose land is taken for a highway is compensated, not only for parting with the right of way, but for parting with the right of pasturage. *Griffin v. Martin*, *Barb.* 297. This decision was followed and approved in *Hardenburgh v. Lockwood*, 25 *Barb.* 9, but was disapproved in *Williams v. Michigan Central R. R. Co.* 3 *Mich. (Gibbs)*, 297.

is requisite to secure the interests of the owners of land upon such stream. *N. Y. Ct. of Appeals*, 1867, *Cott v. Lewiston R. R. Co.* 86 *N. Y.* 214; 84 *How. Pr.* 224. And see *Hooker v. Canal Co.* 14 *Conn.* 146.

74. Where a company, which was authorized by charter to make a river navigable, for the purpose of making a new channel, cut through a highway, rendering a bridge necessary to carry the highway over the cut,—*Held*, that the company were bound to keep the bridge in repair. *K. B.* 1815, *Rex v. Kerison*, 8 *Maule & S.* 526.

75. Where a public company, (a navigation company), under the powers conferred by the legislature, "to amend or alter such bridges or highways as may hinder the navigation, leaving them or others as convenient in their room," destroyed a ford and substituted a bridge,—*Held*, that they were liable to keep the bridge in repair. *K. B.* 1810, *Rex v. Inhabitants of Kent*, 18 *East*, 220; 1811, *Rex v. Inhabitants of Lindsey*, 14 *East*, 817.

76. When power was conferred upon a navigation company to use a public drain, by substituting another, or others,—*Held*, that the company were bound to keep in repair the substituted drains, as well as to make them. *C. P.* 1840, *Priestley v. Foulds*, 2 *Eng. Railw. Cas.* 422; 2 *Mann. & G.* 175; 2 *Scott, N. R.* 205.

77. As to reversion. Land which is taken by the State for the public use, either by a fee-simple purchase, or through the exercise of the right of eminent domain, does not revert to the original owner on cessation of use. *Pa. Supreme Ct.* 1865, *Haldeman v. Pennsylvania Central Railroad*, 50 *Pa. St.* 425.

78. Thus it was *Held*, that the title to land permanently taken under the Pennsylvania acts of 1826 and 1827, for the construction of the Pennsylvania Canal, became upon payment of damages awarded, absolute in the State; that it passed to the grantee of the State, the defendant corporation, under the act of 1857, which provided for the sale of the canal; and did not revert to the grantee of the original owner on a change being made in the course of the canal by the canal commissioners, previous to the sale. *Id.*

79. The title to premises appropriated by a State for the construction of its public works vests in the State; and it acquires an estate in fee in such premises. Hence, upon

an abandonment of their use for the purposes for which they were seized, the title does not revert to the original owner, but remains in the State. *N. Y. Ct. of Appeals*, 1854, *Rexford v. Knight*, 11 *N. Y.* (1 *Kern.*) 808.

80. When the fee of lands is acquired by a municipal corporation under a legislative power to take the lands for a specified purpose, upon paying compensation, no reversionary interest remains in the former owner, even though the particular use for which the land was originally taken ceases. *N. Y. Ct. of Appeals*, 1852, *Heyward v. Mayor &c. of New York*, 7 *N. Y.* (8 *Seld.*) 314.

81. A grant by the legislature to a corporation of property in fee simple absolute, on payment of compensation, will not be construed as a conditional fee or usufruct, leaving the possibility of a reverter to the original owner on the lapse of the particular use, but will be held to have vested the entire property forever in the grantee. *U. S. Circ. Ct. (N. Y.)* 1848, *De Varaigne v. Fox*, 2 *Blatch. C. Ct.* 95.

82. If a change in the destination of the property granted, after a continuance for twenty-six years of the use of it first contemplated, raises any right or interest, on the part of the original owner, it is of an equitable character, cognizable only in chancery and not at law. *Id.*

83. Where a State takes land, after making ample provision for compensation, and builds a railroad upon it, which it subsequently conveys to a corporation, a man cannot claim damages against the corporation for any land originally taken. *Mich. Supreme Ct.* 1855, *People v. Michigan Southern R. R. Co.* 8 *Mich.* 496.

84. A railroad company erected, on a part of the land which belonged to the complainant, and which the company had caused to be condemned for railroad purposes, a house for the accommodation of passengers waiting for the arrival of the cars. *Held*, that though the house was sometimes used for a tavern and store, the complainant had no claim to the house by reason of an abandonment or cessation of the use for which it was built; nor was he entitled to an injunction to restrain the use of the building as a hotel. *Md. Ct. of Appeals*, 1852, *Hamilton v. Annapolis & Elk Ridge R. R. Co.* 1 *Md.* 553.

85. The title to land granted to a turnpike company is vested in the corporation

amount of compensation, are not thereby precluded from afterward giving notice of their intention to take, or from appropriating the surface of the same land, where they find that the making of the tunnel is impracticable or dangerous to the buildings on the surface. *Chancery*, 1848, *Stamps v. Birmingham &c. Railway Co.* 17 *Law J. N. S.* 431; 7 *Hare*, 251.

66. Where the legislature confer the power upon two railway companies to purchase compulsorily the same piece of land, and one company has taken the land and constructed their road upon it, equity will enjoin the other company from proceeding to take it compulsorily for their use, until the conflicting rights of the companies are determined, by a trial, at law. *V. Chan. Ct.* 1851, *Manchester &c. Railway Co. v. Great Northern Railway Co.* 12 *Eng. L. & Eq.* 216; 9 *Hare*, 284. Compare *Lancaster & Carlisle Railway Co. v. Maryport & Carlisle Railway Co.* *Eng. Railw. Cas.* 504.

4. *The title acquired.*

67. What right is obtained by the corporation. Where a statute authorizes a municipal corporation to take land and water, for the purpose of conveying water into the city, for the use of said city, a taking *in invitum* of the bed of a stream and the water, and paying the damages assessed, can only be for such a use as is necessary for the purpose specified in the act, as there is no authority to take more; and therefore the owner retains the right to make any use not interfering with the above purpose. *Md. Ct. of Appeals*, 1859, *Kane v. Mayor &c. of Baltimore*, 15 *Md.* 240.

68. The fee in land taken for the purpose of constructing a railroad, under the laws of New Hampshire, remains in the owner of the soil from whom the land is taken, subject to the easement of the corporation, as leased to them by the State. The exclusive right of property in the land,—in the trees and herbage upon its surface, and the minerals below it,—remains unchanged, subject, always, to the right of the corporation to construct and operate a railroad over and through it, as authorized by law.* *N. H.*

* In New York it has been decided that provision of 1 Rev. Stat. 240, § 5, subd. 11,—empowering the electors of each town to make rules and regulations for ascertaining the sufficiency

Supreme Ct. 1856, *Blake v. Rich*, 34 *N. H.* 282; 1859, *Chapin v. Sullivan R. R.* 39 *N. H.* 564.

69. *It seems*, that where land is taken for a railroad by the appraisal of the commissioners and selectmen, the corporation are entitled to employ the whole or any portion of the earth, stone and gravel, excavated on one portion of the line, in the proper construction of any other portion thereof. See *Chapin v. Sullivan R. R.* 39 *N. H.* 564.

70. A clause in the charter of a corporation, authorizing the company to take and hold land necessary for the construction of their road, and to remove thence earth, timber, and other material required for such construction, does not authorize the servants of the company to enter upon land, not so taken, for the construction of the road, and to remove materials therefrom against the will and without the consent of the owners of the land. *Me. Supreme Ct.* 1856, *Parsons v. Howe*, 41 *Me.* 218.

71. One whose land has been taken for a railroad, has no right to afterward enter thereupon, and dig and carry away the turf, or do any other act which in any degree interrupts or endangers its use by the railroad company; and for such entry he will be liable in trespass. *Vt. Supreme Ct.* 1859, *Connecticut &c. R. R. Co. v. Holton*, 32 *Vt.* 43.

72. Where, under the charter of a turnpike company, which requires the corporation to open a road not exceeding a certain width, the owner of land taken has been compensated by the assessment of damages, he has no further claim on the wood growing on the land, and cannot maintain an action against a contractor for cutting and selling the wood. *Ohio Supreme Ct.* 1841, *Prather v. Ellison*, 10 *Ohio*, 396.

73. Obligation to repair. A corporation diverting a stream from its natural channel are bound to restore it, and preserve it in its former state as nearly as possible, if so doing

of all fences in such town, and for determining the times and manner in which cattle, horses, or sheep shall be permitted to go at large on highways,—is not in conflict with the provision of art. 1, § 6, of the Constitution of 1846, against taking private property for public use without just compensation. One whose land is taken for a highway is compensated, not only for parting with the right of way, but for parting with the right of pasturage. *Griffin v. Martin*, *Barb.* 297. This decision was followed and approved in *Hardenburgh v. Lockwood*, 25 *Barb.* 9, but was disapproved in *Williams v. Michigan Central R. R. Co.* 3 *Mich. (Gibbs)*, 297.

is requisite to secure the interests of the owners of land upon such stream. *N. Y. Ct. of Appeals*, 1867, *Cott v. Lewiston R. R. Co.* 36 *N. Y.* 214; 34 *How. Pr.* 224. And see *Hooker v. Canal Co.* 14 *Conn.* 146.

74. Where a company, which was authorized by charter to make a river navigable, for the purpose of making a new channel, cut through a highway, rendering a bridge necessary to carry the highway over the cut,—*Held*, that the company were bound to keep the bridge in repair. *K. B.* 1815, *Rex v. Kerrison*, 3 *Moule & S.* 526.

75. Where a public company, (a navigation company), under the powers conferred by the legislature, "to amend or alter such bridges or highways as may hinder the navigation, leaving them or others as convenient in their room," destroyed a ford and substituted a bridge,—*Held*, that they were liable to keep the bridge in repair. *K. B.* 1810, *Rex v. Inhabitants of Kent*, 13 *East*, 220; 1811, *Rex v. Inhabitants of Lindsey*, 14 *East*, 817.

76. When power was conferred upon a navigation company to use a public drain, by substituting another, or others,—*Held*, that the company were bound to keep in repair the substituted drains, as well as to make them. *C. P.* 1840, *Priestley v. Foulds*, 2 *Eng. Railw. Cas.* 422; 2 *Mann. & G.* 175; 2 *Scott, N. R.* 205.

77. As to reversion. Land which is taken by the State for the public use, either by a fee-simple purchase, or through the exercise of the right of eminent domain, does not revert to the original owner on cessation of use. *Pa. Supreme Ct.* 1865, *Haldeman v. Pennsylvania Central Railroad*, 50 *Pa. St.* 425.

78. Thus it was *Held*, that the title to land permanently taken under the Pennsylvania acts of 1826 and 1827, for the construction of the Pennsylvania Canal, became upon payment of damages awarded, absolute in the State; that it passed to the grantee of the State, the defendant corporation, under the act of 1857, which provided for the sale of the canal; and did not revert to the grantee of the original owner on a change being made in the course of the canal by the canal commissioners, previous to the sale. *Id.*

79. The title to premises appropriated by a State for the construction of its public works vests in the State; and it acquires an estate in fee in such premises. Hence, upon

an abandonment of their use for the purposes for which they were seized, the title does not revert to the original owner, but remains in the State. *N. Y. Ct. of Appeals*, 1854, *Rexford v. Knight*, 11 *N. Y.* (1 *Kern.*) 808.

80. When the fee of lands is acquired by a municipal corporation under a legislative power to take the lands for a specified purpose, upon paying compensation, no reversionary interest remains in the former owner, even though the particular use for which the land was originally taken ceases. *N. Y. Ct. of Appeals*, 1852, *Heyward v. Mayor &c. of New York*, 7 *N. Y.* (3 *Seld.*) 814.

81. A grant by the legislature to a corporation of property in fee simple absolute, on payment of compensation, will not be construed as a conditional fee or usufruct, leaving the possibility of a reverter to the original owner on the lapse of the particular use, but will be held to have vested the entire property forever in the grantee. *U. S. Circ. Ct. (N. Y.)* 1848, *De Varaigne v. Fox*, 2 *Blatch. C. Ct.* 95.

82. If a change in the destination of the property granted, after a continuance for twenty-six years of the use of it first contemplated, raises any right or interest, on the part of the original owner, it is of an equitable character, cognizable only in chancery and not at law. *Id.*

83. Where a State takes land, after making ample provision for compensation, and builds a railroad upon it, which it subsequently conveys to a corporation, a man cannot claim damages against the corporation for any land originally taken. *Mich. Supreme Ct.* 1855, *People v. Michigan Southern R. R. Co.* 3 *Mich.* 496.

84. A railroad company erected, on a part of the land which belonged to the complainant, and which the company had caused to be condemned for railroad purposes, a house for the accommodation of passengers waiting for the arrival of the cars. *Held*, that though the house was sometimes used for a tavern and store, the complainant had no claim to the house by reason of an abandonment or cessation of the use for which it was built; nor was he entitled to an injunction to restrain the use of the building as a hotel. *Md. Ct. of Appeals*, 1852, *Hamilton v. Annapolis & Elk Ridge R. R. Co.* 1 *Md.* 553.

85. The title to land granted to a turnpike company is vested in the corporation

only for the purposes of a road, and when that is abandoned the land reverts to the original owners. The right of way, which, during its existence, belonged to the corporation, does not upon a discontinuance of the road, cease, nor does it become vested in the town so as to render it liable to keep the road in repair. Hence, an indictment will not lie against a town, upon the repeal of the charter of such a corporation, for not keeping the road in repair subsequent to the repeal. *N. H. Superior Ct. 1840, State v. New Boston, 11 N. H. 407.*

86. That land taken for public use can be held only so long as it is used by the public, and cannot be diverted to any other purpose, —see *Giesy v. Cincinnati &c. R. R. Co. 4 Ohio St. 308.*

III. COMPENSATION A CONDITION.

87. Necessity of making compensation.

Where an act of the legislature authorizes a corporation to make a road, and to take land for that purpose without the owner's consent, the law must provide for compensation to the landowner; though it is not necessary that it should give him the right to try the question of damages by a jury. *N. H. Supreme Ct. 1857, Petition of Mount Washington Road Co. 35 N. H. 134.*

88. The company can acquire no title, without the consent of the owner of the fee, or the appraisal and payment of the damages. *N. Y. Supreme Ct. 1868, Craig v. Rochester City & Brighton R. R. Co. 39 Barb. 491.*

89. Private property cannot be taken by a municipal corporation for public use without compensation or provision therefor. And if none is made the party may retake the property. *Cal. Supreme Ct. 1858, Colton v. Rossi, 9 Cal. 595.*

90. — for property of another corporation. That the property of a public corporation is so far private as to be protected, — see *Miller v. New York & E. R. R. Co. 21 Barb. (N. Y.) 518.*

91. — for a franchise. To justify an interference with a vested franchise by granting another to a rival company, upon the ground that it is taking the former franchise under the right of eminent domain, it must appear that the government intend to exercise this high sovereign right, by clear and

express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent.

It must also appear by the act that they recognize the right of private property and mean to respect it, and under our constitutions the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property for any use other than a public one, or fails to make compensation, the act is simply void, no right of taking as against the owner is conferred, and he has the same rights and remedies against a party acting under such authority, as if it had not existed.

In general, therefore, where any act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those affected. *Mass. Supreme Ct. 1854, Boston & Lowell R. R. Co. v. Salem & Lowell &c. R. R. Co. 2 Gray, 1.* And see *Matter of Flatbush Avenue, 1 Barb. (N. Y.) 286*; *Matter of Hamilton Avenue, 14 Id. 405.*

92. An exclusive privilege to build a bridge is a franchise, not only as to the right to build and maintain, but as to the exclusion of all other such grants, though the limits of such exclusion extend beyond the limits set for the location of the proposed bridge. And such an exclusive privilege is not held subject to any implied condition of yielding it up without compensation if required by the public convenience. Although it is competent for the legislature to grant to others a franchise which interferes with such exclusive right, if they provide in the new grant for compensation to be made, they cannot make such new grant without providing for compensation. It is not enough that the grantees of the former privilege may have an action for damages against the grantees of the latter. *N. H. Superior Ct. 1834, Piscataqua Bridge Co. v. New Hampshire Bridge Co. 7 N. H. 85.*

93. The grant of a ferry over a public wa-

ter course, although a franchise, is not an exclusive grant in the sense that government cannot interfere with it by establishing a rival franchise. Such a grant is for the convenience of the community and is held subject to the superior and paramount rights of the public; and the principle that private property cannot be subjected to public use, without adequate compensation, does not apply to alleged losses sustained by the owner of a ferry by reason of the contiguous erection of a toll bridge, under a charter granted by the legislature. *Ala. Supreme Ct.* 1835, *Ryer v. Tuscaloosa Bridge Co.* 2 *Port.* 296.

94. It is well settled, that, where there has been a legislative grant to a private corporation to erect a bridge, turnpike, or other public convenience, which is not in its terms exclusive, there is no constitutional obligation on the legislature not to grant to a second corporation the right to erect another bridge or turnpike for a similar purpose, to be constructed so near the former as greatly to impair, or even to destroy, the value of the former; and this without making compensation to the first corporation for the consequential injury. [11 *Pet.* 420; 17 *Conn.* 454; 6 *Paige*, 544.] *Vt. Supreme Ct.* 1849, *White River Turnpike Co. v. Vermont Central R. R. Co.* 21 *Vt.* 590.

95. But so far as the real estate of a private corporation, or their interest in real estate, is concerned, they are entitled to the same constitutional protection that an individual would be. The property of either may be taken for public use by authority of the legislature, if compensation be made therefor, but not otherwise. *Id.*

96. — for a highway. The location of a railroad upon a public highway is the imposition of a new servitude upon the land, in addition to and distinct from that to which it was originally subjected when taken for a highway, and the owner of the fee is entitled to compensation for the damage caused thereby. *Conn. Supreme Ct.* 1857, *Imlay v. Union Branch R. R. Co.* 26 *Conn.* 249.

97. The legislature have no power to authorize a railroad company to take land which has already been taken by the public as a highway, and appropriate it to the construction of the railroad, without making compensation to the owner of the fee. The owner is not divested of the fee by the laying out of the highway, and the public thereby

only acquire a right of way and the incidental privileges. Appropriating such highway to a railroad company is giving not an easement to the public, but an exclusive right to the company, and they cannot be regarded as standing in the place of the public.* *N. Y. Supreme Ct.* 1842, *Trustees of Presb. Soc. in Waterloo v. Auburn & Rochester R. R. Co.* 8 *Hill*, 567; *S. P.* 1841, *Fletcher v. Auburn & Syracuse R. R. Co.* 25 *Wend.* 462. See also *Craig v. Rochester &c. R. R. Co.* 39 *Barb.* 404.

98. One who dedicates land to the purpose of a highway does not relinquish to the public anything more than the right of way, and the municipal or State authorities have no power to authorize the taking of such highway by a railroad company, without his consent or making compensation to him. The taking and use of the street for a railroad is not one of the modes of enjoying the public easement, but imposes an additional burden upon the soil, for which the owner is entitled to damages, and he may recover them in an action against the company if the road is taken without compensation. *N. Y. Ct. of Appeals*, 1857, *Williams v. N. Y. Central R. R. Co.* 16 *N. Y.* 97.

99. That a railway company has no right to tunnel under a highway, without making previous compensation to the landowner,—see *Ramsden v. Manchester &c. Railway Co.* 1 *Exch.* 728.

100. — for a city street. A city has such interest in the soil of its streets, that the legislature cannot empower a railway company to use them for a railway track, without compensation; and it pertains to the corporation of a city to determine the mode of

* The provisions of 1 *N. Y. Rev. Stat.* 581, authorizing a turnpike or plank road company to take any public highway as a portion of its road, on appraising the value of the public interest in it, and paying the same to the commissioners of highways to be applied to the improvement of roads in their respective towns,—have however been held not to be unconstitutional, although they provide for no new compensation to the owner. A turnpike is a highway, and the legislature have power to provide for the construction and care of highways in such mode as the public interest in their judgment requires. The interest that such turnpike company acquires is merely that which the public had before. *N. Y. Supreme Ct.* 1848, *Benedict v. Golt*, 8 *Barb.* 459.

Where a plank or turnpike road is constructed along a highway, the company succeed to the rights and powers of the commissioners of highways, and any inconvenience or damage which an owner of land suffers by proper and reasonable repairs or improvements of the highway is *damnum abeque injuria*. *Id.*; 1858, *Dexter v. Broat*, 16 *Barb.* 387.

propelling cars within its limits, whether by steam or horse power, and the rate of speed. *Miss. Ct. of Errors*, 1847, *Donnaher v. State*, 8 *Smad. & M.* 649.

101. Besides the right of way which the public have in a street, there is a private right, which passes to a purchaser of a lot upon the street, as appurtenant to it, which he holds by an implied covenant, that the street in front of his lot shall forever be kept open for his enjoyment; and for any obstruction thereof, to the owner's injury, he may maintain an action. The right which the owner of a lot has to the enjoyment of an adjoining street, is part of his property, and can only be taken for public use, on just compensation being made, pursuant to the constitution. *Ind. Supreme Ct.* 1856, *Tate v. Ohio & Mississippi R. R. Co.* 7 *Ind.* 479; *S. P. Protzman v. Indianapolis & Cincinnati R. R. Co.* 9 *Ind.* 467. But see *Murray v. Graham*, 6 *Paige*, 622.

102. Where the authorities of a municipal corporation are invested by charter with exclusive control over its streets, and, in pursuance of such power, permission is granted to locate railway tracks along a street, the owners or occupants of property fronting such street cannot enjoin the laying of such tracks, nor recover any damage or compensation for such use of a street. *Ill. Supreme Ct.* 1859, *Moses v. Pittsburg & C. R. R. Co.* 21 *Ill.* 516. And see *New Albany R. R. Co. v. O'Daily*, 18 *Ind.* 853.

103. In the case of constructing the track of a railroad through the streets of a city by the permission of the common council, the lands forming the streets wherein the track is laid are not to be deemed "taken" from the adjoining owners for the construction of the road; they are used, and the rails laid down upon them, by the permission of the city to whom the lands, subject to the trust for public uses of them, belong, or, at any rate, the right and duty of regulating them appertains. They still continue streets, for the use, benefit and accommodation of the public at large. *N. Y. Supreme Ct.* 1849, *Drake v. Hudson River R. R. Co.* 7 *Barb.* 508, 588.

104. Injury to individual owners of land by the authorized construction of a railroad through a street, the title to which is in the people of the State, is *damnum absque injuria*, and gives them no right of action against

the company. *N. Y. Supreme Ct.* 1856, *Corey v. Buffalo, Corning & N. Y. R. R. Co.* 23 *Barb.* 482.

105. — for a railway track. A railroad corporation is entitled to damages for the construction of another railroad across its track, although such track is laid upon piles over tidewater. *Mass. Supreme Ct.* 1860, *Grand Junction R. R. & C. Co. v. County Commissioners*, 14 *Gruy*, 558.

106. A State statute (*e. g.* the New York act of 1853, ch. 68) authorizing highways to be laid out across railroad tracks without making compensation, does not violate the constitutional provisions against taking private property for public use, or impairing the obligation of contracts. The title which a railroad corporation acquires to its track is qualified as being taken for public use, and is subject to the exercise, by the legislature, of all the powers to which the franchisees of the corporation are subject. *N. Y. Ct. of Appeals*, 1862, *Albany Northern R. R. Co. v. Brownell*, 24 *N. Y.* 345.

107. — for a turnpike road. A turnpike company owns the way, and is entitled to damages for any interference that obstructs or impairs the use of it in the least degree,—*e. g.* the laying of a railroad track across it; though such track is authorized by the railroad company's charter. *N. Y. Supreme Ct.* 1848, *Seneca Road Co. v. Auburn Rochester R. R. Co.* 5 *Hill*, 170. Followed, *Mahon v. Utica & Schenectady R. R. Co.* *Hill & D. Supp.* 156.

108. The easement enjoyed by the public in a turnpike road is vested in the public as much as is that which exists in a common highway; and the resumption of such a franchise leaves the public easement unaffected. Where, therefore, the legislature passed a resolution repealing the charter of a turnpike company, discontinuing the road as a turnpike, and establishing it as a public highway,—*Held*, that the road became a legal public highway, without any new assessment of damages to the owners of the soil. *Conn. Supreme Ct.* 1858, *State v. Maine*, 27 *Conn.* 641. See also *Hingham & Quincy Bridge & Turnpike Co. v. County of Norfolk*, 6 *Allen*, 358.

109. — for a towing path. That the owner of a towing path which is obstructed, or from which the navigation is diverted, by commissioners appointed for the improve-

ment of river navigation, is entitled to compensation,—see *Rex v. Commissioners of Thames &c. Navigation*, 5 *Ad. & E.* 804.

110. — for a wharf. Where the value of a wharf is impaired by the construction of a railroad across the flats below it, the owner is entitled to recover of the proprietors of the railroad, the damages thus sustained by him. *Mass. Supreme Ct.* 1842, *Ashby v. Eastern R. R. Co.* 5 *Metc.* 368, 1 *Am. Railw. Cas.* 356.

111. When the private owners of a pier have an exclusive right to the wharfage, the city cannot legally deprive them of this right, by appropriating the slip adjoining the pier to the purposes of a public ferry; at least without payment of just compensation. *N. Y. Superior Ct.* 1857, *Murray v. Sharp*, 1 *Bono.* 589.

112. — for a stream. The owner of land is entitled to the use of a (non-navigable) stream of water which has been accustomed, from time immemorial, to flow through it; and it cannot be diverted for public use without his consent, or a just compensation. *N. Y. Chancery*, 1816, *Gardner v. Trustees of Newburgh*, 2 *Johns. Ch.* 162.

113. A water power situated on one of the smaller streams of the State, is such a property as a railroad company is liable to make compensation for, if damaged by the construction of their road, although the stream may have been declared a public highway by act of assembly. *Pa. Supreme Ct.* 1860, *Barclay R. R. &c. Co. v. Ingham*, 86 *Pa. St.* 194.

114. But where the right to build and maintain a dam was held under a statute which was adjudged to be, in effect, a license from the State, which the State had power to revoke whenever the paramount interests of the public should require,—*Held*, that the owner of such mill dam privilege could not recover any damage for injuries done to it by virtue of the charter of a railroad company granted by the State. *Pa. Supreme Ct.* 1859, *New York & Erie R. R. Co. v. Young*, 33 *Pa. St.* 175.

115. There is no private property in the waters of navigable rivers or in the strip of shore between high and low water mark, vested in the riparian owners. And the legislature may authorize the land below high water mark to be taken for a public use, without providing for a compensation

to the riparian owner, even though the use authorized cuts off all communication between his land and the river. *N. Y. Ct. of Appeals*, 1852, *Gould v. Hudson River R. R. Co.* 6 *N. Y. (3 Seld.)* 522; *S. P. N. Y. Ct. of Errors*, 1829, *Lansing v. Smith*, 4 *Wend.* 9. And see *Davidson v. Boston & Maine Railway*, 3 *Cush.* 91; *Champlain & St. Lawrence Railway v. Valentine*, 19 *Barb.* 484.

116. Where a ford way was destroyed by the erection of a dam across a river, in the construction of a canal, under legislative grant, the river being a public highway, although not strictly navigable, in the common-law sense (which only included such rivers as were affected by tidewater),—*Held*, that the owner of the ford way could recover no compensation from the State, or their grantees, the act being but a reasonable exercise of the right to improve the navigation of the stream, as a public highway. *Pa. Supreme Ct.* 1841, *Zimmerman v. Union Canal Co.* 1 *Watts & S.* 846.

117. The owner of a dam erected by legislative grant upon a navigable river, with a proviso that the navigation of the same should not be thereby obstructed, and which is afterwards cut off by a canal, granted by the same authority, is not entitled to recover damages. The State is never deemed to have parted with one of its franchises, in the absence of conclusive proof of such intention. [6 *Watts & S.* 101.] *Pa. Supreme Ct.* 1845, *Susquehanna Canal Co. v. Wright*, 9 *Watts & S.* 9.

118. The owner of land adjoining a navigable stream, has no property in the bed of the stream, and hence the legislature may give permission to a railway company to so construct their road as to interfere with, and alter the bed of such a stream, to the damage of any owner of adjoining land, in regard to flowage, or otherwise, even to the hindrance of accustomed navigation, without compensation; and the railway company, in constructing their road, within the provisions of the act of incorporation, do not become liable to an action for damages to any such proprietor of adjoining land. *Q. B.* 1851, *Abraham v. Great Northern Railway Co.* 5 *Eng. L. & Eq.* 258; 20 *Law J. N. S.* 322; 15 *Jur.* 855; 16 *Q. B.* 586.

119. The owners of a brewery accustomed to take water from a public river, and not claiming its use as an easement to the par-

ticular tenement, are not entitled to receive compensation from the deterioration of the waters by the works of a dock company. *K. B.* 1810, *Rex v. Bristol Dock Co.* 13 *East*, 429; *S. P. Q. B.* 1846, *Regina v. Hull Dock Co.* 3 *Eng. Railw. Cas.* 795; 11 *Jur.* 15. Compare *Jubb v. Hull Dock Co.* 9 *Ad. & El. N. S.* 448.

120. Where a railroad company's works cut off a spring of water, below high water mark, on a navigable river,—*Held*, that the riparian owner was entitled to compensation in damages for the injury thereby sustained, in a proceeding under the statute. *Pa. Supreme Ct.* 1857, *Lehigh Valley R. R. Co. v. Trone*, 28 *Pa. St.* 206.

121. — for unimproved lands. The power to lay out roads through wild or unimproved lands, without the consent of the owners of the lands taken, cannot be conferred unless compensation is made to such owners. Wild land owned by an individual is private property; and the fact that a right of way is all that is taken, and the fee of the land is left in the owner, is a matter of no importance. *N. Y. Supreme Ct.* 1854, *Wallace v. Karlenowefski*, 19 *Barb.* 118.

122. A statute for "draining swamps, marshes, &c." [3 *N. Y. Rev. Stat.* 548], which authorized the taking the property of the owner of the land, and transferring it to the applicant for the ditch, against the consent of the owner,—*Held*, unconstitutional and void. *N. Y. Supreme Ct.* (1848?), *Gilbert v. Foote*, cited in *White v. White*, 5 *Barb.* 474, 483.

123. — for minerals. A canal company were authorized, by their act of incorporation, to require the workers of any mines under the canal to leave so much coal on each side of the canal as they might require for its safety; and the company were to make compensation, to be assessed (if the parties differed) by a jury,—*Held*, that the company were bound to make compensation, not only for the value of the coal in the bed, but also for the additional profit, which could only be made by getting it. *Chancery*, 1844, *Barnsley Canal v. Twibell*, 18 *Law J. N. S.* 434. Compare *Sparrow v. Oxford & C. Railway Co.* 13 *Eng. L. & Eq.* 38; 21 *Law J. N. S.* 731; 16 *Jur.* 708.

124. What provision for compensation is sufficient. A statute which provides that compensation shall be made when demanded,

and in the case of non-residents, by depositing the damages assessed in the county treasury, is constitutional. Compensation may be said to be made, when it is so fully and securely provided for, that no possible hazard can be incurred in obtaining it. *Ill. Supreme Ct.* 1859, *Johnson v. Joliet & Chicago R. R. Co.* 28 *Ill.* 202.

125. Where private property is taken by the State for public use, it is sufficient that a certain and adequate remedy is provided, by which the individual can obtain compensation without any unreasonable delay. Though the fee may not vest in the State until the payment of the compensation, the authority to enter upon and appropriate the land may be complete, prior to payment. If the officers, whose duty it is to procure an appraisal, do not proceed to perform that duty, the remedy is by mandamus.* *N. Y. Ct. of Appeals*, 1854, *Rexford v. Knight*, 11 *N. Y. (1 Kern.)* 808.

For the Right to compensation, the Measure of it, how it is Assessed, &c., see COMPENSATION.

ESTOPPEL.

- I. AGAINST CORPORATIONS.
- II. AGAINST INDIVIDUALS.

I. AGAINST CORPORATIONS.

1. The general rule. As a general rule, corporations have power to waive their rights, and are bound by estoppels *in pais*, like natural persons. *N. H. Supreme Ct.* 1855, *Hale v. Union & C. Ins. Co.* 32 *N. H.* 295.

2. Effect of organizing as a corporation. When an association of persons, having assumed a name which implies a corporate body, exercise the power of a corporation; they are estopped from denying their corporate liability. *Ill. Supreme Ct.* 1864, *United States Express Co. v. Bedbury*, 34 *Ill.* 459.

3. A bank organized under a general banking law, and acting under such organization, is estopped to deny the regularity of

* To the same effect are *Bloodgood v. Mohawk & Hudson R. R. Co.* 18 *Wend.* 9; *Baker v. Johnson*, 3 *Full.* 342; *People v. Hayden*, 6 *Id.* 359; *Smith v. Helmer*, 7 *Barb.* 416.

its organization. *Ind. Supreme Ct.* 1860, *Ewing v. Robeson*, 15 *Ind.* 26.

4. — of contracting as one. A corporation which has entered into contracts in its corporate capacity, is estopped, when sued thereon, to deny its corporate existence. *Ohio Supreme Ct.* 1860, *Callender v. Painesville & Hudson R. R. Co.* 11 *Ohio St.* 516.

5. If a county or other municipal corporation is authorized by statute to borrow money and issue bonds for the payment thereof, and if bonds are made and delivered, reciting the facts which show them to have been regularly issued, the corporation is estopped to deny their regularity, or to assert that they were not made in conformity to the statute. *U. S. Supreme Ct.* 1862, *Moran v. Commissioners of Miami County*, 2 *Black*, 722.

6. On a petition for a peremptory mandamus to compel the trustees of a township to pay the overdue interest on certain bonds, issued by said trustees to a railroad company incorporated by an Ohio statute, and indorsed to the petitioner. *Held*, that the defendants were estopped to aver, as to third persons holding such securities in good faith, without notice, that the act of incorporation of said railroad company was abrogated by the new constitution of the State, and if not superseded, that the provisions of said act in the proceedings preliminary to the issuing of the bonds were not complied with, as to notice of elections, &c. *Ohio Supreme Ct.* 1858, *State v. Trustees of Union Township*, 8 *Ohio St.* 394.

7. The bonds of a municipal corporation, issued in aid of a railroad, were publicly sold, with a knowledge of all the inhabitants of the city. Many of them had been deposited with the State treasurer by banks, as security for their circulation, one of which, located in the city, had for several years published in a newspaper there, a quarterly statement, embracing such fact. The city had paid the semi-annual interest on the bonds, down to a certain date, and the payments had been reported at the annual city meetings. *Held*, that the corporation, under these circumstances, was equitably estopped from denying the validity of the bonds, against parties who held them in good faith; and that individual citizens and tax payers who had acquiesced in the conduct of the city, and taken no measure to prevent the sale of the bonds or the payment of interest, were equally estopped

from denying their validity, so far as their individual rights were concerned. *Conn. Supreme Ct.* 1860, *Society for Savings v. City of New London*, 29 *Conn.* 174. See also, *President, &c. of Keithsburg v. Frick*, 34 *Ill.* 405; *Maher v. City of Chicago*, 38 *Ill.* 266.

8. Seal. The seal of a municipal corporation attached to a contract does not estop the corporation from inquiring into the power of its officers to make it. *Kan. Supreme Ct.* 1864, *City of Leavenworth v. Rankin*, 2 *Kan.* 357.

9. A release issued by a corporation to restore the competency of its servants, purporting to be under the corporate seal, and signed by the president of the company, and exhibited by them in court, as their act, will operate as an estoppel upon the company, in any suit between the party as to whom the release was given and the company, and the latter cannot be heard to dispute its validity. *Md. Ct. of Appeals*, 1856, *Scaggs v. Baltimore & Washington R. R. Co.* 10 *Md.* 268.

10. Accepting statute. Where a statute is passed creating new powers, and providing that any existing corporation may accept it, and that, on filing their acceptance, that part of their charter which is inconsistent with the act shall be repealed, if a corporation assumes to act under the statute and exercise the powers, though without filing the required acceptance, they cannot exonerate themselves from responsibility upon contracts made in the exercise of such powers by objecting that they had not filed the evidence required by the statute to evince their decision to accept it. Although a corporation cannot vary from the object of its creation, and persons dealing with them must take notice of whatever is contained in the law of their organization, nevertheless in cases in which a corporation act within the range of the general authority, they may be bound though failing to comply with some formality or regulation which should not have been neglected but has been. *U. S. Supreme Ct.* 1859, *Zabriskie v. Cleveland &c. R. R. Co.* 23 *How.* 381. See also *Lalorborough v. Curtis*, 22 *Pick.* 320.

11. Grantees who accept a statutory grant providing for an assessment of the damages of owners of property affected thereby,—*Held*, to have admitted, by such acceptance,

that such owners sustained damage. *N. Y. Supreme Ct. Sp. T.* 1860, *People v. Law*, 34 *Barb.* 494; 22 *Hov. Pr.* 109.

12. Consolidating. While a corporation cannot relieve itself from responsibility to those to whom it may be indebted, by becoming merged into a new organization, it may, by the act of merger, become so situated as to be estopped from claiming that it remains undissolved. *Iowa Supreme Ct.* 1857, *Carey v. Cincinnati &c. R. R. Co.* 5 *Clarke*, 357.

13. Agents' acts. A railroad company not authorized by their charter to run lines of stages in connection with their route, and who have not, by any vote of the corporation or the directors, empowered their officers to make contracts with passengers to transport them over connecting stage routes, are not estopped, by the acts of their agents in making such contracts, from setting up the want of power to do so, as a defence to an action against them for the breach of such a contract. Where a corporation have the power to do an act, they may be estopped from objecting that the form they adopted was not the exact mode prescribed in the charter; but where the question is one of power, they cannot be deemed estopped to deny that they have done what they never could by legal possibility have done. *Conn. Supreme Ct.* 1853, *Hood v. New York & N. H. R. R. Co.* 23 *Conn.* 1, 502; *S. P. Md. Ct. of Appeals*, 1836, *Pennsylvania &c. Steam Nav. Co. v. Dandridge*, 8 *Gill & J.* 248.

14. If the agents of a railroad company represent the company to the public as common carriers to a place beyond the limits of their own road, in such a manner and for such a length of time, that the corporators may be presumed to know and assent to it, the company will be estopped to deny it, although no actual arrangement with connecting lines exists. Although the company may have had no special authority, by their charter, to make such contracts, and could, perhaps, by proper proceedings, have been restrained from doing it, they cannot plead such want of authority against persons contracting with their agents, empowered so to contract by express act of the company or their directors, or by implication arising from a mutual arrangement amongst all the carriers between the place where the goods are received and the place of delivery. *Me.*

Supreme Ct. 1859, *Perkins v. Portland &c. R. R. Co.* 47 *Me.* 578.

15. And although the agent making such a contract had no authority from the company to do so, yet, if for several years before and after the transaction sued upon, he practiced making similar contracts to deliver goods at various places beyond the line of the company's road, their assent may be presumed, and they will be estopped from denying his authority. *Id.*

II. AGAINST INDIVIDUALS.

16. Acting as officers. The defendant accepted from the plaintiffs, who were acting as a corporation, the appointment of their treasurer, and served as such for several years, and received, in his official capacity, the money sued for. *Held*, that he could not deny the plaintiffs' corporate existence. [14 *Johns.* 238.] *N. Y. Superior Ct.* 1828, *All Saints' Church v. Lovett*, 1 *Hall*, 191.

17. If the charter of a corporation requires a particular officer to be a resident of the State in which it is located, one who has accepted and exercised that office cannot, when sued by its creditors, be heard to deny the character in which he held himself out to the world, nor aver that he was not qualified to hold that office by his residence in the State. *Ala. Supreme Ct.* 1854, *Bank of St. Mary's v. St. John*, 25 *Ala. N. S.* 566.

18. A bank charter required that a certain proportion of its capital should be paid in, in specie, and a certificate thereof, under oath, be rendered by its officers, before it should proceed to issue bills. The president rendered such a certificate, knowing it to be untrue (in consequence of which the bank was illegally organized), and afterwards transferred his stock. *Held*, that his administrator could not recover of the stockholders upon the bills of which he died possessed. *Ga. Supreme Ct.* 1855, *McDougald v. Belamy*, 18 *Ga.* 411.

19. Inducing one to act as officer. A party who has concurred in inducing another to exercise an office, is estopped from making application in the nature of a *quo warranto* to eject him from the office. Thus a borough officer, who administers an oath or declaration, on admission to office, to a party whom he knew to be disqualified at the time, cannot be a relator against such

party. *Q. B.* 1842, *Regina v. Greene*, 3 *Q. B.* 460.

20. Members assenting to charter and by-laws. One who effects an insurance with an incorporated company, by the terms of whose charter he, by so doing, becomes a member of the corporate body, and, on receiving his policy, gives a premium note in consideration therefor, payable to the company by its corporate name, is estopped from denying the corporate existence of the company, in an action against him on the note. *Mich. Supreme Ct.* 1845, *Cahill v. Kalamazoo Mut. Ins. Co.* 2 *Dougl.* 124, 138.

21. A person applying for membership in an incorporated insurance company must be presumed to know the charter and by-laws of the company. *N. J. Ct. of Errors*, 1858, *Belleville &c. Ins. Co. v. Van Winkle*, *Beas.* 383.

22. The articles of copartnership of a joint stock bank provided that the directors should submit yearly abstracts of the company's affairs; such abstracts to be binding on the partners, who were to have no right to examine the company's books. A partner filed his bill, alleging that the abstracts were fraudulent; that the losses already equalled the amount specified in the deed as sufficient to dissolve the company; and that the funds had been misapplied by the directors. *Held*, that he was not estopped by the deed from seeking redress in a court of equity; for the deed contemplated a case where the abstracts were *bona fide*, and not fraudulent. *H. of L.* 1852, *North British Bank v. Collins*, 23 *Eng. L. & Eq.* 7.

23. — or to course of corporate dealing. It is not competent for a person who has been admitted a member of a corporate company, and has acted as such, to dispute, in an action for infringing by-laws, the acceptance of the charter by a majority of the grantees. *K. B.* 1826, *Tobacco Pipe Makers' Co. v. Woodroffe*, 7 *Barn. & C.* 888; 8 *Dowl. & R.* 530.

24. A member of a mutual insurance company, who became such after it had practically adopted a statutory provision, enacted subsequently to its charter, authorizing the property insured to be divided into classes, and acted thereon for several years, cannot object, in an action to recover an assessment upon his deposit note, that the same was not formally adopted at a meeting

regularly called for that purpose. *Mass. Supreme Ct.* 1864, *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 *Allen*, 217.

25. A mutual insurance company, without authority from its charter, established a guarantee fund, secured by mortgages, for the purpose of giving credit to the company. A creditor, who was also a corporator, having taken out a policy, trusted to this fund, — *Held*, that by becoming a corporator he sanctioned and participated in the fraud on the law perpetrated by the corporation, and therefore could not ask to have the illegal agreement enforced. *N. J. Chancery*, 1858, *Trenton &c. Ins. Co. v. McKelway*, 1 *Beas.* 183.

26. After a banking association have repudiated, for years, all the arrangements made with one who subscribed for shares, and denied him the rights of a stockholder, the associates, by their receiver, who represents them, cannot be permitted to come in and claim the defendant as a stockholder or partner. They are concluded by their acts. *N. Y. Ct. of Appeals*, 1853, *Burrows v. Smith*, 10 *N. Y. (6 Seld.)* 550.

27. In a proceeding in equity, by a corporation, to enforce a security, it appeared that the general act under which the petitioners were incorporated, required "a copy" of the articles of association to be filed, and the incorporators had filed a paper which contained the text of the articles, but did not state the names of the original signers. It was objected that the paper, without the names, was not a copy, and the petitioners were therefore not incorporated so as to enable them to sue.

Held, 1. That the objection could not be taken under a general denial. An objection to the existence of a corporation plaintiff, is preliminary, and must be raised at an earlier stage of the cause. The existence of the corporation and its capacity to sue, are admitted by pleading to the merits.

2. That the respondent, having been a member of the company, and having done, and consented that the company should do, numerous acts implying that it was a corporation, was equitably estopped from denying its incorporation. *Conn. Supreme Ct.* 1858, *West Winsted Savings Bank &c. v. Ford*, 27 *Conn.* 282. See also *Howard Mut. Loan Ass. v. McIntire*, 3 *Allen*, 571.

28. Subscriber to stock. In the absence

of fraud a subscriber for stock is estopped to deny the existence of the corporation. *Ind. Supreme Ct.* 1857, *Stoops v. Greensburgh &c. Plank Road Co.* 10 *Ind.* 47; 1858, *Ensey v. Cleveland & St. Louis R. R. Co.* *Id.* 178; *Fort Wayne Turnp. Co. v. Deams* *Id.* 563; *N. Y. Supreme Ct.* 1817, *Dutchess Cotton Manufactory v. Davis*, 14 *Johns.* 238; *Circuit*, 1850, *Oswego & Syracuse Plank Road Co. v. Rust*, 5 *How. Pr.* 390.

29. But a subscription promising to pay a certain sum to the trustees of a church, does not estop the subscriber from denying that the church is a corporation. *N. Y. Supreme Ct.* 1837, *First Baptist Soc. v. Rapalee*, 16 *Wend.* 605.

For various cases in which the circumstances attending the Subscription for stock have been held to bind the subscriber, see SUBSCRIPTION; also STOCK and STOCKHOLDERS.

80. If a party admit himself to be a subscriber to the stock of a company, and on the faith of such admission others have acted for his benefit, he will be estopped from subsequently denying that he did in fact subscribe. *Pa. Supreme Ct.* 1858, *Graff v. Pittsburgh & Steubenville R. R. Co.* 31 *Pa. St.* 489.

81. Where a subscriber to the stock of a bank gave a bond and mortgage for the amount of his subscription, with intent that it should be assigned to the comptroller as security for notes to be issued by the bank, and the bond and mortgage were so assigned, and notes issued upon the security of them. *Held*, that, in a suit by the comptroller or his assignee upon the bond and mortgage, the subscriber would be estopped from setting up that they were obtained from him by false representations. The case would be the same as though the plaintiff had personally participated in depositing the bond and mortgage as security for circulating notes, and had asserted to the comptroller that they were valid securities. If he had done this even in good faith, not having discovered the fraud afterwards asserted, he would have been precluded from setting up that the securities were invalid. [31 *Wend.* 172; 19 *Wend.* 557; 2 *Comst.* 278; 4 *Sandf.* 361.] *N. Y. Ct. of Appeals*, 1865, *Hubbard v. Briggs*, 31 *N. Y.* 518.

82. One who assumes the liability of an original subscriber, on receiving a transfer of such subscriber's shares, places himself in the

same relation to the company, and is estopped from disputing the validity of the debt upon any grounds that could not have been taken by the original subscriber. *N. Y. Superior Ct.* 1849, *Palmer v. Lawrence*, 3 *Sandf.* 161.

83. Owner permitting property to be taken. Tacitly permitting a railroad to be laid down over one's land does not prevent the owner of the land from asserting his rights in it. As the corporation can, by proper proceedings, acquire the land upon just terms, they are not injured by the delay of the owner to assert his claims. *N. Y. Supreme Ct.* 1859, *Eggleston v. New York & Harlem R. R. Co.* 35 *Barb.* 162.

84. Where an individual, whose land was appropriated for the purpose of a municipal corporation, was a member of the city council, which authorized the improvement; one of those who petitioned them for that purpose; a member of the committee to which the petition was referred; participated in all the proceedings which resulted in the opening; and stood silently by while the city was making large expenditures upon the work; *Held*, that he had neither a legal nor equitable right to set up his title against the city. *Pa. Supreme Ct.* 1845, *Mayor &c. of Pittsburgh v. Scott*, 1 *Pa. St.* 309.

85. Creditor being also stockholder. A creditor of an insolvent joint stock corporation is not, by reason of his being a stockholder in and indebted to such corporation by note given in payment of his subscription for stock, estopped from exercising any right to recover his claim which other creditors possess. Hence, in an action by the corporation to recover said note,—*Held*, that the defendant, although a stockholder, might set off against the plaintiff's demand, a claim for goods sold by him to the corporation. *Conn. Supreme Ct.* 1856, *Pondville Co. v. Clark*, 25 *Conn.* 97.

86. Creditor claiming under assignment. An insurance company, whose charter provided that the stockholders, at the time of its expiration, should be individually liable for the corporate debts then to be due, became insolvent, and made an assignment under the New York act of April, 1814. *Held*, that although the discharge, so far as it assumed to exonerate the corporation and the stockholders from debts previously contracted, was void; nevertheless, creditors

who came in under the assignment, precluded themselves from asserting a claim upon the stockholders personally, for the balances of their debts. [Citing 3 Pet. 411; 3 Cai. 154; 3 Barn. & Cr. 477; 2 Kent's Com. 393, n. 3 ed; Baldw. C. C. 296; 3 Pet. Dig. 470; 3 Barn. & Cr. 477.] *N. Y. Ct. of Errors*, 1841, *Van Hook v. Whitlock*, 26 *Wend.* 43.

87. — or in insolvency proceedings. Proving a claim against a corporation in insolvency, and receiving a dividend, not a bar to a suit for balance of the debt, in Massachusetts. *Coburn v. Boston Papier Maché Manuf. Co.* 10 *Gray*, 243.

88. — or suing the corporation. Where a party has sued and obtained judgment against a company, as a corporation, he is estopped from afterwards denying its corporate capacity in an action upon the judgment. *La. Supreme Ct.* 1859, *Pochelu v. Kemper*, 14 *La. Ann.* 308.

89. Contracting with corporation. One who has contracted with the plaintiff, as a corporation, is estopped from denying that it was a corporation at the time of the contract. If he relies on a subsequent dissolution to defeat the action, he must aver and prove how it has ceased to exist. *Ind. Supreme Ct.* 1856, *Brookville & Greensburg Turnpike Co. v. McCarty*, 8 *Ind.* 392; 1858, *Ensey v. Cleveland & St. Louis R. R. Co.* 10 *Ind.* 178; *Fort Wayne & Bluffton Turnpike Co. v. Deam*, *Id.* 563; 1859, *Anderson v. Newcastle & Richmond R. R. Co.* 13 *Ind.* 376.

40. A person contracting with an association, by what purports to be a corporate name, is estopped to deny the existence of the corporation at the time of contract. *Ind. Supreme Ct.* 1861, *Meikel v. German Savings &c. Society*, 16 *Ind.* 181.

41. A person contracting with an organized corporation, when there is a law in force authorizing its formation, is estopped, in a suit upon such contract, to deny their corporate existence. *Ind. Supreme Ct.* 1862, *Brownlee v. Ohio &c. R. R. Co.* 18 *Ind.* 68; *Commissioners &c. v. Bright*, *Id.* 93.

42. One who enters into a contract with a corporation, is estopped from setting up in an action upon such contract, that the corporation was not legally formed. [3 *Sandf.* 170; 17 *Barb.* 378; 17 *Ohio*, 407.] *N. Y. Supreme Ct.* 1859, *White v. Coventry*, 29 *Barb.* 305. To the same effect, *N. Y. Ct. of*

Appeals, 1860, *White v. Ross*, 15 *Abb. Pr.* 66; *N. Y. Supreme Ct.* 1862, *Hyatt v. Esmond*, 37 *Barb.* 601; *Hyatt v. Whipple*, *Id.* 595. But compare *Welland Canal Co. v. Hathaway*, 8 *Wend.* 480.

43. A defendant who has contracted with a corporation *de facto*, is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue; but all such objections, if valid, are only available on behalf of the sovereign power of the State. It would be in the highest degree inequitable and unjust to permit him to rescind a contract, the fruits of which he retains, and can never be compelled to restore. *N. Y. Superior Ct.* 1849, *Palmer v. Lawrence*, 8 *Sandf.* 161. See also *Brouwer v. Hill*, 1 *Id.* 629; *Steam Navigation Co. v. Weed*, 17 *Barb.* 378.

44. Where a charter gives to individuals a corporate capacity upon the performance of certain acts, a person contracting with these individuals, by their corporate name, is precluded from denying the performance of those acts which were necessary to give them a corporate existence. *Mo. Supreme Ct.* 1829, *Hamtramck v. Bank of Edwardsville*, 2 *Mo.* 169.

45. One who contracts with a corporation acting under an amended charter and by its amended name, cannot complain that the amendment has not been properly accepted by the corporation. *Ala. Supreme Ct.* 1859, *Eppes v. Mississippi &c. R. R. Co.* 35 *Ala. N. S.* 33.

46. Instances. Contracting with a corporation in its corporate name, addressing petitions to its directors, and acting on a committee to report by-laws,—*Held*, to be an admission of its incorporation. *Ma. Supreme Ct.* 1849, *South Bay Meadow Dam Co. v. Gray*, 30 *Ma.* 547.

47. A person who has received the funds of a bank and transacted business with it, cannot afterwards, in an action by the receivers, deny the legality of its organization. *Ohio Supreme Ct.* 1846, *Receivers of Bank of Circleville v. Renick*, 15 *Ohio*, 322.

48. A debtor to a bank cannot, collaterally, in a suit on the debt, avail himself of fraud in the organization of the bank to defeat their charter, they having always acted as if well organized. *Ga. Supreme Ct.* 1858, *Southern Bank of Georgia &c. v. Williams*, 25 *Ga.* 534.

49. In an action by a foreign corporation to recover a sum of money loaned in this State,—*Held*, that the defendant was not at liberty to avail himself of the defence that the plaintiff was precluded, by the terms of its charter, from making such loan. *N. Y. Supreme Ct.* 1853, *Steam Navigation Co. v. Weed*, 17 *Barb.* 378.

50. A carrier who contracts with a corporation to transport goods for it, cannot defend an action for damages resulting from his negligence in transporting such goods, on the ground that the corporation could not lawfully acquire title in them. *Wis. Supreme Ct.* 1863, *Farmers & Millers' Bank of Milwaukee v. Detroit and Milwaukee R. R. Co.* 17 *Wis.* 372.

51. But a party who contracts with a municipal corporation for the performance of works which the corporation has no authority to construct, and who has received the benefit of his contract, is not estopped, when sued by the corporation, from setting up its want of authority to make the contract. *Ala. Supreme Ct.* 1857, *City Council of Montgomery v. Montgomery & W. Plank Road Co.* 31 *Ala. N. S.* 76.

52. The giving of a note to a corporation is an admission of its existence, and the maker is afterwards estopped to deny that there is such a corporation. *N. H. Superior Ct.* 1833, *Congregational Society v. Perry*, 6 *N. H.* 164; *Ky. Ct. of Appeals*, 1847, *Jones v. Bank of Tennessee*, 8 *B. Monr.* 122; *Ala. Supreme Ct.* 1846, *Montgomery R. R. Co. v. Hurst*, 9 *Ala. N. S.* 513; *Ind. Supreme Ct.* 1830, *John v. Farmers & Mechanics' Bank*, 2 *Blackf.* 367.

53. The makers of a note payable to the president, directors, and company of the bank of G. are estopped from alleging that they had forfeited the charter before the note was made. *Ky. Ct. of Appeals*, 1846, *Bank of Gallipolis v. Trimble*, 6 *B. Monr.* 599.

54. Indorsing a note to a bank does not admit that they are a corporation. To give it such effect would be to make them for judicial purposes a corporation, though they had no existence in fact. *Ill. Supreme Ct.* 1825, *Hargrave v. Bank of Illinois*, *Breese*, 84.

How far Receiving the benefit of a contract will preclude from disputing its validity,—see *CONTRACTS*, 257–312.

EXPRESS COMPANIES.

1. Liable as common carriers. Express companies, whose business it is to receive packages to transport for hire, are common carriers, and, as such, responsible for the safe delivery of property intrusted to them. *S. Ct. of Appeals*, 1856, *Stadhecker v. Combs*, 9 *Rich. Law*, 193; *N. Y. Ct. of Appeals*, 1861, *Sweet v. Barney*, 23 *N. Y.* 835; *S. P. K. B.* 1793, *Hyde v. Trent & Mersey Nav. Co.* 5 *Durnf. & E.* 339. See also *Bland v. Adams Express Co.* 1 *Duv.* 232; *Kallman v. United States Express Co.* 3 *Kan.* 205.

2. It is immaterial that they are not interested in the conveyances by which the goods are transported. [Disapproving 19 *Barb.* 577.] *N. Y. Com. Pl.* 1858, *Place v. Union Express Co.* 2 *Hilt.* 19. To the same effect, *N. Y. Superior Ct.* 1859, *Read v. Spaulding*, 5 *Bosw.* 395.

3. Agents. The agent of an express company entered into an arrangement with the defendant, in whose store the company had its office, that when he should be absent from the office delivering packages, as his duties required, the latter should receive packages, designed for transmission, for the company, and give the company's receipt therefor. A package was delivered to the defendant by the plaintiff, who believed him to be the agent of the company, for which a receipt was given in the name of the company; but it never reached its destination. The defendant had for a long time prior and subsequent to the delivery of the package in question, acted as the agent of the company with their full knowledge and permission. *Held*, in action for the loss of the package, that the defendant was the company's agent to receive it, his receipt being as binding on the company as the regular agent's would have been, and that he was not personally liable therefor. *Vt. Supreme Ct.* 1865, *Landon v. Proctor*, 39 *Vt.* 78.

EXPULSION.

1. Power to expel. That the right to remove a member for improper conduct is incident to every corporation,—see *Smith v. Smith*, 8 *Desaus.* 557; *Evans v. Philadelphia Club*, 50 *Pa. St.* 107.

2. The exercise of this power does not affect the private rights of the corporator in

the franchise. The power of disfranchisement, which destroys a member's franchise, must, in general, be conferred upon a corporation by statute, and is never sustained as an incidental power, without statute grant, except on conviction of the member in a court of justice for an infamous offence; or for the commission of some act *against the society* which tends to its destruction or injury. In joint stock companies or in any corporation owning property, no power of expulsion can be exercised unless expressly conferred by the charter. [Ang. & A. Corp. §410.] *Pa. Supreme Ct.* 1865, *Evans v. Philadelphia Club*, 50 *Pa. St.* 107.

3. By-laws which vest in a majority the power of expulsion for minor offences, are, in so far, void, and expulsions made under them will not be sustained in courts of justice.* *Ib.*

4. A by-law of a benevolent association which provides for the expulsion of a member for acts not affecting the interests or good government of the corporation, and not indictable, is not valid, unless authorized by an express power in the charter. The right of membership cannot be taken away without an authority derived from the charter, or from the nature of corporate bodies. Every such corporation has power, inherently, to expel members in three cases:

1. Where a member commits an infamous offence, rendering him unfit for the society of honest men. In such case, there must be a previous conviction at law.

2. Where the offence is against the party's duty as a corporator. In this case, he may be expelled on trial and conviction by the corporation.

*The supreme court of Pennsylvania have *Held*, that it is good ground for refusing their approval to articles of a corporation, that they purport to confer a power of expulsion for trivial offences, or for offenses indefinitely specified. *Butchers' Beneficial Assoc.* 38 *Pa.* 278; *Beneficial Assoc. of Brotherly Unity*, *Id.* 209.

Thus an article giving power to a beneficial society to expel any members who shall be "guilty of actions which may injure the association," will not be approved. Such an article gives the association an entirely indefinite power over its members. For any action which may injure them, they may expel; and therefore they might expel a member for becoming insolvent. It is totally incompatible with the whole spirit of our institutions, to clothe any body with such indefinite power over its members; for it is equivalent to a rejection of an individual right, within the association. It is common in such charters to found the right of expulsion on the fact that the member has been found guilty of some crime, on a trial in court; and this is quite proper. *Butchers' Beneficial Association*, 35 *Pa. St.* 151.

8. Where the offence is of a mixed nature, against the party's duty as a corporator, and also against the law of the land. Except for these causes, an express power in the charter is necessary to warrant expulsion. *Pa. Supreme Ct.* 1810, *Commonwealth v. St. Patrick Benevolent Society*, 2 *Binn.* 441; 1821, *Commonwealth v. Guardians of the Poor*, 6 *Serg. & R.* 469.

5. A benevolent society incorporated for the purpose of providing a fund for sick and indigent members, the articles of association of which do not fix any qualifications of religious opinions, cannot make a by-law which will authorize the expulsion of members on grounds of religious belief. *N. Y. Supreme Ct. Sp. T.* 1862, *People ex rel. Schmidt v. St. Franciscus Benevolent Soc.* 24 *How. Pr.* 216. And see *People ex rel. Gearn v. Farrington*, 23 *Id.* 294.

6. What are adequate grounds for expulsion. A corporation has not authority to expel a member upon the ground of a defect of original qualification,—*e. g.* that he procured his admission as a member of the corporation by false pretences. *N. Y. Supreme Ct.* 1835, *Fawcett v. Charles*, 13 *Wend.* 478.

7. Two members of a private corporation or club were sitting together, engaged in quiet and friendly conversation, in the bar room of the club house, and a third came in and used defamatory words, understood by one of the two to be applied to himself, and he thereupon struck the offender. In pursuance of a by-law of the club, the assaulting member was expelled. *Held*, that the act complained of was not of such a character as to justify his expulsion, and that a *mandamus* would lie to restore him to membership. *Pa. Supreme Ct.* 1865, *Evans v. Philadelphia Club*, 50 *Pa. St.* 107.

8. Charges that the member of "a society for mutual support and assistance," "assisted as president of the society in defrauding the society out of the sum of fifty cents;" and, "of defaming and injuring the same in public taverns," are not sufficient cause of disfranchisement. *Pa. Supreme Ct.* 1850, *Commonwealth v. German Society*, 15 *Pa. St.* 251.

9. Under articles authorizing expulsion for any scandalous or improper proceedings which might injure the reputation of the society,—a fraudulent alteration of a voucher presented to the president of the society as

the basis of a claim against it, was *Held* cause for expulsion. *Pa. Supreme Ct.* 1813, *Commonwealth v. Philanthropic Society*, 5 *Binn.* 486.

10. In an association established for the purpose of providing assistance for sick members, feigning sickness or deceitfully drawing relief after recovery, are offences in fraud of the interests and subversive of the fundamental objects of the society, and, as against the duty of the offender as a corporator, are within the power of expulsion by the association. *Pa. Supreme Ct.* 1866, *Society &c. v. Commonwealth*, 52 *Pa. St.* 125.

11. Charging a corporation with money which the member never paid, is sufficient cause for expulsion, if done fraudulently. *Pa. Supreme Ct.* 1821, *Commonwealth v. The Guardians of the Poor*, 6 *Serg. & R.* 469.

12. Necessity of a vote or corporate act, declaring the member expelled,—see *Commonwealth v. Pennsylvania Beneficial Institution*, 2 *Serg. & R.* 141; *Commonwealth v. German Soc.* 15 *Pa. St.* 251.

13. Notice. A member of a corporation is entitled to notice of the intention to expel him, and of the grounds; and to an opportunity to be heard in answer to the charges.* *Ind. Supreme Ct.* 1854, *Southern Plank Road Co. v. Hixon*, 5 *Ind.* 165; *N. Y. Supreme Ct. Sp. T.* 1862, *People v. St. Francis Benevolent Soc.* 24 *How. Pr.* 216. And see *Innes v. Wylie*, 1 *Carr. & K.* 257; *Delacy v. Neuse River Nav. Co.* 1 *Hawks*, 274.

14. Where under the constitution and by-laws of a beneficial society, a member was entitled to twenty-four hours' notice before his expulsion, and such notice was not given, nor waived by him, and the expulsion took place in the absence of the member,—*Held*, that he was entitled to recover damages to the extent of the injury; and that the omission to give him the notice directed by the constitution and by-laws, rendered the expulsion invalid. *Pa. Supreme Ct.* 1853, *Washington Beneficial Soc. v. Bacher*, 20 *Pa. St.* 425.

15. Review. Where the cause assigned for expulsion is insufficient, or the proceedings taken were irregular, the courts will

restore the member by *mandamus*. *Pa. Supreme Ct.* 1850, *Commonwealth v. German Soc.* 15 *Pa. St.* 251.

16. But where the cause assigned is adequate, and the proceedings for inquiry and expulsion prescribed by the charter or by-laws, by which the member has assented to be bound, by accepting membership, have been regularly had, the sentence of the society, acting judicially, cannot be inquired into collaterally, nor can the merits of his expulsion be examined by *mandamus* or by action. *Pa. Supreme Ct.* 1866, *Society &c. v. Commonwealth*, 52 *Pa. St.* 125; 8 *P.* 1836, *Black & White Smiths' Soc. v. Vandyke*, 2 *Whart.* 309; 1844, *Commonwealth v. Pike Beneficial Soc.* 8 *Watts & S.* 247.

FOREIGN CORPORATIONS.

[This chapter embraces only the most general principles relative to questions of State jurisdiction over corporations created by another State. In presenting the law of any one State relative to corporations, it would be convenient to exhibit under this title all the rules determining how far the domestic law of the State recognizes or regulates corporations created by another government. But in a work dealing with the jurisprudence of numerous States regarded as upon an equal footing, the term becomes less applicable; the foreign corporations of one government are the domestic ones of another. Hence the rules which apply when corporations act outside of the State in which they are created, are in this work generally treated as qualifications of the corporate powers. Thus the power of a corporation to contract out of the State of its creation is under *CONTRACTS*. Its power to hold a meeting, or to hold property out of the State, is under *MEETINGS* and *PROPERTY*. Its power to sue or be sued in another State, is under *SUITS*.]

1. Their existence. Although a corporate body may carry on business beyond the territorial limits of the State which created it, it has no corporate existence beyond those limits. *U. S. Circ. Ct. (N. Y.)* 1850, *Day v. Newark India Rubber Co.* 1 *Blatchf.* 628; 8 *P. U. S. Supreme Ct.* 1839, *Bank of Augusta v. Earle*, 13 *Pet.* 588; 1861, *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286.

2. The existence of a foreign corporation is a question of fact for the jury, and must be proven as such, subject to the power of the court to determine the competency and legal effect of the evidence. *Ark. Supreme Ct.* 1853, *Lindauer v. Delaware Ins. Co.* 13 *Ark.* (8 *Engl.*) 461.

3. Cases of two charters. If a corpora-

* If, however, the accused member is present when the subject is taken up, and is willing to enter into the inquiry immediately, there is no occasion for further notice. *Commonwealth v. Pennsylvania Beneficial Institution*, 2 *Serg. & R.* 141.

tion is incorporated by the laws of the State where action is brought, it is regarded as a domestic corporation, although it may also be incorporated by another State. *R. I. Supreme Ct.* 1858, *Sprague v. Hartford &c.* R. R. Co. 5 *R. I.* 233.

4. A corporation, owing its corporate existence to, and exercising its franchises in, several States, must be treated by the courts of any one State as a separate corporation, or as a domestic legal entity, to the extent of its action under the government of that State, and as a foreign corporation as regards the other sources of its existence. *Md. Ct. of Appeals*, 1861, *State v. Northern Central Railway Co.* 18 *Md.* 193.

5. A corporation cannot exist under charters from two separate States; in contemplation of law, each charter creates a legal entity to be recognized within its own State, though the same corporators may compose both entities. *U. S. Supreme Ct.* 1861, *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286.

6. Their privileges. A corporation, created by the laws of one State and composed entirely of citizens of that State, is not entitled to all the privileges and immunities of citizens of every other State, under the first clause of section 2 of article 4 of the constitution. Such a construction would give to citizens of other States greater privileges than are enjoyed by the citizens of the State itself, and deprive a State of all control over the extent of corporate franchises, proper to be granted, within its limits. *U. S. Supreme Ct.* 1839, *Bank of Augusta v. Earle*, 13 *Pet.* 519, 586.

7. Upon a change of territorial jurisdiction from one government to another, a corporation created in one State and brought thus into another, is not entitled to privileges which by the statutes of the latter are confined to corporations created by a law of that State. *Ohio Supreme Ct.* 1851, *Myers v. Manhattan Bank*, 20 *Ohio (Lawr.)* 283.

8. The nature and extent of the jurisdiction of a State as to foreign corporations, and the duty of comity, as recognized by the courts of the State of New York, towards foreign States by which corporations have been created—explained. *Merrick v. Van Santvoord*, 84 *N. Y.* 208.

9. How far amenable to local laws. When a corporation created by the laws of one State,

comes, by its officers, within the jurisdiction of another State, and there engages in business or undertakes to act, it becomes amenable to the laws of the latter State, and to the process of its courts, upon the same principles and to the same extent that natural persons or companies incorporated by such latter State, would be. If such a corporation (by agents) is guilty of a wrong, or commits a trespass, within such latter State, it cannot escape the consequences of its illegal acts by setting up its existence under a foreign government. *N. J. Supreme Ct.* 1856, *Austin v. N. Y. & Erie R. R. Co.* 1 *Dutch.* 381; *N. Y. Supreme Ct.* 1867, *People v. Central R. R. Co. of New Jersey*, 48 *Barb.* 478; *U. S. Circa Ct. (Conn.)* 1886, *Warren Manuf. Co. v. Etna Ins. Co.* 2 *Paine*, 501. Compare *Merrick v. Brainard*, *Id.* 574.

10. Foreign corporations are to be deemed "persons" within the meaning of a statute relating to taxation, unless a different intent is indicated in the statute. *N. Y. Ct. of Appeals*, 1864, *British Commercial Life Ins. Co. v. Commissioners of Taxes*, 81 *N. Y.* 32; 18 *Abb. Pr.* 118; 28 *How. Pr.* 41.

11. The New York statute of limitations does not apply to foreign corporations. A foreign corporation is a "person" "out of this State" within the provision (2 *N. Y. Rev. Stat.* 297, § 27) which excepts cases where, at the time the cause of action accrues against any person, he is out of the State. [Overruling 1 *Den.* 441.] The literal language of the statute must be so construed as to carry out the general intention of the legislature. [30 *Eng. L. & Eq.* 600; 3 *Exch.* 706; 3 *Johns.* 268; 24 *Eng. L. & Eq.* 239; 8 *Wils.* 145; 1 *Den.* 151; 4 *Bing.* 686; 2 *Seld.* 124.] *N. Y. Ct. of Appeals*, 1859, *Olcott v. Tioga R. R. Co.* 20 *N. Y.* 210. Followed, *N. Y. Supreme Ct.* 1861, *Thompson v. Tioga R. R. Co.* 36 *Barb.* 79.

12. A statute which prohibits "corporations" from interposing the defence of usury (e. g. New York Laws of 1850, ch. 172) will be held to apply to foreign corporations litigating in the courts of the State making the enactment. *N. Y. Ct. of Appeals*, 1858, *Southern Life Ins. & Trust Co. v. Packer*, 17 *N. Y.* 51.

13. A statute providing that if a foreign corporation do any act forbidden by the laws of the State to be done by a home corporation, "it shall not be authorized to

maintain any action founded on such act,"—merely debars it from maintaining an action on a contract prohibited to domestic corporations, but leaves the contract good for other purposes. *N. Y. Supreme Ct.* 1850, *Wright v. Douglass*, 10 *Barb.* 97.

For rules governing the Conduct and dealings of corporations which undertake to carry on business in States other than those by whom they are created (so far as such rules are deemed of general application, and so embraceable within this work at all), see the titles of the kinds of corporations—particularly INSURANCE COMPANIES and RAILROAD COMPANIES.

As to the power of a corporation to Exercise the various corporate powers in a State other than that by which it was created, see the titles under which the corporate powers are treated—particularly AGENTS; CONTRACTS; OFFICERS; POWERS; PROPERTY; SUITS.

FORFEITURE.

[This title relates only to the forfeiture of the corporate franchises. The forfeiture of property, by a violation of the terms of the grant under which it is held, is treated under GRANTS. The forfeiture of stock is under STOCK; and forfeitures incurred by violation of a penal statute are under PENALTY. The title includes the acts or omissions which operate as an absolute forfeiture of the corporate franchise,—and also those which are grounds for a judicial proceeding to declare a forfeiture, with the rules which determine the selection of the proper proceeding. But matters relative to the conduct of each proceeding to enforce a forfeiture are under its title:—*a. g.* QUO WARRANTO; SCIRE FACIAS. The effect of a forfeiture to dissolve or authorize the dissolution of the corporation, is under DISSOLUTION.]

1. Power to impose forfeiture. A private corporation, created by the legislature, may lose its franchises by a misuser or nonuser of them; and they may be resumed by the government, under a judicial judgment, upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. And upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished. *U. S. Supreme Ct.* 1815, *Terrett v. Taylor*, 9 *Cranch*, 48. And see *Commonwealth v. Union Fire & Marine Ins. Co.* 5

Mass. 280; *Commonwealth v. Blue Hill Turnp. Corp.* *Id.* 428; *Mumma v. Potomac Co.* 8 *Pet.* 281.

2. Where the charter of a corporation, which the legislature have not reserved power to repeal, makes certain defaults only qualified cause of forfeiture, giving the corporation an opportunity to relieve itself from the forfeiture, a subsequent act, imposing an absolute forfeiture in case of such defaults, is void as to such corporation, because it would impair the obligation of the contract contained in the charter. The remedy is here a part of the contract. *Pa. Com. Pl.* 1841, *Commonwealth v. U. S. Bank*, 2 *Ashm.* 849; *Ind. Supreme Ct.* 1855, *Aurora & Laughery Turnp. Co. v. Holthouse*, 7 *Ind.* 59; *S. P. Ala. Supreme Ct.* 1858, *Powell v. Sammons*, 31 *Ala. N. S.* 552.

3. A declaration of the forfeiture of a charter, in pursuance of a law accepted by the corporation, does not violate the constitution by impairing the obligation of contracts. The effect of a repeal and of a forfeiture is the same, so far as the rights of creditors are concerned. And a charter may be made liable to repeal by the legislature, by an amendment accepted by the corporation, reserving the power, notwithstanding the charter was before irrevocable. Persons must be regarded as having contracted with a corporation upon the hypothesis of the existence and possible exercise of the power to consent to the forfeiture of the charter upon certain defaults; but such consent, *it seems*, can only be given by all the stockholders. *Ala. Supreme Ct.* 1857, *Mobile & Ohio R. R. Co. v. State*, 29 *Ala. N. S.* 573.

4. Under a general statute, reserving to the legislature the right to amend or repeal all charters thereafter to be granted, with a proviso that they will not repeal a certain class of charters unless for some violation or other default, the legislative inquiry to ascertain if there has been a violation or other default is not "a judicial act" within the meaning of the clause of a bill of rights which forbids the legislature from exercising judicial acts. *Mass. Supreme Ct.* 1839, *Crease v. Babcock*, 23 *Pick.* 384.

5. A State legislature, which is restricted by the constitution from the exercise of judicial power, is not competent, without the consent of a corporation, to declare their franchise forfeited and the corporation

abolished, and their property transferred to another corporation, without due process of law. *Md. Ct. of Appeals*, 1838, *Regents of University of Md. v. Williams*, 9 *Gill & J.* 365; *S. P. Ill. Supreme Ct.* 1861, *Bruffett v. Great Western R. R. Co.* 25 *Ill.* 353.

6. Forfeiture a question of law. Whether or not a corporation has violated its charter, or forfeited its franchise, is a question for the sole determination of a court of law. *N. J. Chancery*, 1860, *President &c. v. Trenton Bridge Co.* 2 *Beas.* 46.

7. A court of chancery cannot decree a forfeiture of a corporate charter unless specially empowered by statute. *Tenn. Supreme Ct.* 1847, *State v. Merchants' Ins. & Trust Co.* 8 *Humph.* 235; *N. J. Chancery*, 1880, *Society for Useful Manufactures v. Morris Canal &c. Co.* *Satt.* 157; 1881, *Attorney General v. Stevens*, *Satt.* 369.

8. Only the government can claim a forfeiture. In the absence of a statute enabling a private party to take advantage of a forfeiture of charter, only the government can assert it. It is for the State to decide whether the forfeiture shall be enforced or not, and an individual cannot assert it until it has been enforced through a proceeding on behalf of the State for that purpose. *Pa. Supreme Ct.* 1852, *Commonwealth v. Alleghany Bridge Co.* 20 *Pa. St.* 185; *N. Y. Superior Ct. Sp. T.* 1856, *Mechanics' Building Assoc. v. Stevens*, 5 *Duer*, 676; *Ill. Supreme Ct.* 1863, *Baker v. Backus*, 32 *Ill.* 79; *Ind. Supreme Ct.* 1856, *Brookville Co. v. McCarty*, 8 *Ind.* 392; *Md. Ct. of Appeals*, 1839, *Planters' Bank v. Bank of Alexandria*, 10 *Gill & J.* 346; 1866, *Taggart v. Western Maryland R. R. Co.* 24 *Md.* 568; *Md. Chancery*, 1847, *Hamilton v. Annapolis &c. R. R. Co.* 1 *Md. Ch. Dec.* 107; *Ark. Supreme Ct.* 1859, *Hammett v. Little Rock &c. R. R. Co.* 20 *Ark.* 204; *Mississippi &c. R. R. Co. v. Cross*, *Id.* 443; *La. Supreme Ct.* 1839, *Atchafalaya Bank v. Dawson*, 18 *La.* 497; *Miss. Ct. of Errors*, 1847, *Grand Gulf Bank v. Archer*, 8 *Smed. & M.* 151. See also, *Commonwealth v. Burrell*, 7 *Pa. St.* 34; *Commonwealth v. Farmers' Bank*, 2 *Grant's Cas.* 392; *Lehigh Bridge Co. v. Lehigh Coal &c. Co.* 4 *Raule*, 9; *All-Saints' Church v. Lovett*, 1 *Hall*, 198.

9. A private party cannot take advantage of a forfeiture resulting from irregularities or departures from the charter, in the organization of the company. That is a question

for the sovereign power, which may waive it, or enforce it, at its pleasure. The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it. *U. S. Supreme Ct.* 1860, *Frost v. Frostburg Coal Co.* 24 *How.* 278; *U. S. Circ. Ct. (Vt.)* 1826, *Vermont v. Society for the Propagation of the Gospel*, 1 *Paine*, 652; *Circ. Ct. D. C.* 1836, *United States v. Williams*, 5 *Cranch. C. Ct.* 62.

10. Where a charter imposes upon a corporation the duty of making stated returns of its expenditures and profits, the government alone can enforce a forfeiture for a neglect of that duty. *N. H. Superior Ct.* 1839, *Peirce v. Somersworth*, 10 *N. H.* 869; 1844, *State v. Fourth N. H. Turnpike*, 15 *Id.* 162.

11. The non-performance of a condition subsequent in an act extending a charter, though it may be ground of forfeiture, at suit of the State, cannot be taken advantage of by a stranger. *Mass. Supreme Ct.* 1829, *Charles River Bridge v. Warren Bridge*, 7 *Pick.* 344.

12. It cannot be inquired of, collaterally. The question whether a corporation has forfeited its charter, whether by irregularities or failure to perform conditions in organizing, or by neglect or misuse of its franchises, or otherwise,* cannot be raised or examined collaterally, or in any other than a direct proceeding to obtain a decree of forfeiture. *Ala. Supreme Ct.* 1843, *Selma & Tennessee R. R. Co. v. Tipton*, 5 *Ala. N. S.* 787; 1849, *Duke v. Cahawba Nav. Co.* 18 *Id.* 372; *Ark. Supreme Ct.* 1859, *Hammett v. Little Rock &c. R. R. Co.* 20 *Ark.* 204; *Mississippi &c. R. R. Co. v. Cross*, 20 *Ark.* 443; *Cal. Supreme Ct.* 1863, *Spring Valley Water Works v. San Francisco*, 22 *Cal.* 434; *Conn. Supreme Ct.* 1833, *Spencer v. Champion*, 9 *Conn.* 536; 1837, *Kellogg v. Union Co.* 12 *Conn.* 7; 1850, *Pearce v. Olney*, 20 *Conn.* 544; *Ga. Supreme Ct.* 1849, *Young v. Harrison*, 6 *Ga.* 180; 1853, *Union Branch R. R. Co. v. East Tennessee & Georgia R. R. Co.* 14 *Ga.* 327; *Ill. Supreme Ct.* 1844, *Wilman v. Bank of Illinois*, 1 *Gilm.* 667; 1863, *Baker v. Backus*, 32 *Ill.* 79; *Ind. Supreme Ct.* 1880, *John v. Farmers & Mechanics'*

* It has been held that the expiration of the charter by the lapse of time, according to its terms, may be shown collaterally. *Ky. Ct. of Appeals*, 1846, *Bank of Gallipolis v. Trimble*, 6 *E. Monr.* 599. Compare *Kellogg v. Union Co.* 12 *Conn.* 7.

Bank, 2 *Blackf.* 367; 1856, Brookville & Greensburg Turnpike Co. v. McCarty, 8 *Ind.* 392; *Ky. Ct. of Appeals*, 1846, Bank of Gallipolis v. Trimble, 6 *B. Monr.* 599; *La. Supreme Ct.* 1839, Atchafalaya Bank v. Dawson, 18 *La.* 497; *Me. Supreme Ct.* 1832, Day v. Stetson, 8 *Me.* (8 *Greenl.*) 372; *Md. Ct. of Appeals*, 1832, Chesapeake &c. Canal Co. v. Railroad Co. 4 *Gill. & J.* 1; 1838, Regents of University of Md. v. Williams, 9 *Id.* 365; 1839, Planters' Bank v. Bank of Alexandria, 10 *Id.* 346; *Md. Chancery*, 1847, Hamilton v. Annapolis &c. R. R. Co. 1 *Md. Ch. Dec.* 107; *Mass. Supreme Ct.* 1809, Commonwealth v. Union Ins. Co. 5 *Mass.* 230; 1834, Boston Glass Manuf. v. Langdon, 24 *Pick.* 49; *Miss. Chancery*, 1839, Bayless v. Orne, *Freem. Ch.* 173; *Miss. Ct. of Errors*, 1847, Grand Gulf Bank v. Archer, 8 *Smed. & M.* 151; 1856, Bohannon v. Binns, 81 *Miss.* 355; *Mo. Supreme Ct.* 1846, Bank of Missouri v. Merchants' Bank of Baltimore, 10 *Mo.* 123; 1864, Bank of Missouri v. Snelling, 85 *Mo.* 120; *N. H. Superior Ct.* 1831, State v. Carr, 5 *N. H.* 367; 1839, Peirce v. Somersworth, 10 *Id.* 369; 1844, State v. Fourth N. H. Turnpike Co. 15 *Id.* 162; 1851, Sewalls Falls Bridge v. Fisk, 3 *Fost.* 171; *N. Y. Ct. of Appeals*, 1862, Buffalo & Alleghany R. R. Co. v. Cary, 26 *N. Y.* 75; *N. Y. Supreme Ct.* 1824, Trustees of Vernon Soc. v. Hills, 6 *Cow.* 23; *N. Y. A. V. Chan. Ct.* 1846, Thompson v. N. Y. & Harlem R. R. Co. 3 *Sandf. Ch.* 625, 652; *N. Y. Superior Ct. Sp. T.* 1856, Mechanics' Building Assoc. v. Stevens, 5 *Duer.* 676; *Ohio Supreme Ct.* 1838, Webb v. Moler, 8 *Ohio (Ham.)* 548; 1846, Receivers of Bank of Circleville v. Renick, 15 *Ohio*, 322; 1847, Johnson v. Bently, 16 *Id.* 97; *Pa. Supreme Ct.* 1827, Kishacoquillas &c. Turnp. Co. v. McConaby, 16 *Serg. & R.* 140; 3 *C. 1 Pa.* 426; 1841, Irvine v. Lumbermen's Bank, 2 *Watts & S.* 190; *Vt. Supreme Ct.* 1852, Connecticut & Passumpsic Rivers R. R. Co. v. Bailey, 24 *Vt.* 465; *Va. Ct. of Appeals*, 1825, Banks v. Poitiaux, 3 *Rand.* 136; 1851, Crump v. U. S. Mining Co. 7 *Gratt.* 352.

13. — nor set up as a defence. The defendant in an action brought by a corporation is not allowed to set up in his defence the charge that the corporation has been guilty of irregularities, neglect, abuse, &c., which warrant a forfeiture of the charter or corporate powers. The forfeiture, if incurred, can only be enforced in a direct proceeding.

Until it has been judicially declared in such a proceeding, the corporation is not disabled from prosecuting its rights of action against individuals. *Me. Supreme Ct.* 1839, Penobscot Boom Corp. v. Lamson, 16 *Me.* 224; *N. Y. Supreme Ct.* 1824, Trustees of Vernon v. Hills, 6 *Cow.* 23; *Ind. Supreme Ct.* 1830, John v. Farmers & Mechanics' Bank of Indiana, 2 *Blackf.* 367; *Mich. Supreme Ct.* 1845, Cahill v. Kalamazoo Mut. Ins. Co. 3 *Dougl.* 124, 139.

14. The above rule applied in actions brought by corporations against subscribers to the corporate stock, to recover the amount of the subscription, or an assessment upon it. *Vt. Supreme Ct.* 1852, Connecticut & Passumpsic Rivers R. R. Co. v. Bailey, 24 *Vt.* 465; *N. Y. Ct. of Appeals*, 1862, Buffalo & Alleghany R. R. Co. v. Cary, 26 *N. Y.* 75; *Va. Ct. of Appeals*, 1851, Crump v. United States Mining Co. 7 *Gratt.* 352. See also *Waterford &c. R. R. Co. v. Dalbiac*, 6 *Each.* 443; 6 *Eng. Railw. Cas.* 753; 20 *Law J. N. S. Exch.* 227; 4 *Eng. L. & Eq.* 455; Receivers of Bank of Circleville v. Renick, 15 *Ohio*, 322.

15. In actions brought by corporations to recover debts due to them from individuals. *Ky. Ct. of Appeals*, 1824, Hughes v. Bank of Somerset, 5 *Litt.* 45; *Pa. Supreme Ct.* 1861, Coil v. Pittsburgh Female College, 40 *Pa. St.* 439.

16. In an action brought by a building association to foreclose a mortgage given to them for a building loan. *N. Y. Superior Ct. Sp. T.* 1856, Mechanics' Building Assoc. v. Stevens, 5 *Duer.* 676.

17. Where an incorporated company are required by law, as a condition of a right granted to them, to give bonds for the completion of the work, their neglect to give bonds is not available to defeat an action by them against other persons, to enjoin the latter from interfering with the work. *Conn. Supreme Ct.* 1828, Enfield Toll Bridge Co. v. Connecticut River Co. 7 *Conn.* 28.

18. The fact that a corporation have forfeited their charter forms no defence to an indictment against them for neglect to perform a public duty. *Mass. Supreme Ct.* 1825, Commonwealth v. Worcester Turnpike Co. 3 *Pick.* 327.

19. A provision in the charter of a bank, that upon suspension of payment for more than ninety days, their charter shall be, ip-

so facto, forfeited and void, has no greater force than the provision of the civil code of Louisiana, that a corporation "becomes extinct" by a violation of the conditions of the charter; and does not create an exception to the general rule, that the forfeiture is unavailing to defeat a suit by the corporation, until it has been judicially declared. *La. Supreme Ct.* 1839, *Atchafalaya Bank v. Dawson*, 18 *La.* 497.

20. Under a statute authorizing a banking corporation to hold no more real property than may be requisite for its immediate accommodation in the transaction of business, the bank may purchase land adjoining its banking house, and erect thereon fire-proof houses for the greater security of its banking house, and dispose of them to third persons; and the purchasers of the houses cannot resist a specific performance of their contracts, by alleging that the bank exceeded its powers in erecting and selling them. *Va. Ct. of Appeals*, 1825, *The Banks v. Poitiaux*, 8 *Rand.* 136.

21. Where a railroad company have taken land for the use of their road, under the statute, the former owner cannot maintain a bill to recover it back, on the ground that they have appropriated the land to a use not authorized. The forfeiture cannot be so determined. *Md. Chancery*, 1847, *Hamilton v. Annapolis R. R. Co.* 1 *Md. Ch. Dec.* 107.

22. An incorporated town retains its corporate capacity until its charter is declared forfeited in a direct judicial proceeding; it cannot be held, in any collateral proceeding, to have forfeited its charter by nonuser. *Ala. Supreme Ct.* 1854, *Harris v. Nesbit*, 24 *Ala. N. S.* 398.

23. A stockholder sued on his individual liability, as such, cannot avail himself of the objection that the corporation was never legally organized. A corporation, though not a valid corporation in point of law, may carry on its enterprises, have its day in court, and divide its revenue among the holders of the shares of its capital, until the State shall interpose and ask that it be dissolved. *N. Y. Ct. of Appeals*, 1859, *Eaton v. Aspinwall*, 19 *N. Y.* 119.

24. The principle that a forfeiture can only be enforced by direct judicial proceedings, applies to a question of the forfeiture of a particular franchise as well as of the whole. And where the charter permits

either of several modes of exercising a franchise (*e. g.* the improvement of the navigation of a river), the neglect of one mode while trying or using others, does not forfeit the franchise as to the former. *Md. Ct. of Appeals*, 1832, *Chesapeake &c. Canal Co. v. Ohio R. R. Co.* 4 *Gill & J.* 1, 107.

25. Proceedings for forfeiture.* There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter. The one is by *scire facias*, which is the proper process when there is a legally existing body capable of acting, but who have abused their power. The other is by information in the nature of a *quo warranto*, which properly applies, where there is a corporate body, *de facto*, only, but who take upon themselves to act, though from some defect in their constitution or organization, they cannot legally exercise their powers. The proceedings in both cases must be at the instance of the government, and in no other way; and the corporation is entitled to a hearing in either case before condemnation. *Md. Ct. of Appeals*, 1838, *Regents of University of Maryland v. Williams*, 9 *Gill & J.* 365; *Pa. Com. Pl.* 1841, *Commonwealth v. United States Bank*, 2 *Ashm.* 849.

26. Non-performance of charter conditions a ground of forfeiture. A non-performance of the conditions of the act of incorporation is *per se* a misuser that will forfeit the grant. The same principles of forfeiture on failure to perform conditions, which are applicable to the case of grants to individuals, are to be applied to grants of corporate power by the act of incorporation. *N. Y. Supreme Ct.* 1840, *People v. Kingston & Middletown Turnpike Co.* 23 *Wend.* 193; *People v. Bristol & Rensselaerville Turnp. Co.* *Id.* 222. See also, *Proprietors of Quincy Canal v. Newcomb*, 7 *Met. (Mass.)* 276; *State v. Royalton & Woodstock Turnp. Co.* 11 *Vt.* 431; *Lombard v. Stearns*, 4 *Cush.* 60; *Attorney General v. Petersburg & Roanoke R. R. Co.* 6 *Ired.* 456.

27. It is enough to work a forfeiture, that the performance of the condition is neglect-

* See also, as to the proper proceeding to ascertain and declare a forfeiture, *Slee v. Bloom*, 5 *Johns. Ch.* 366; *State v. Real Estate Bank*, 5 *Ark.* 595; *Huntington v. Crescent City Bank*, 18 *La. Ann.* 350; *Riggin v. Union Bank of Louisiana*, *Id.* 677; *State v. Merchants' Ins. & Trust Co.* 8 *Humph.* 235; *Cleveland v. Marine Bank of Milwaukee*, 17 *Wis.* 545.

ed, or designedly omitted; the ingredient of a bad or corrupt motive is not necessary. *N. Y. Supreme Ct.* 1840, *People v. Kingston & Middletown Turnpike Co.* 23 *Wend.* 193.

28. A reasonable and substantial performance of the conditions is all that is necessary to defeat a claim to a forfeiture. *N. Y. Ct. of Errors*, 1840, *Thompson v. People*, 23 *Wend.* 537; *People v. Kingston & Middletown Turnp. Co.* 23 *Wend.* 193. And see *Commonwealth v. Alleghany Bridge Co.* 20 *Pa. St.* 185.

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45. Defences to proceedings for forfeiture. When a cause of forfeiture has once arisen, whether from non-feasance, or otherwise, it cannot be legally atoned for by subsequent good behavior. Thus, putting a turnpike into good repair prior to the filing of an information to declare a forfeiture for want of repair, is no bar to the writ. *N. Y. Supreme Ct.* 1840, *People v. Hillsdale & Chatham Turnpike Co.* 23 *Wend.* 254.

46. Where a non-feasance (*e. g.* bad repair of a road) is made a cause of forfeiture by statute, if the default was occasioned by any irresistible cause, it lies with the defendants to show that fact. *Id.*

47. The fact that the officers of a bank proceeded to make additional loans or discounts to directors, or upon paper upon which they were responsible, without taking the proper precautions to ascertain whether such additional loans or discounts would exceed limits allowed them by their charter, cannot exempt the corporation from liability to be proceeded against for the violation. It is the duty of the officers to keep a proper account of loans or discounts for the benefit of the directors, either as individuals, or, where they are concerned with others as partners or otherwise, and of the paper discounted upon which they are answerable, as indorsers, &c. And the power of making loans or discounts to or for their benefit, should only be intrusted to the board at one of its regular meetings, unless it be for a very limited amount. *N. Y. Chancery*, 1837, *Bank Commissioners v. Bank of Buffalo*, 6 *Paige*, 497.

48. The statutes of Massachusetts (Rev. Stat. ch. 44, §§ 11, 16) provide that the franchise, with all the rights and privileges of a turnpike corporation, "so far as relates to the receiving of toll," may be levied upon by a creditor of the corporation, and pass by sale on execution; the corporation to retain its powers in all other respects, and to be bound to the same duties as before the sale. *Held*, that a sale of the franchise of a turnpike corporation, in pursuance of this statute, was no bar to proceedings by the State against such corporation for a forfeiture of the charter, and that it was unnecessary, in such case, to make the purchaser of the

franchise a party. *Mass. Supreme Ct.* 1850, *Commonwealth v. Tenth Mass. Turnp. Corp.* 5 *Cush.* 509.

49. Effect of forfeiture on the powers and franchises. After the charter of a corporation is declared forfeited, it can do no act by which rights can be acquired, nor can it maintain a suit to enforce those acquired during the continuance of the charter, unless its power and capacity for that purpose is continued by statute after its existence as a corporation is ended. *Ala. Supreme Ct.* 1850, *Saltmarsh v. Planters & Merchants' Bank of Mobile*, 17 *Ala. N. S.* 761.

50. Though a corporation is dissolved by a legal seizure or forfeiture of its franchises, those franchises are not thereby destroyed; they exist in the custody of the State, and may be afterwards granted to the same or to other individuals. *Ind. Supreme Ct.* 1823, *State Bank v. State*, 1 *Blackf.* 267.

51. Legislative power to waive forfeitures. The grounds of forfeiture of a charter may be waived by the legislature. *Mass. Supreme Ct.* 1809, *Commonwealth v. Union Fire & Marine Insurance Co.* 5 *Mass.* 280; *La. Supreme Ct.* 1838, *Atchafalaya Bank v. Dawson*, 13 *La.* 497; *Md. Ct. of Appeals*, 1832, *Chesapeake &c. Canal Co. v. Ohio R. Co.* 4 *Gill & J.* 1, 127; *La. Supreme Ct.* 1842, *State v. New Orleans Gas Light & Banking Co.* 2 *Rob.* 529.

52. Corporations are mere creatures of the law, and cannot violate the conditions upon which they are incorporated. But the law does not design that, for every imaginable breach, the charter of a corporation must be revoked. And it rests with the sovereign power, as a reserved right, to determine not only when proceedings of forfeiture shall be instituted, but also when violations of a charter are to be overlooked. *Md. Ct. of Appeals*, 1850, *Board of Commissioners for Frederick Female Seminary v. State*, 9 *Gill*, 379.

53. The power to waive a forfeiture of charter is, however (in the case of a corporation existing under laws of a State), confined to the legislature. The act of the governor and senate (*e. g.* their appointment of a director) cannot operate as a waiver. *N. Y. Supreme Ct.* 1840, *People v. Phoenix Bank*, 24 *Wend.* 431.

54. What amounts to a waiver. An act of the legislature passed with notice of the

grounds of forfeiture, which recognizes the corporation as still existing notwithstanding them, operates as a waiver of the forfeiture. *Pa. Supreme Ct.* 1827, *Kishacoquillas & Co. v. Turnp. Co. v. McConaby*, 16 *Serg. & R.* 140; 1830, *McConahy v. Turnp. Co.* 1 *Pa.* 426; *N. Y. Supreme Ct.* 1832, *People v. Manhattan Co.* 9 *Wend.* 851; *S. C. Ct. of Errors*, 1842, *State v. Bank of Charleston*, 2 *McMull.* 439; *Ark. Supreme Ct.* 1859, *State v. Mississippi & C. R. R. Co.* 20 *Ark.* 495. And see *People v. Fishkill & Beekman Plank Road Co.* 27 *Barb.* 445; *Lumpkin v. Jones*, 1 *Kelly*, 27; *Commonwealth v. Union Fire & C. Ins. Co.* 5 *Mass.* 280.

55. Where the legislature passed a statute requiring the banks of a State which had suspended specie payments to resume payments on or before a day named,—*Held*, that this in effect amounted to a waiver on the part of the State, of the right to enforce a forfeiture for the previous suspension. *Miss. Ct. of Errors*, 1846, *Commercial Bank of Natchez v. State of Mississippi*, 6 *Smed. & M.* 599.

56. A charter provision requiring periodical accounts to be rendered by the corporation to the legislature, "under forfeiture of the privileges of the act in future," does not make the franchise absolutely determine on a breach of the condition (in which case the doctrine of waiver could not apply), but it intends a forfeiture proved by judicial proceedings. And if, after default, and without such proceedings, the legislature accept accounts from the corporation in subsequent years, as satisfactory, and by statute confer further powers upon it, this amounts to a waiver of the ground of forfeiture, so that the State cannot afterward insist upon it. *N. H. Superior Ct.* 1844, *State v. Fourth N. H. Turnp.* 15 *N. H.* 162.

57. Where, after a suit had been commenced by the State to forfeit a charter, the legislature passed an act reciting that the corporation had assigned their franchise to M., and that he had performed the conditions greatly to the public advantage, and enacted that all the rights given by the charter to the corporation be vested in M. "provided that nothing herein contained shall be so construed as to affect any suit or suits now pending in favor of or against said company. *Held*, that the act was a bar to the further prosecution of the suit. The

proviso was intended to apply only to suits by the company against individuals, or by individuals against the company, and not to proceedings of forfeiture. *Ala. Supreme Ct.* 1851, *State v. Centreville Bridge Co.* 18 *Ala. N. S.* 878.

58. That the right to prosecute for a forfeiture by failure to comply with a provision of the charter, may be lost by unreasonable delay to institute proceedings,—see *People v. Oakland County Bank*, 1 *Dougl. (Mich.)* 282.

FRANCHISES.

1. Power to confer them. The legislature of a State may confer exclusive privileges and franchises upon individuals or corporations, except as restricted by the constitution of the State. *Cal. Supreme Ct.* 1863, *California State Telegraph Co. v. Alta Telegraph Co.* 22 *Cal.* 398.

2. A legislative grant contained in the charter of a bank, authorizing the corporation to demand, in specified cases, more than the legal rate of interest is a franchise, which may be conferred, as well as the privilege of banking upon a few individuals by the State. Such a grant is not a partial law within the constitutional prohibition, but a contract, which cannot be made subject to the legislative will. *Tenn. Supreme Ct.* 1853, *Hazen v. Union Bank of Tennessee*, 1 *Sneed*, 115.

3. An act to incorporate a gas light company,—creating a corporation with authority to lay their pipes in the streets, &c., of a city for the purpose of conducting gas, &c., upon their obtaining permission of the two boards of the common council,—*Held*, not unconstitutional and void, either because it established a monopoly in the trade or business of supplying gas in the city of New York, or because it took for the use of the gas company the streets, or easements or privileges in the streets of the city (they being the property of the city), without making or providing for compensation and without the consent of the city. *N. Y. Supreme Ct.* 1859, *People v. Bowen*,* 30 *Barb.* 24.

4. The general power of the legislature to grant franchises—a *g.* to build bridges—

* Affirmed, approving, without discussing, this point, 21 *N. Y.* 517.

involves the power to make such a franchise exclusive, and they may extend such exclusive privilege beyond the limits within which they confine the location of the bridge. [7 Pick. 898; 9 Johns, 525; 17 Id. 488; 4 Johns. Ch. 150; 9 Wheat 74.] *N. H. Superior Ct.* 1834, *Piscataqua Bridge Co. v. New Hampshire Bridge Co.* 7 *N. H.* 85.

5. Interpretation of grant of franchise. Where the purpose of a franchise is the performance of a public act, the grant must be so interpreted as to enable that act to be done. Hence, a proviso in the charter of a bridge company that the erection of piers, necessarily contemplated by the act of incorporation, should not injure the navigation, should be construed reasonably, though strictly in favor of the State; for a literal construction placed on this proviso would prevent the erection of the bridge and defeat the grant. *Pa. Supreme Ct.* 1868, *Monongahela Bridge Co. v. Kirk*, 46 *Pa. St.* 112. Compare *Hartford Bridge Co. v. Union Ferry Co.* 29 *Conn.* 210.

See CHARTERS, 49-112.

6. A corporation were authorized to "erect, maintain, repair and rebuild, a mill dam on their own land across the head of L. R. harbor," with gates, &c., so as to admit boats at high water.

Held, 1. That the words "on their own land," did not confine the company to any particular place of building, but were intended to exclude any inference that the legislature designed to authorize the corporation to take land of others for the purpose.

2. That the company might erect their dam across the head of the harbor, although it might be not only below high water mark, but even across a part of the channel where the tide ebbed and flowed. *Me. Supreme Ct.* 1841, *Parker v. Cutter Mill Dam Co.* 20 *Me.* 358.

7. Where a statute was passed authorizing the proprietors of a wharf to extend the same into the channel to the line of the harbor, and before it was extended, the legislature incorporated a railroad company, with authority to locate their road across the flats between such wharf and the line of the harbor,—*Held*, that the former act operated as a grant to the proprietors of the wharf, and was not a mere license, revocable at the pleasure of the legislature, and revoked by the act incorporating the railroad company.

Mass. Supreme Ct. 1849, *Fitchburg R. R. Co. v. Boston & Maine Railroad*, 8 *Cush.* 58.

8. It will not be presumed exclusive. Under a grant by the State, of a franchise—*e. g.* of the privilege to build a toll bridge, and take tolls—without any exclusive privilege being given, or any engagement from the State that another rival work shall not be erected, or any understanding not to sanction competition or to make improvements which shall diminish the income of the first grantees, the right to an exclusive privilege cannot be implied from the nature of the grant. In charters of this description, no rights are taken from the public or given to the corporation beyond those which the words of the charter by their natural and proper construction purport to convey. The whole community are interested; and the power of the State to promote the public convenience, shall not be construed to have been surrendered or diminished unless it appear by plain words that it was intended to be done. *U. S. Supreme Ct.* 1837, *Charles River Bridge v. Warren Bridge*, 11 *Pet.* 420; 1851, *Richmond &c. R. R. Co. v. Louisa R. R. Co.* 18 *How.* 71; 1865, *Turnpike Co. v. State*, 3 *Wall.* 210; *N. Y. Chancery*, 1887, *Mohawk Bridge Co. v. Utica & Schenectady R. R. Co.* 6 *Paige*, 554; 1846, *Oswego Falls Bridge Co. v. Fish*, 1 *Barb. Ch.* 547; *N. Y. Supreme Ct. Sp. T.* 1852, *Matter of Hamilton Avenue*, 14 *Barb.* 405; *N. Y. A. V. Cham. Ct.* 1846, *Thompson v. N. Y. & Harlem R. R. Co.* 3 *Sandf. Ch.* 625.*

9. A monopoly cannot be implied from the mere grant of a charter to a company to construct a work of public improvement, and to take the profits. To give such a monopoly there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for rival and competing works. [11 *Pet.* 420.] *Va. Ct. of Appeals*, 1840, *Tuckahoe Canal Co. v. Tuckahoe &c. R. R. Co.* 11 *Leigh*, 42.

10. Thus, where the legislature has granted a charter to a company to construct a canal through the valley of a stream, and to take the profits of it, without any provi-

* See also, *Shrunk v. Schuylkill Nav. Co.* 14 *Serg. & R.* 71; *Monongahela Nav. Co. v. Cooma*, 6 *Watts & S.* 101; *Susquehanna Canal Co. v. Wright*, 9 *Watts & S.* 9; *Meads v. Wandell*, 4 *Ch. Sect.* 14; *Lansing v. Smith*, 4 *Wend.* 10. But compare *Newburgh &c. Co. v. Miller*, 5 *Johns. Ch.* 191; *Endicott Toll Bridge Co. v. Connecticut River Co.* 1 *Conn.* 22.

sion against the exercise of the power to charter other and rival companies, the legislature is not prohibited from granting a charter to a company to construct a railroad through the same valley, though it should afford the same public accommodation as the canal, and impair or annihilate its profits. *Id.*; S. P. *Vt. Supreme Ct.* 1849, *White River Turnp. Co. v. Vermont Central R. R. Co.* 21 *Vt.* 590; *Md. Ct. of Appeals*, 1889, *Washington & Baltimore Turnp. Road v. Baltimore & Ohio R. R. Co.* 10 *Gill & J.* 392; *Ill. Supreme Ct.* 1853, *Illinois & Michigan Canal v. Chicago & Rock Island R. R. Co.* 14 *Ill.* 314.

11. Although persons will not be permitted to establish a road near an incorporated turnpike company, with a view to diminish the profits of such turnpike; yet, a community will not be restrained from the construction of a road obviously demanded by the situation of the country, on the ground that it tends to diminish the profits of the turnpike. *Ala. Supreme Ct.* 1833, *Hall v. Ragdale*, 8 *Ala.* (4 *Stew. & P.*) 252.

12. That an incorporated company authorized by its charter to build a toll bridge across a river, but without any exclusive privilege being given them for the transportation of persons or goods, cannot complain of persons who establish a private ferry near the bridge, for the use of themselves alone, and not for the use of the public,—see *Trent v. Cartersville Bridge Co.* 11 *Leigh*, 529.

13. The original charter of a bridge company prohibited the erection of any other bridge within a mile of the one authorized to be erected by the grantees. The section containing that prohibition was subsequently repealed. *Held*, that the grantees of the franchise stood in precisely the same position, in reference to a second bridge, that they would have done if no such prohibition had been contained in their charter. *N. Y. Ct. of Appeals*, 1864, *Fort Plain Bridge Co. v. Smith*, 30 *N. Y.* 44.

14. Where a bridge company were required by their charter to build locks to preserve the navigation, and by a subsequent act, granted on their petition, were authorized to suspend the building of the locks until further order of the legislature,—*Held*, that the construction of locks was to be deemed a burden, from which the company had sought and obtained relief, and, conse-

quently, that they could not afterwards exercise the right of erecting locks without legislative interposition. Hence, not being in the possession and enjoyment of a right to do so, they were not in equity entitled to an injunction against their erection by another corporation subsequently chartered. *Conn. Supreme Ct.* 1828, *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 *Conn.* 28.

15. What is an infringement of an exclusive franchise. In 1798 the plaintiffs were chartered as a toll bridge company, the charter providing that for the term of one hundred years no person should have liberty to erect another bridge within certain limits. *Held*, that this provision precluded the legislature from granting authority to a railroad company within that term to construct a bridge within those limits, although exclusively for railroad use. The structure for the railroad crossing must be deemed a bridge within the meaning of the statute; and the fact that railroads were unknown at the time of the grant of the charter does not exclude such bridges from the effect of such a stipulation. There is no implied condition in such a grant that it should be avoided upon some new improvement being made. *Conn. Supreme Ct.* 1845, *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.* 17 *Conn.* 40.*

16. The construction of a viaduct over a river for a railway, to be used exclusively for the passage of locomotives, engines, and railroad cars, is not an infringement of an exclusive franchise vested in a bridge company for the purpose of maintaining bridges over said river, and taking tolls thereon. Such a structure is not a toll bridge within the prohibition of the original grant. *N. J. Chancery*, 1860, *Bridge Co. v. Hoboken Land and Improvement Co.* 2 *Beas.* 81.

17. A free bridge cannot be erected without authority from the legislature so near an authorized toll bridge as to interfere with the franchise of the latter. *Miss. Ct. of Errors*, 1841, *Townsend v. Blewett*, 5 *How.* 503. And see *Commonwealth v. Inhabitants of Deerfield*, 6 *Allen*, 449; and *supra*, 12.

18. Power to revoke a franchise. A provision made in the charter for the punishment of a turnpike company and its agents,

* To the contrary effect is *McRee v. Wilmington & C. R. R. Co.* 2 *Jones L.* 186. But this case is disapproved, as not sustained by the authorities in this country or England, in *Ang. & A. on Corp.*

if it neglect to keep in good repair, does not deprive the State of its power to annul the grant, when its purposes have failed through the positive or negative act of the company, and the court having jurisdiction shall determine, upon evidence, the issue for the State. *Md. Ct. of Appeals*, 1862, *Washington & C. Road v. State*, 19 *Md.* 289.

See the subject of **Annulling corporate powers** more fully treated under **FORFEITURE**.

19. Transfers of franchises. The franchises and corporate rights of a company, and the means vested in them which are necessary to the existence and maintenance of the object for which they were created, are incapable of being granted away and transferred by any act of the company, or by any adverse process against them. *Pa. Supreme Ct.* 1845, *Susquehanna Canal Co. v. Bonham*, 9 *Watts & S.* 27. *S. P. Miss. Ct. of Errors*, 1848, *Arthur v. Commercial & Railroad Bank*, 9 *Smed. & M.* 394.

20. A transfer of all the franchises of a corporation and the subscriptions for its stock to another corporate body, made by a majority, only, of the members of the former, is void, though made by permission of an act of the legislature, if no power to amend the fundamental law of the corporation is given by the charter to the majority. The contract subsisting between the members of a corporate body and the corporation is equally a contract within the protection of the constitution, as is the charter itself. And the legislature cannot confer upon the members representing a majority of the stock the power to make such an alteration as one which looks not to the surrender of the charter and the exoneration of the members, but to transferring the stockholders into another company. It is true that it is an implied, but essential stipulation, in all such associations that the will of the majority shall govern; but this rule does not extend beyond acts performed within the scope of the charter powers; and the fundamental law of the corporation cannot be altered against the consent of the minority, unless a power to do so is reserved. [18 *Eng. Ch.* 131; 2 *Russ. & M.* 461; 1 *Am. L. Reg.* 154.] *Miss. Ct. of Errors*, 1854, *New Orleans & C. R. R. Co. v. Harris*, 27 *Miss.* 517.

21. Such a transfer does not bring even one who assents to it under the obligations of

a member in the corporation to which it is made. The only consideration for such obligation would be that the transfer was valid and made him a stockholder in such corporation. He is not estopped by his assent without some new consideration, apart from the transfer. His assent cannot impart validity to an act void in itself. *Id.*

22. The franchise of a corporation, in the absence of any provision in the charter allowing it, cannot be levied upon and sold under execution. *Mo. Supreme Ct.* 1867, *Stewart v. Jones*, 40 *Mo.* 140.

23. — from the promoters to the corporation. A franchise was granted to an individual and his associates and assigns, with a provision in the act requiring their incorporation within a fixed time,—*Held*, that the franchise passed to the corporation so formed, by operation of law, no assignment from the individual to the corporation being necessary. *Cal. Supreme Ct.* 1863, *Spring Valley Water Works v. San Francisco*, 23 *Cal.* 434.

24. When a corporation is to be brought into existence by some future acts of the incorporators, the franchises remain in abeyance until such acts are done; and when the corporation is brought into life, the franchises instantaneously attach to it. There is no difference between the case of a grant of land or franchises to an existing corporation, and a grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is *in esse*, and the franchise and property become vested and executed in it, it is as much an executed contract as if its prior existence had been established for a century. *U. S. Supreme Ct.* 1852, *Vincennes University v. Indiana*, 14 *How.* 268. To similar effect, 1819, *Dartmouth College v. Woodward*, 4 *Wheat.* 518, 689.

25. Partition. A statute granted to several persons the exclusive privilege of running stage wagons upon a certain route, and imposed a penalty on any other person who should establish a stage on the same route; and the grantees, by resolution, divided the route, each taking a portion. *Held*, that on a proper construction of the resolutions, they did not sever the tenancy in common, if, indeed, such a franchise can be partitioned, and that one of the grantees did not incur the penalty, by running a stage upon the portion so assigned to another. *N. Y. Supreme Ct.* 1808, *Donelly v. Vandenberg*, 3 *Johns.* 27.

FRIENDLY SOCIETIES.**BENEFIT SOCIETIES.****FUND SOCIETIES.****BENEFIT SOCIETIES.****GAS COMPANIES.**

1. **Obligation to supply gas.** In the absence of any contract, express or implied, and where the charter of the corporation contains no provisions on the subject, a gas company is under no obligation to sell gas. The manufacture and sale of gas is a business which may be prosecuted or discontinued at the will of the party engaged in it. The relations between the maker and the consumer originate in the contract between them, their respective rights and obligations being controlled by its stipulations, and as the one may refuse to take the article at his pleasure, so may the other at his pleasure refuse to supply it. A maker of gas is subjected to no greater duties or liabilities than the manufacturers and vendors of other commodities. *Conn. Supreme Ct.* 1862, *McCune v. Norwich City Gas Co.* 80 *Conn.* 521; *S. P. N. J. Supreme Ct.* 1858, *Paterson Gas Light Co. v. Brady*, 3 *Dutch.* 245.

2. A gas company, which has the exclusive right of manufacturing and selling gas in a city, is bound to furnish gas to a citizen, who has made the necessary preparations to receive and use the same in his buildings situated along the line of the company's pipes; upon his compliance with such reasonable conditions as the company may rightfully impose. *Wis. Supreme Ct.* 1858, *Shepard v. Milwaukee Gas Light Co.* 6 *Wis.* 539.

3. **Right to require a written application.** In general an incorporated gas company have a right to require that a person desiring to be supplied with gas shall sign a written application for the supply desired. *Wis. Supreme Ct.* 1862, *Shepard v. Milwaukee Gas Light Co.* 15 *Wis.* 818.

4. But when in a printed form submitted to an applicant, for signature, the application was so connected with an agreement to abide by certain rules that the applicant

could not sign without becoming bound by the rules, and these were such as the company could not lawfully impose;

Held, 1. That the applicant was not bound to sign the application in this form.

2. That by presenting the application in that form, the company waived any claim that he should have made a written application in some other form.

3. That, after the company had refused to supply him because of his declining to sign the agreement to abide by the unauthorized rules, the applicant was not bound to renew his application in order to recover damages for the whole time the gas was withheld. The refusal of the company must be deemed to continue until retracted. *Id.*

5. **Liability for carelessness of gas fitter.** Where a person employed by a gas company to let on gas into houses, was permitted, after his discharge from such employment, to continue in such business at the request of the consumers,—*Held*, that the company was not responsible for injuries resulting from an explosion of gas caused by his carelessness, if the person injured had notice that his employment by the company had ceased. *Mass. Supreme Ct.* 1865, *Flint v. Gloucester Gas Light Co.* 9 *Allen*, 552.

6. **Requisites of an indictment for obtaining gas by fraudulently connecting a pipe with a gas main pipe without passing the gas through the meter (framed under N. Y. Laws of 1854, ch. 109)**—stated. *People v. Wilber*, 4 *Park Cr.* 19.

GENERAL ACTS.**INCORPORATION.****GRANTS.**

1. **What will be deemed a grant.** A statute providing that a new municipal corporation shall receive its proportion of the property of an old one,—*Held*, not a grant. *Mass. Supreme Ct.* 1862, *Simmons v. Inhabitants of Nahant*, 8 *Allen*, 816.

2. An ordinance of a town, not under the seal of the corporation, which purports to convey certain land within the corporate limits, but which neither expresses a consideration, nor is delivered to the pretended donees, does not amount to a conveyance, nor

color of title. *N. C. Supreme Ct.* 1853, Commissioners of Beaufort v. Duncan, 1 *Jones Law*, 239.

3. A vote of proprietors of common land that a specified portion of their lands be sold by their standing committee, and a deed thereof given to the purchaser by their clerk, to be approved by the committee,—*Held*, a mere authority to sell, and not to pass the land without a deed. *Ma. Supreme Ct.* 1836, Thorndike v. Richards, 18 *Ma.* 430.

4. A vote of proprietors of common land that the income should be devoted to the support of a school in the same town, and that it should be leased from time to time forever by the selectmen,—*Held*, to be a grant, and not revocable by the proprietors. *Mass. Supreme Ct.* 1823, Inhabitants of Rehoboth v. Hunt, 1 *Pick.* 224.

5. The title to land taken by the State for the purposes of a canal, is not divested by a naked license or permission granted to an adjoining owner to use a portion of the land thus appropriated for the purposes of a wharf. *Pa. Supreme Ct.* 1865, Haldeman v. Pennsylvania Central Railroad, 50 *Pa. St.* 425.

6. The owner of land adjoining the line of a projected gravel road, executed, with others, a writing, conferring upon the company building the road, the right to enter upon his land and remove gravel therefrom for the purposes of the road,—*Held*, that the instrument was a grant and not a mere license, and was not revocable. *Ind. Supreme Ct.* 1866, Bracken v. Rushville & Vienna Gravel Road Co. 27 *Ind.* 346.

7. Where a general law prescribes the mode in which a deed of a corporation, conveying its real estate, shall be executed,—*a. g.* by the president reciting the vote of the corporation authorizing him to convey,—a deed of the real estate, executed by all the shareholders, in their private capacity, or a deed by them of all the shares, will not convey the real estate of the corporation. *Vt. Supreme Ct.* 1843, Wheelock v. Moulton, 15 *Vt.* 519. See Roberts v. Button, 14 *Vt.* 195; Wilde v. Jenkins, 4 *Paige*, 481; Isham v. Bennington Iron Co. 19 *Vt.* 280.

8. Acceptance. Grants beneficial to corporations may be presumed to have been accepted by them, as in the case of grants to natural persons, and an express acceptance

is unnecessary.* [12 Wheat. 70.] *Mass. Supreme Ct.* 1829, Charles River Bridge v. Warren Bridge, 7 *Pick.* 344, 470, 506.

For applications of this rule to Acceptance of charters, see CHARTERS, 26-31.

9. When a grant to a corporation is made by indenture, their sealing of the counterpart is a sufficient acceptance. See Cooper v. Gooderich, *Cro. Eliz.* 862.

10. Interpretation. It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers or rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication,—regard being had to the objects of the grant. *U. S. Supreme Ct.* 1859, Minturn v. Larue, 28 *How.* 435. And see Perrine v. Chesapeake & Delaware Canal Co. 9 *How. (U. S.)* 172.

For applications of this principle to Grants of power in charters, see CHARTERS, 64-104.

11. All public grants to corporate bodies will be strictly construed. [11 East, 635; 4 Bing. 452; 2 Barnw. & Ad. 635; 4 Pet. 514; 11 Id. 521.] And this rule applies especially to a grant which interferes with prior grants. *Pa. Supreme Ct.* 1852, Packer v. Sunbury & Erie Railroad Co. 19 *Pa. St.* 211.

12. Terms of present grant, used in an act of incorporation, will be interpreted as only a promise to grant, if the given right be with reference to what does not at the time exist. They are but a legislative promise, which the judiciary will not enforce. Thus, a passenger railroad company, to whom, by their act of incorporation, was granted the right "to connect with any passenger railway now constructed, or hereafter to be constructed, so as to give them a complete route from F. to E.," cannot, under that right, connect with another passenger railway which was not made, nor the right of making granted at the time the claimant's act of incorporation was passed. *Pa. Supreme Ct.* 1861, North Branch & Co. Railway Co. v. City Passenger Railway Co. 38 *Pa. St.* 361.

13. In a grant "to the inhabitants of a town to be held by them as a body politic and corporate, and to their successors for-

* See also, in support of this proposition, Bank of United States v. Dandridge, 12 Wheat. 70; Proprietors of Monumol

&c. v. Rogers, 1 Mass. 159; Amherst Bank v. Root, 2 Met. (Mass.) 533; Western R. R. v. Babcock, 6 Id. 856; Rathbone v. Tioga Navigation Co. 2 Watts & S. 74.

ever," the title vests in the town as a corporation.* *N. H. Supreme Ct.* 1868, *Town of New Market v. Smart*, 45 *N. H.* 87.

14. An owner of land which was encumbered by a mortgage, sold to a railroad company a portion of it, to be used for their track. At the time of such sale, an open, notorious, and visible way existed over the part conveyed, the right to which had been reserved in the agreement for sale, but was omitted in the conveyance. In an action by a subsequent purchaser of the land at sheriff's sale, under the mortgage, against the company for obstructing the way,—*Held*, that he was entitled to the road; and that an action on the case for damages for such obstruction would lie. The right of way did not originate in the reservation in the agreement, but existed previously, and was merely recognized therein. *Pa. Supreme Ct.* 1865, *Pennsylvania R. R. Co. v. Jones*, 50 *Pa. St.* 417.

15. A deed of conveyance to A, B, and C, trustees of a religious society,—*Held*, to vest the title of the premises in the trustees individually, and not in the corporation. *N. J. Supreme Ct.* 1847, *Den v. Hay*, 1 *Zabr.* 174.

16. Where trustees of a religious corporation purchase lands with the corporate funds, and take the deeds in their individual names, they must be deemed, in Ohio, to hold the lands as trustees for the corporation, and if they subsequently sell the lands, the proceeds belong to the corporation, and are to be held for its use. *Ohio Supreme Ct.* 1881, *Methodist Episcopal Church of Cincinnati v. Wood*, 5 *Ohio*, 283.

17. Where the charter of a town was

granted to sixty-four proprietors, each to take one seventieth part of the township, which, with the six public rights, were to make up the whole township,—*Held*, that this vested in the proprietors one seventieth part each, and did not vest in them the title to the other six parts, to hold in trust [9 *Cranch*, 292.] *Vt. Supreme Ct.* 1839, *Caledonia County Grammar School v. Burt*, 11 *Vt.* 632.

18. The proprietors of a town voted that one hundred acres of the poorest land in a certain part of the town be left common for the use of the town for building stones. The vote was recorded in the book of records, but not in the registry of deeds. *Held*, that the vote constituted, even as against grantees under subsequent conveyances duly recorded in the registry, a grant of the quarry to the town, not for their use in a corporate capacity, but for the use and benefit of those only who were or might become inhabitants thereof, for all purposes for which such materials, in the progress of time and the arts, might be made useful. *Mass. Supreme Ct.* 1851, *Green v. Putnam*, 8 *Cush.* 21.

19. A vote of a township "that a hundred acres of the poorest land, &c., be left common for the use of the town for building stones,"—*Held*, not to convey the land to the town, but merely the particular use named. *Mass. Supreme Ct.* 1824, *Inhabitants of Worcester v. Green*, 2 *Pick.* 425.

20. Consideration. It is not necessary, in order to sustain a grant by a vote of a town, to show a consideration for the grant. *Mass. Supreme Ct.* 1830, *Thomas v. Inhabitants of Marshfield*, 10 *Pick.* 864.

21. Setting aside. A grant made by the authorities of a municipal corporation will not be set aside by a court of equity, if void. Such a grant being a nullity, casts no cloud upon the title of the corporation. And where a grant from such a corporation is not void, but voidable only, the aid of a court of equity cannot be invoked to set aside the grant, unless the corporation do equity by reimbursing the grantee for expenditures incurred under the grant. *Cal. Supreme Ct.* 1868, *City of Oakland v. Carpenter*, 21 *Cal.* 642.

22. Where a corporation, vested with power to take and hold real estate for specified purposes, purchased and took a conveyance of land, and afterward used the land

* In New York it is *Held*, that although a corporation is chartered for a limited term of years, a grant to them and their successors is a grant in fee. The power to purchase lands was a power incident, at common law, to all corporations, unless they were specially restrained by their charters or by statute [3 *Kent*, 281; *Co. Lit.* 44, a, 300, b; 1 *Kyd on Corp.* 76, 78, 108, 115; 8 *Pick.* 239]; and is expressly conferred (1 *N. Y. Rev. Stat.* 781) for the purposes of the corporation. Moreover, by 1 *Rev. Stat.* 748, § 1, every grant passes all the estate or interest of the grantor, unless the intent to pass a less estate or interest appears by express terms, or is necessarily implied. There is no necessary connection between the period of enjoyment and the quantity of the estate. *Nicoll v. N. Y. & Erie R. R. Co.* 12 *N. Y.* (2 *Kern.*) 121; *People v. Mauran*, 5 *Den.* 389.

An agreement by one corporation to grant an easement to another need not be by deed; and may be permanent although made with the company only, and not to the company and their successors; the word "company" meaning a body which is to exist forever. *Great Northern Railway Co. v. The Manchester &c. Railway Co.* 10 *Eng. L. & Eq.* 11; 16 *Jur.* 146.

for other purposes than the charter permitted,—*Held*, that such abuse of power was no ground for setting aside the deed at the instance of the vendor. *Tenn. Supreme Ct.* 1848, *Barrow v. Nashville & Charlotte Turnpike Co.* 9 *Humph.* 304.

23. Certain lands were conveyed in payment of stock to a railroad corporation, created by a special act passed by the legislature of Indiana, before the present constitution of that State (under which such corporations cannot be created by special act) went into effect, but the act of incorporation was not accepted, and no organization was perfected under the charter, until after the constitution was adopted. The company afterwards conveyed the lands to the respondent. *Held*, that a bill in equity would not lie to set aside such conveyances to the corporation. *Iowa Supreme Ct.* 1864, *Brown v. Phillips*, 16 *Iowa*, 210.

24. Revocation. A grant of land or of a corporate franchise by an act of legislation, is a contract between the State and the grantee, the obligation of which a subsequent legislature cannot impair. Thus if the legislature, in creating a corporation, prescribe a rate of taxation, and expressly release the power to impose further taxes, or do not expressly reserve the power to themselves, a subsequent tax law impairs the obligation of the contract, and is void. *Pa. Supreme Ct.* 1860, *Iron City Bank v. City of Pittsburgh*, 87 *Pa. St.* 340.

25. The legislature of Georgia authorized the sale of a tract of wild land belonging to the State, and a grant thereof was made by letters patent, in pursuance of that authority, to the Georgia Company. A succeeding legislature declared the former act to be void. *Held*, that the former act could not be constitutionally repealed, so as to rescind a sale made under it. *U. S. Supreme Ct.* 1810, *Fletcher v. Peck*, 6 *Cranch*, 87. See also *University v. Foy*, 2 *Hayw.* 810; *Den v. Foy*, 1 *Murph.* 58; *Wales v. Stetson*, 2 *Mass.* 146; *Thomas v. Daniel*, 2 *McCord*, 354; *Yarmouth v. North Yarmouth*, 84 *Me.* 411.

26. A grant of land by the legislature to a corporation of a college or school, for the purposes of public instruction, is a contract which the State has no power to impair by subsequent legislation, especially where it was made on condition of a pecuniary consideration by way of donations from third

persons to the same purposes. *Vt. Supreme Ct.* 1839, *Caledonia Co. Grammar School v. Burt*, 11 *Vt.* 632.

27. An act of New Jersey, passed in the year 1760, enabled the owners of meadows along a small creek, which emptied into a navigable river, and into which the tide ordinarily flowed for two miles, to construct a dam for the purpose of shutting out the tide from the creek, in order to drain such meadows. Provision was subsequently made for maintaining the dam by assessments upon the landowners benefited by the erection. In 1854, an act was passed declaring the creek to be a public highway in all respects, as fully as it was before the erection of such dam, and empowering the municipal authorities to remove the dam, and open the navigation of the creek. Upon a bill filed in equity to restrain the township committee from performing this work,—*Held*, that the legislature had the right to make the original grant (there being nothing to show that the public interest demanded the navigation of the creek); and that the act of 1854, being a virtual repeal of the former statute, under which rights had become vested and property acquired, was in violation of the constitutional provision prohibiting the passing of laws impairing the obligation of contracts. *N. J. Chancery*, 1854, *Glover v. Powell*, 2 *Stockt.* 211.

28. Reversion. A grant to a corporation does not cease or revert, and cannot be reclaimed by the grantor merely on the ground that the company has committed a breach of its charter, for which it may be subject to judgment of forfeiture. *Ky. Ct. of Appeals*, 1849, *Harrison v. Lexington & Frankfort R. R. Co.* 9 *B. Monr.* 470; *S. P. Webb v. Moler*, 8 *Ohio*, 548.

29. Thus when land was conveyed for the use of a railway, upon condition that it should revert to the owner upon the abandonment of the road, and the road was sold under a mortgage, to the State, and by the State, and by new companies chartered for that purpose, was completed,—*Held*, that the grantor was not entitled to reclaim the land. *Ky. Ct. of Appeals*, 1849, *Harrison v. Lexington & Frankfort R. R. Co.* 9 *B. Monr.* 470.

See also, EMINENT DOMAIN.

30. In 1835, the legislature of Illinois passed an act appointing commissioners to locate permanently the seat of justice of T.

county. The commissioners were clothed with authority to locate the county seat on private property, on condition that the proprietor thereof should donate and convey, with covenants of general warranty, to the county commissioners, for the use of the county, a quantity of land not less than twenty acres, on which to erect the necessary public buildings; otherwise the location was to be made upon public lands in the county. Under this act, the plaintiff conveyed the premises in suit to the county commissioners. The deed was expressed to be made in consideration of the location of the county seat having been made upon the premises conveyed, and also of one dollar, and it contained a covenant of general warranty. After this conveyance, the county erected a court house upon the land, and occupied the premises as the seat of justice for the county for fifteen years, until 1850. During this time the plaintiff laid out a large portion of surrounding lands belonging to him into town lots, and sold them. In 1849 the legislature passed an act providing for the removal of the county seat to another town, and giving the lands obtained from plaintiff to the defendants, in trust, for the use of the inhabitants of the county, to be occupied for purposes of education. In an action of ejectment brought by the former owner of the lands, to recover them from the trustees,—*Held*, that it was no part of the contract made between the plaintiff and the county in 1835, that the county seat should forever remain as then located. On the contrary, plaintiff must have known, when he made the deed, that the legislature at that time possessed the power to change the location of county seats at pleasure. He must therefore be considered, in legal contemplation, as having made the deed in view of the liability, at least, of a future change of the county seat. Had the land been granted upon condition that it should be used for a particular purpose, it would have reverted to the donor when it ceased to be thus used. But it was competent for the legislature to make it a condition precedent to the location of the county seat upon the land of any individual, that he should convey twenty acres of the tract to the county in fee simple absolute. The owner was not obliged to accept such a proposition, but having done so, and made his deed accordingly, he could not complain when the legisla-

ture, to promote the public good, and in the exercise of an undoubted right, subsequently provided for a change of the county seat. [11 Ill. R. 336.] There was therefore no reversion, and the title of the trustees was good. *Ill. Supreme Ct.* 1851, *Harris v. Shaw*, 13 Ill. 456.

INCORPORATION.

[Comprises the general theory of the creation of corporations; including the distinction between what bodies are incorporated, what are not, and what possess in part a corporate character,—in whom is originally vested the power to incorporate, and what delegation of that power is lawful,—what steps or acts constitute a corporation, with the rules relating to the different methods of acquiring incorporation, and what grants confer, by implication, a corporate capacity. *Charters and Articles of association*, considered as written instruments, are treated under their respective heads. Rules peculiar to incorporation of any one particular class of corporations, are under its title.]

I. GENERAL THEORY.

1. *Nature of corporate existence.*
2. *What bodies are or are not corporations.*
3. *Who can confer incorporation.*
4. *Effect of incorporation as respects individual promoters.*

II. HOW IT IS EFFECTED.

III. HOW IT MAY BE QUESTIONED.

IV. PROOF.

I. GENERAL THEORY.

1. *Nature of corporate existence.*

1. Corporations defined, and the various classes of them described. *Dartmouth College v. Woodward*, 4 *Wheat.* 518.

2. Legislative authority necessary. That corporate existence and the power to acquire property by exercise of the right of eminent domain, can only be derived from legislative enactment,—see *Atkinson v. Marietta & Cincinnati R. R. Co.* 15 *Ohio St.* 21.

3. That acting as a corporation, without being lawfully constituted one, is an offence at common law,—see *Kinder v. Taylor*, 8 *Law. J.* 68.

4. Acting as a corporation without a charter is contrary to law; therefore no action will lie on a bond given to secure payment of a compensation to the obligee for the formation of any such pretended corporation. Hence, in debt on a bond conditioned for paying plaintiff 10,000*l.* upon his form-

ing a company, and procuring purchasers for nine thousand shares therein, such company to carry on a distillery according to a process for which a patent had been granted, a plea, that the patent contained a proviso rendering it void if transferred to more than five; that it was intended that the said company should consist of more than five, and be formed for the purpose of enjoying the benefit of the letters patent, of acting as a corporate body, and of dividing the benefit of the patent into ten thousand shares, transferable and assignable without charter from the king; and that it was corruptly and illegally agreed between the parties, that the plaintiff should form the company for such purposes, and should sell the nine thousand shares in order to raise a larger sum of money under pretence of carrying on the privilege granted by the patent, was *Held* a bar to the action. *C. P.* 1828, *Duvergier v. Fellows*, 5 *Bing.* 248; 5 *M. & P.* 403.

5. Where an association, calling themselves "The Equitable Loan Bank Company," issued shares, transferable without restriction, and assumed to act as a corporate body without an act of Parliament, or royal charter,—*Held*, that, as they were chargeable with a violation of the provisions of the bubble act (6 Geo. 1, ch. 18), a broker could not maintain an action against his principal for the price of certain of such shares purchased at the request of the latter. *K. B.* 1825, *Josephs v. Pebrer*, 3 *Barn. & C.* 639; 1 *Carr. & P.* 507; 5 *Dowl. & R.* 542. Compare *Rex v. Stratton*, 1 *Camp.* 549.

6. Necessity of organization. A corporation may be regarded in law as *in esse* before they have the right to organize. If the charter declares that such persons as shall subscribe for stock *are* a corporation, each subscriber becomes, *per se*, a corporator, and all, as fast as they subscribe, become corporators. It is in such a case the statute which creates the subscribers a corporation and not their organizing under it, at least for the purpose of rendering valid contracts in the favor of the corporation. *Vt. Supreme Ct.* 1848, *Vermont Central R. R. Co. v. Claves*, 21 *Vt.* 80.

See ORGANIZATION.

7. — of taking "associates." A grant of corporate powers to one person and his associates and successors, without any provisions requiring him to take associates or call-

ing for a division of stock into shares, or any meetings, officers' organization, &c., virtually confers on him alone the right to exercise all the corporate powers thereby granted, without taking any associates. *Ib.*

8. The legislature have power to permit one person or his successor to exercise all the corporate powers, and to make his acts, when acting upon the subject matter of the corporation, and within its sphere of action and grant of powers, the acts of the corporation. Although corporations originating according to the rules of the common law must be governed by it in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred, and, where one claims its origin from such source, its rules must be regarded in deciding upon its legal existence; yet the legislature have power to create a corporation, not only without conforming to such rules, but in disregard of them; and when a corporation is thus created, its existence, powers, capacities, and the mode of exercising them, must depend upon the law creating it. *Me. Supreme Ct.* 1839, *Penobscot Boom Corp. v. Lamson*, 16 *Me.* 224.

9. Where the charter declared certain persons named, and such others as should be associated with them, to be incorporated, and subsequently provided that, until the first election of directors, the persons before named should have authority to exercise all the corporate powers,—*Held*, that the addition of associates was not essential, before the charter could take effect. *U. S. Supreme Ct.* 1860, *Frost v. Frostburg Coal Co.* 24 *How.* 378.

10. Where a charter is granted to specified persons, "their associates, successors and assigns," the grantees can elect directors without taking associates. The grant is in effect to them alone, or to them and associates, if they choose to take associates, or to their assigns, if they transfer the franchise. It is a power, not a duty. *N. H. Superior Ct.* 1848, *Hughes v. Parker*, 19 *N. H.* 181; 1849, *The Same v. The Same*, 20 *N. H.* 58.

11. A charter incorporating "A and his associates" creates A a corporation if he takes no associates; and even if it were made his duty to take associates, it would be a condition subsequent, and his omission to do so is not available to defeat his action for a

disturbance of his franchise. *Ms. Supreme Ct.* 1882, *Day v. Stetson*, 8 *Greenl.* 365.

12. In a charter declaring certain designated persons "and their associates" to be a corporation, the words "their associates" mean persons already associated with the persons named. They do not include, as original grantees of the charter, those who may come in afterward. The right to receive associates is a corporate right, and presupposes a corporate organization. If, therefore, there are persons included in the act as grantees of the charter, under the name of "associates," they must be those who were actually associates, and could be properly designated, identified, and ascertained to be such, at the time of passing the act. Where a charter was granted on a petition presented to the legislature signed by all of the petitioners, and the charter describes the corporators by naming the first three of the signers, adding, "and their associates," the term must, in the absence of any evidence to countervail this, be presumed to intend the other petitioners only, and not to embrace persons who did not sign the petition, but who merely subscribed for stock in the same, in sundry books prepared and circulated at the meeting when the enterprise originated, and where the petition to the legislature was drawn up and signed. *Mass. Supreme Ct.* 1853, *Lechmere Bank v. Boynton*, 11 *Cush.* 369.

13. The obtaining an act of incorporation by two individuals, adding enough names of holders of single shares to effect an organization, but continuing to do business as individuals as between themselves, the company not acting by its board, although it will not exonerate the two from the liabilities of partners, holds them to conduct their business as an incorporation; and an account stated between them in the course of such business does not bar the right of the company or of a *bona fide* assignee of the interest of one of them in the company as a stockholder, to have an accounting of the dealings. *N. J. Chancery*, 1852, *Vandyke v. Brown*, 4 *Halst.* 657.

As to how far incorporation affects the Liability as partners of the members, see INDIVIDUAL LIABILITY.

14. Corporations deemed "persons." In general, corporations are entitled to rights or remedies conferred by a statute upon

"persons" if corporations are within the equity of the statute.* *Pa. Supreme Ct.* 1883, *Lehigh Bridge Co. v. Lehigh Coal & Nav. Co.* 4 *Rawle*, 9. Compare *Schuyler Co. v. Mercer Co.* 4 *Gilm.* 20; *McIntire v. Preston*, 5 *Gilm.* 48.

15. The N. University, by its charter, was empowered "to have, receive, and enjoy lands, tenements," &c. The Tennessee statute of 1837-38, to dispose of the lands of the Owee district, subjected the land to entry by "any person or persons wishing to make the same." *Held*, that the word "person" embraced corporations, and that the N. University, having the power "to have, receive, and enjoy lands," had the right to enter in the Owee district. *Tenn. Supreme Ct.* 1843, *State v. Nashville University*, 4 *Humph.* 157.

16. That a corporation may, without express authority in its charter, give a negotiable promissory note in the course of its legitimate business, since it is included in the word "person," used in the statute 3 and 4 Anne,—see *Mott v. Hicks*, 1 *Cow.* 513; *State of Indiana v. Woram*, 6 *Hill*, 33.

17. Corporations are deemed persons, within a treaty clause against confiscation and prosecutions against "any persons." *U. S. Supreme Ct.* 1823, *Society for the Propagation of the Gospel v. Town of New Haven*, 8 *Wheat.* 464.

18. Corporations are "persons" within attachment laws. *Ala. Supreme Ct.* 1839, *Planters & Merchants' Bank v. Andrews*, 17 *Ala.* (8 *Port.*) 404.

19. The words "living person" (as used in section 399 of the N. Y. Code of Procedure, relating to the examination of parties as witnesses) include corporations. *N. Y. Ct. of Appeals*, 1860, *La Farge v. Exchange Fire Ins. Co.* 22 *N. Y.* 352; *N. Y. Supreme Ct.* 1859, *Field v. N. Y. Central R. R. Co.* 29 *Barb.* 176; *Johnson v. McIntosh*, 31 *Barb.* 267; *N. Y. Com. Pl.* 1859, *Wallace v. Mayor &c. of N. Y.* 2 *Hill.* 440; 9 *Abbott's Pr.* 40; 18 *How. Pr.* 169.

20. The word "person," as used in the New York statute of limitations includes corporations. *N. Y. Ct. of Appeals*, 1859 *Olcott v. Tioga R. R. Co.* 20 *N. Y.* 210.

21. Corporations are included within the

* It seems that the word "individuals" may include corporations when used in a statute in contradistinction to the State. *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 *Pa. St.* 9.

prohibition of the New York act to restrain unauthorized banking, although the act does not in terms include corporations, but only speaks of persons. *N. Y. Supreme Ct.* 1818, *People v. Utica Ins. Co.* 15 *Johns.* 358.

22. Corporations are liable to be taxed under a statute imposing taxes on "persons.*" *N. Y. Supreme Ct.* 1817, *Clinton Manuf. Co. v. Morse*, cited in *People v. Utica Ins. Co.* 15 *Johns.* 358.

23. Corporations are deemed "persons," within the purview of penal statutes, as well as for civil purposes. *U. S. Supreme Ct.* 1826, *United States v. Amedy*, 11 *Wheat.* 892.

24. Corporations are to be deemed "persons" within statutes of usury. *U. S. Supreme Ct.* 1830, *Thornton v. Bank of Washington*, 3 *Pet.* 36, 42; *Miss. Ct. of Errors*, 1848, *Commercial Bank of Manchester v. Nolan*, 7 *How.* 508; 1847, *Grand Gulf Bank v. Archer*, 8 *Emed. & M.* 151.

25. Though in general, corporations are included in acts relating to persons, an incorporated bank is not a person, within the act of Congress of Mar. 3, 1797, § 5 (1 *U. S. Stat.* at L. 512), which requires priority of payment to be made to the United States, when "any revenue officer or other person" indebted to them, becomes insolvent. *Mass. Supreme Ct.* 1846, *Commonwealth v. Phoenix Bank*, 11 *Metc.* 129.

26. Identity of corporations. Corporations may be different, although the names, the officers, and the members of each are the same. The identity is not to be determined by the facts that the corporate name given in both charters, and the officers and a majority of the members are the same, and that the business of the old corporation was for a time done, and its debts paid, by the new one. To ascertain whether a charter creates a new corporation, or merely continues the existence of an old one, we must look to its terms, and give them a construction consistent with the legislative intent, and the intent of the corporators. Thus, where the legislature had by statute limited the duration of a bank charter, and subsequently granted a charter with the same corporate name, but fixing a smaller capital, and declaring direct-

ors of the existing bank eligible as directors in the bank thereby established, and authorizing assignments from one corporation to the other,—*Held*, that they must be deemed distinct corporations, although the same officers were elected and carried on the business of both banks at the same place. *U. S. Circ. Ct. (Mass.)* 1819, *Bellows v. Hallowell & Augusta Bank*, 2 *Mass.* 81. Compare *Wyman v. Hallowell & Augusta Bank*, 14 *Mass.* 58; *Episcopal Charitable Society v. Episcopal Church in Dedham*, 1 *Pick.* 372.

27. Where the members of three distinct corporations were the same,—*Held*, that in a court of law they might be considered as distinct legal persons; and that contracts between the several corporations were valid and might even be implied from corporate acts. *Mass. Supreme Ct.* 1823, *Proprietors of Canal Bridge v. Cordon*, 1 *Pick.* 297.

As to how far corporations are deemed Citizens, with respect to the capacity of corporations chartered by one State to exercise their powers in another, see FOREIGN CORPORATIONS; POWERS.

As to how far they are deemed Citizens, with respect to the power to sue, see, also, *SUITS*.

28. Relation between the corporation and the members. A corporate body is a juridical being, separate and distinct in its rights and obligations from the individuals who compose it; and, while it exists, the majority of its members cannot maintain an action against the minority for the sale and distribution of the proceeds of the property belonging to it. *La. Supreme Ct.* 1861, *Curien v. Santini*, 16 *La. Ann.* 27. Compare *Society of Practical Knowledge v. Abbott*, 2 *Beav.* 559.

29. The relation of *cestui que trust* and trustee does not exist between the stockholders of an incorporated company and the corporation in such sense as to call for interposition of the court of chancery against the corporation. Such remedy is against the officers, if at all. *N. Y. V. Chan. Ct.* 1831, *Verplanck v. Mercantile Ins. Co.* 1 *Edw.* 84.

See MEMBERS; STOCKHOLDERS.

30. — between the corporation and the officers. It is the citizens of a city, and not the common council, who constitute the "corporation" of the city. The aldermen and other charter officers are only officers of the corporation. *N. Y. Supreme Ct.* 1857,

* That the words "persons and associations," as used in the New York act of 1855, relative to taxation of non-resident persons and associations, include foreign corporations.—see *People ex rel. Parker Mills v. Commissioners of Taxes*, 28 *N. Y.* 242; 3 *C. 22 How. Pr.* 143.

Lowber v. Mayor &c. of N. Y. 5 *Abbotts' Pr.* 325; *Clarke v. City of Rochester*, 24 *Barb.* 446; 5 *Abbotts' Pr.* 107; 14 *How. Pr.* 193.

See MUNICIPAL CORPORATIONS.

31. Incorporated religious societies are aggregate corporations, and whatever property they acquire, whether real or personal, is vested in interest in the body corporate. Whatever possession the officers have, is the possession of the corporation. Although called trustees, they do not hold the property in trust. Their name is simply a title of office, and their position the same as if they were called directors or managers. Their right to intermeddle is an authority, not an estate or title. This would be so upon general principles, relating to the legal nature of corporations, apart from the particular language of the act concerning religious corporations.* *N. Y. Ct. of Appeals*, 1854, *People v. Fulton*, 11 *N. Y. (1 Kern.)* 94.

See RELIGIOUS CORPORATIONS.

2. What bodies are or are not corporations.

32. A State is a corporation. It is a legal being, capable of transacting some kinds of business like a natural person, and such a being is a corporation. [1 *Hill*, 620.] *N. Y. Supreme Ct.* 1843, *State of Indiana v. Worum*, 6 *Hill*, 83.

33. That towns are regarded as corporations so far as corporate powers are granted, or are incidental to express grants,—see *North Hempstead v. Hempstead*, 2 *Wend.* 109; *People v. Morris*, 13 *Id.* 325.

See MUNICIPAL CORPORATIONS.

34. Associations formed under general laws. A body formed pursuant to a statute authorizing the formation of "associations" composed of stockholders, and governed by president and directors, and declared by the statute, to be, when duly formed, a body corporate and politic, and vested with enumerated powers, such as are usually incident to corporations, is to be deemed a corporation, not a quasi corporation nor a joint stock company, or limited partnership.† *U. S. Circ. Ct. (Mich.)* 1840, *Falconer v. Campbell*, 2 *McLean*, 195.

* That the real property of a corporation can be conveyed only by the proper officers; and cannot be by the stockholders,—see *Wilde v. Jenkins*, 4 *Page*, 481.

† This question was the subject of much litigation in the courts of the State of New York, in cases turning on provisions of the constitution of that State restricting the enactment of charters, and the provisions of law regulating cor-

35. Boards of health (in New York), are not corporations, as respects the power to sue and be sued. *N. Y. Ct. of Appeals*, 1852, *Gardner v. Board of Health of New York*, 10 *N. Y.* 409; *N. Y. Supreme Ct.* 1854, *People v. Supervisors of Monroe*, 18 *Barb.* 567.

36. The water commissioners (appointed under N. Y. Laws of 1834, 451) are not a corporation, and cannot be proceeded against as such. *N. Y. Supreme Ct.* 1842, *Appleton v. Water Commissioners of New York*, 2 *Hill*, 432.

37. Fire districts. As to a person with whom it contracted a pecuniary liability arising on contract, a fire district (in Vermont), if not otherwise limited in respect to its power to enter into the contract, or to the persons through whom that power should be exerted, stands on the same footing with a private corporation or an individual. It may therefore make a contract by an agent chosen by a vote of the district for that purpose. *Vt. Supreme Ct.* 1864, *Hunneman v. Fire District No. 1*, 37 *Vt.* 40.

38. The board of supervisors of a county are not a corporation; and as such board, and

porations; and the final result of the conflicting cases has been to sustain, as respects most purposes, the proposition of the text. The New York cases turn too much upon language of statutes, or other special considerations, to render it desirable to quote them at large. Consult *Thomas v. Dakin*, 23 *Wend.* 9; *Warner v. Beers*, 23 *Id.* 103; *Parmly v. Tenth Ward Bank*, 8 *Edw.* 395; *People v. Assessors of Watertown*, 1 *Hill*, 616; *Bank of Watertown v. Assessors of Watertown*, 25 *Wend.* 686; *Willoughby v. Comstock*, 3 *Hill*, 339; *People v. Supervisors of Niagara*, 4 *Id.* 20; 7 *Id.* 304; *Leavitt v. Yates*, 4 *Edw.* 124; *Leavitt v. Tylee*, 1 *Sandf. Ch.* 207; *Bolagerard v. New York Banking Co.* 2 *Id.* 23; *Matter of Bank of Dansville*, 6 *Hill*, 870; *Gifford v. Livingston*, 2 *Den.* 330; *Case v. Mechanics' Banking Association*, 1 *Sandf.* 693; *Leavitt v. Blatchford*, 5 *Barb.* 9; *Cuyler v. Sanford*, 8 *Barb.* 225; *Gillet v. Moody*, 3 *N. Y. (Comst.)* 479; *Talmage v. Pell*, 7 *N. Y. (3 Seld.)* 323; *Tracy v. Talmage*, 18 *Barb.* 456; *Gillet v. Phillips*, 18 *N. Y. (3 Kern.)* 114; *Leavitt v. Blatchford*, 17 *N. Y.* 321; *Codd v. Rathbone*, 19 *Id.* 27; *DeBow v. People*, 1 *Den.* 9; *Purdy v. People*, 4 *Hill*, 384; *People v. Morris*, 18 *Wend.* 325; *People v. Purdy*, 2 *Hill*, 39; *Palmer v. Lawrence*, 5 *N. Y. (1 Seld.)* 339.

But it is *Held*, that an individual banker, under the act of 1833, is not a corporation; for there is no provision for succession; the heir or legatee may continue his business [Laws of 1837, ch. 189], and the banker may sell the business [Laws of 1854, ch. 242]; the business is his individual affair, and he may sue in relation to it in his individual name. *N. Y. Ct. of Appeals*, 1859, *Codd v. Rathbone*, 19 *N. Y.* 371; 3 *P. N. Y. Supreme Ct.* 1860, *Hallett v. Hanower*, 33 *Barb.* 537. See also *Bank of Havana v. Magee*, 30 *N. Y.* 355.

Therefore, the provision of the New York act of 1833, ch. 307, § 1—making it unlawful for any "moneyed corporation" to charge premium of exchange on drafts,—does not apply to an individual banker,—for such banker cannot be a corporation. *N. Y. Supreme Ct.* 1850, *Cuyler v. Sanford*, 8 *Barb.* 235.

apart from the county, they are not liable to a suit. They can be sued only as representing the county; and to warrant a suit against them as representing the county, there must be some duty of the county, and the case must be such that an action founded upon that duty is the appropriate remedy. But where there is a failure of duty by the supervisors only, not by the county, an application for a mandamus is the only remedy* [Following 8 Johns 242; 19 Id. 272; 2 Cow. 580; 5 Id. 292; 9 Wend. 508; 3 Barb. 332; 15 Id. 529; and disapproving *People v. Supervisors of Fulton*, 14 Barb. 52.] *N. Y. Supreme Ct.* 1855, *Boyce v. Supervisors of Cayuga*, 20 Barb. 294. To similar effect is *N. Y. Superior Ct.* 1849, *Brady v. Supervisors of New York*, 2 Sandf. 460.

39. The Presbyterian general assembly. The charter of the "Trustees of the General Assembly of the Presbyterian Church" incorporated, under that name, eighteen persons, and declared them to be seized of all the temporalities of the general assembly; and provided that the assembly might as often as they met, change one-third in number of the trustees; and that the corporation should obey instructions given them by the assembly touching the management and disposal of the property. *Held*, that the assembly were not thereby made a corporation, nor was it a particular order or rank in the corporation, but was an association having no corporate quality. *Pa. Supreme Ct.* 1839, *Commonwealth v. Green*, 4 Whart. 581, 598.

40. Institutions for instruction. Where an act for founding an university authorized a certain existing medical college, previously incorporated, to constitute, appoint, and annex to itself three other faculties, viz., divinity, law, and arts and sciences, the four faculties or colleges to constitute one university, the members or the four faculties to be one corporation, under the name of regents of the university,—*Held*, that, on a view of the whole act, the original college corporation was not destroyed or merged in the university corporation; but continued to exist as a distinct corporate body. *Md. Ct. of Appeals*,

1888, *Regents of University of Maryland v. Williams*, 9 Gill & J. 365.

41. In a statute of Maryland, enacted for the purpose of extending aid in the establishment of a female seminary, certain persons were named as commissioners and invested with certain powers preliminary to the exercise of corporate privileges by the institution, such as raising funds by lottery, and selecting and purchasing suitable grounds. It was afterward provided in the same act that the corporation should be named the "Trustees of the Frederick Female Academy." *Held*, that the board of commissioners was not thereby constituted a corporate body. The two boards may co-exist, and a member of one may, at the same time, be a member of the other. *Md. Ct. of Appeals*, 1850, *Board of Commissioners for Frederick Female Seminary v. State*, 9 Gill, 379.

42. The Medical Institution of Geneva College is not a corporation,—see *Medical Institution of Geneva College v. Patterson*, 5 Den. 618.

43. A public officer, though a corporation, is not an "incorporated company" within the meaning of a statute,—*e. g.* 2 N. Y. Rev. Stat. 678, § 59,—punishing embezzlement by any clerk, &c., of any private person, or any agent, &c., of any "incorporated company." Hence a keeper of a county poor house, employed as such by a superintendent of the poor, cannot be convicted under such statute of an embezzlement of the funds coming into his possession in his employment. Such superintendent, in his relations to the keeper, cannot be deemed a "private person." The whole relation between the two is of a public nature. And superintendents of the poor, although by another statute declared a corporation (2 N. Y. Rev. Stat. 617, § 16), cannot be deemed such an "incorporated company" as is intended by the penal provision. Such an act does not embrace the agents of any public body, either politic or corporate. *N. Y. Ct. of Appeals*, 1860, *Coats v. People*, 23 N. Y. 245.

44. Overseers of the poor, in New York, are a corporation, *sub modo*. They are the public agents and trustees of the towns, in respect to their poor, and must necessarily, without express authority from the legislature, possess a capacity to sue, commensurate with their public trusts and duties. *N. Y.*

* Compare *Jansen v. Ostrander*, 1 Cow. 670; where it is said that the supervisor of a town may be considered to be a corporation, and to have the capacity of suing and being sued, in right of the office he holds, so far as his trust is concerned.

And see QUASI CORPORATIONS.

Supreme Ct. 1820, *Rouse v. Moore*, 18 *Johns.* 407. See also. *Governor v. Gridley*, *Walk.* 328.

3. Who can confer incorporation.

45. The national government. The power of establishing a corporation is not a distinct sovereign power, or end of government, but only the means of carrying into effect other powers which are sovereign. When it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government. Thus Congress has power to incorporate a bank, and the act of the 10th of April, 1816, ch. 44, to "incorporate the subscribers to the Bank of the United States," is a law made in pursuance of the constitution. The government of the Union, though limited in its powers, is supreme within its sphere of action; and although the power of creating a corporation is not included in the enumerated powers, the great fiscal powers which are enumerated give the implied power to create a corporation if the existence of such a being is essential to those powers. *U. S. Supreme Ct.* 1819, *McCulloch v. State of Maryland*, 4 *Wheat.* 318. See also, *Osborne v. Bank of United States*, 9 *Id.* 738.

46. State governments. So also a State may grant acts of incorporation for the attainment of those objects which are essential to the existence of society. This power is incident to sovereignty, and there is no limitation in the federal constitution on its exercise by the States, in respect to the incorporation of banks. *U. S. Supreme Ct.* 1837, *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 *Pet.* 257.

47. Hence the Kentucky act of November 29, 1820, establishing the Bank of the Commonwealth of Kentucky, which declares the bank shall be established "in the name and behalf of the commonwealth of Kentucky," under the direction of a president and directors, to be chosen by the legislature; that the president and directors shall be a corporation, capable of suing and being sued, and of purchasing and selling every description of property; that the bank shall be exclusively the property of the commonwealth; and is authorized to issue notes—was a constitutional exercise of power by the State. And the notes issued by the bank are not "bills

of credit," within the meaning of the constitution of the United States. An act of a State legislature attempting to make bills of a bank legal tender would be unconstitutional, but such attempt will not in any degree affect the constitutionality of the bank. *Id.*

48. A State has, as being a sovereign and independent power except so far as restrained by the constitution of the United States, the power to create, by its legislature, corporations for municipal purposes, and with the means of self-government, including that of levying taxes for local purposes, by assessors chosen by the inhabitants of the corporation. *Tenn. Supreme Ct.* 1847, *Hope v. Deaderick*, 8 *Humph.* 1; 1848, *Nichol v. Mayor &c. of Nashville*, 9 *Id.* 252; *S. P. N. Y. Supreme Ct.* 1843, *Tanner v. Trustees of Albion*, 5 *Hill*, 121.

49. Provisions in a State constitution (*e. g.* *N. Y. Const.* of 1846, art. 8, §§ 1, 9) that corporations may be formed under general laws, and that the legislature shall provide for the organization of cities and incorporated villages are merely directions for the exercise of the legislative authority, and are not grants of power. And it is competent for the legislature to authorize an existing village to adopt, by a vote of its electors, provisions contained in the general law for the incorporation of future villages, or any other existing provisions of law, and such provisions can thus be made a part of the charter of such a corporation. The legislature of the State possesses the whole legislative power of the people, except so far as it is limited by the constitution. In a juridical sense, and so far as courts are concerned with its application and construction, their authority is absolute and unlimited, except by the express restrictions of the fundamental law. The power to incorporate does not result from the directions contained in the constitution. *N. Y. Ct. of Appeals*, 1863, *Bank of Chenango v. Brown*, 26 *N. Y.* 467.

50. It is competent to a State legislature to pass a general law authorizing the formation of an indefinite number of corporations. The objection that a corporation, being a grant, must be made to a person or persons *in esse*, is not tenable; for the creation of a corporate existence can never take effect until the association be formed and the organization completed. Under a special charter, it

is not until the organization is completed that existence is given to the artificial being, and its agency commences. It is now *in esse*, but before it was not. Vitality is given to it by the voluntary association and organization of its members. Had they remained passive, the law would have had no effect. In neither case is the franchise vested until an association is formed. *U. S. Circ. Ct. (Mich.)* 1840, *Falconer v. Campbell*, 2 *McLean*, 195.

51. A statute by which the legislature assume to give to another body the power to incorporate villages on the petition of a bare majority, is of a questionable character, and not to be carried further than the words of it absolutely require. *Pa. Supreme Ct.* 1843, *Case of the Borough of West Philadelphia*, 5 *Watts & S.* 281.

For the principal Restrictions imposed by State constitutions upon the power of the legislatures to create corporations, see CONSTITUTIONS.

For a view of the Powers of legislatures to enact laws affecting corporations, whether depending on constitutional restrictions, the doctrine of inviolability of charters, or otherwise, see LEGISLATION.

52. Territorial legislatures. Under the act of Congress of May 7, 1800 (2 *U. S. Stat. at L.* 58), relative to the territory of Indiana, which authorizes the government, legislative council, and house of representatives, "to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance,"—the legislature of the territory, being vested with general legislative powers, had power to grant an act of incorporation, with all the functions necessary to effectuate its objects. And an act of incorporation granted by them was not affected by the subsequently adopted constitution of Indiana. *U. S. Supreme Ct.* 1852, *Vincennes University v. Indiana*, 14 *How.* 268. See also, *People v. Marshall*, 1 *Gilm.* 672.

53. The territorial government of Michigan, under the organic law, had power to create a banking corporation. *N. Y. Ct. of Errors*, 1881, *Williams v. Bank of Michigan*, 7 *Wend.* 539.

54. Under the act of Congress of July 1, 1886 (5 *Stat. at L.* 61), which requires the approval and confirmation of Congress to give validity to any act of a territorial legis-

lature incorporating banks, or other institutions with banking powers or privileges,—*Held*, that the issuing of bills and the exercise of other banking powers by a corporation organized under a charter granted by the territorial legislature of Nebraska, which was never confirmed or approved by Congress, were without authority of law. *Iowa Supreme Ct.* 1864, *Allen v. Pegram*, 16 *Iowa*, 163.

55. Incipient State organization. In the case of a territory of the United States, which is about to become a State, until the territorial government ceases to exist by the admission of the new State into the Union, the power to create corporations rests wholly in the territorial government, and not in the newly formed State legislature. Therefore, where the newly formed State legislature of Michigan, before the territorial government ceased to exist, chartered a corporation in a district which was disputed territory between Michigan and Ohio, and subsequently the title of Ohio was confirmed. *Held*, that the charter was not valid in the courts of Ohio. *Ohio Supreme Ct. Myers v. Manhattan Bank*, 20 *Ohio*, (*Lavr.*) 288.

56. Limits of State jurisdiction. A corporate body has no corporate existence beyond the territorial limits of the State which created it. *U. S. Circ. Ct. (N. Y.)* 1850, *Day v. Newark India Rubber Co.* 1 *Blatchf.* 628; *S. P. U. S. Supreme Ct.* 1839, *Bank of Augusta v. Earle*, 13 *Pet.* 588; 1861, *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286; *Pa. Supreme Ct.* 1865, *County of Allegheny v. Cleveland & Pittsburgh R. R. Co.* 51 *Pa. St.* 228.

57. Although a corporation can have no legal existence out of the sovereignty by which it is created; yet, it does not follow that its existence, as an artificial person, capable of contracting, may not be recognized elsewhere. Its residence in one State creates no insuperable objection to its contracting in another. *Ga. Supreme Ct.* 1853, *Union Branch R. R. Co. v. East Tennessee & Georgia R. R. Co.* 14 *Ga.* 327.

58. A public grant by the legislature, who can create a corporation, gives, by its own force, a corporate power to take, if such a power be necessary. It is no objection that the grantees are a body residing without the jurisdiction of the State. The legislature can give legal existence to a body of men living without their territorial limits, or to a

corporation existing in a foreign government. *Vt. Supreme Ct.* 1836, Lord v. Bigelow, 8 *Vt.* 445.

As to how far a corporation, created by one State, may, by agents, Execute corporate acts in another, see POWERS; and the titles of particular powers; especially CONTRACTS, 98-118; PROPERTY; SUITS.

59. A corporation chartered by two States, by the same name and style, clothed with the same capacities and powers, and intended to accomplish the same objects, exercising the same powers and fulfilling the same duties in both States, is a distinct and separate body in each State. *Pa. Supreme Ct.* 1865, County of Allegheny v. Cleveland & Pittsburgh R. R. Co. 51 *Pa. St.* 228; S. P. *R. I. Supreme Ct.* 1858, Sprague v. Hartford &c. R. R. Co. 5 *R. I.* 233.

60. A corporation, owing its corporate existence to, and exercising its franchises in, several States, must be treated by the courts of any one State as a separate corporation, or as a domestic legal entity, to the extent of its action under the government of that State; and as a foreign corporation as regards the other sources of its existence. *Md. Ct. of Appeals*, 1861, State v. Northern Central Railway Co. 18 *Md.* 193.

61. There is no legal difficulty in the way of the creation of a single corporation by the concurrent action of two or more States, nor of the creation of a new corporation out of two or more corporations already existing, nor of the creation by one State of such a corporation where one of the constituent corporations is a foreign one. *Conn. Supreme Ct.* 1859, Bishop v. Brainerd, 28 *Conn.* 289.

62. A corporation cannot exist under charters from two separate States; in contemplation of law, each charter creates a legal entity to be recognized within its own State, though the same corporators may compose both entities. *U. S. Supreme Ct.* 1861, Ohio & Mississippi R. R. Co. v. Wheeler, 1 *Black*, 296.

63. Where associates owning a quarry in New Jersey, organized in New York as a corporation under the laws of New York, for the purpose of working the quarry,—*Held*, that the courts of New Jersey would not recognize them as having any corporate existence, but would hold them to the liabilities of partners. They could not be deemed a domestic corporation, nor be sued as such.

They could not be deemed a foreign corporation, for upon the face of their proceedings, their attempted organization under the general law of New York respecting corporations was a fraud upon the law of that State. *N. J. Chancery*, 1858, Hill v. Beach, 1 *Beasl.* 81.

For the principles relative to the Jurisdiction of a State over a corporation doing business within its limits, but chartered by another State, see FOREIGN CORPORATIONS.

4. Effect of incorporation as respects individual promoters.

64. Title to property. If lands be granted for pious uses to a person or corporation not *in esse*, the right to the possession and custody of the lands remains in the grantor, till the person or corporation intended shall come into existence. And if, in the meantime, there be a disseizin, the grantor may maintain a writ of entry, counting generally upon his own seizin; but he cannot resume the grant; nor can he alienate the lands, without such consent as is necessary for the alienation of other church property. *Me. Supreme Ct.* 1821, Proprietors of Town of Shapleigh v. Pillsbury, 1 *Me.* (1 *Greenl.*) 271.

65. A grant to trustees of a school, before the incorporation of the school, vests no title in the school, upon its being subsequently incorporated. *N. Y. Supreme Ct.* 1861, Robie v. Sedgwick, 35 *Barb.* 319.

66. Where an unincorporated association became incorporated under a general statute intended for the benefit of such associations, the choses in action belonging to the association are, by operation of law, transferred and assigned to the corporation, and the corporation may sue thereon in the name of the assignors, the original parties. *Mass. Supreme Ct.* 1859, Merrill v. McIntyre, 13 *Gray*, 157.

67. The mere incorporation of tenants in common, to enable them to carry on more conveniently a common purpose, does not vest in the corporation a title to the land owned by them, and previously used by them for the same purpose. The title must be conveyed by them to the corporation. *Mass. Supreme Ct.* 1829, Leffingwell v. Elliott, 8 *Pick.* 455; 1855, Holland v. Cruft, 3 *Gray*, 162.

So held also in the case of a religious society. 1837, Second Cong. in Bridgewater v. Waring, 24 *Pick.* 304.

68. Where several tenants in common, on their petition, are incorporated for the purpose of building a public house upon their land, the act of incorporation changes the interests of the parties from that of tenants in common to that of corporators owning stock. *Me. Supreme Ct.* 1835, *Bangor House Proprietary v. Hinckley*, 12 *Me.* (8 *Fairf.*) 885.

69. A minority of the persons for whose benefit property is vested in trustees, cannot, by associating and procuring a charter, acquire a right to manage the property against the will of the majority of the persons interested. *Pa. Supreme Ct.* 1822, *Commonwealth v. Jarrett*, 7 *Serg. & R.* 460. Compare *Fox v. Union Academy*, 6 *Watts & S.* 356.

70. An organization under a general law, by a majority of an unincorporated religious society, operates as a transfer of the rights and interests of the individual members in the property, to the corporation; but an organization effected in opposition to the will of the majority, creates a new society and has no affect upon individual rights and interests in the old one. *Ill. Supreme Ct.* 1864, *Happy v. Morton*, 38 *Ill.* 398.

71. The legislature may transfer property from the trustees of an unincorporated company to the body when incorporated. *Ohio Supreme Ct.* 1881, *Presbyterian Church v. Pickett, Wright*, 57.

For many cases involving the application of these principles to Property devoted to religious societies,—see RELIGIOUS CORPORATIONS.

72. Liabilities. Associates in an ostensible corporation, which has no legal existence, are to be treated as partners. *N. J. Chancery*, 1858, *Hill v. Beach*, 1 *Beasl.* 81.

73. The grant of a charter to an association, though it contain an express provision intended to substitute the liability of the corporation in place of the liability of the associates, upon contracts previously made, cannot be allowed to exonerate the individual associates from their liability on such contracts, even though the original articles of association contemplated the subsequent incorporation, unless it be shown that the creditors, whose rights are sought to be thus affected, assented to the change or at least had direct and clear notice of the contemplated incorporation. Such assent ought to be clear and unambiguous. *Pa. Supreme Ct.* 1830, *Witmer v. Schlatter*, 2 *Rawls*, 359.

74. Where an association which has existed as a mere copartnership, becomes incorporated, and the corporation accepts an assignment of all the property of such association, for the purpose of carrying out their objects, the corporation are primarily liable for all the debts incurred before the act of incorporation; and upon the insolvency of the corporation the members of it are jointly and severally liable therefor. *S. C. Ct. of Appeals*, 1847, *Haalett v. Wotherspoon*, 1 *Strob. Eq.* 209. And see *Salem Mill Dam Co. v. Ropea*, 6 *Pick.* 28.

75. Where an association becomes incorporated, members of the association, who do not, by any act or expression, signify their acceptance of the charter, are not liable to be charged in the character of corporators. It is not necessary for them to show that they expressly dissented. *S. C. Ct. of Appeals*, 1847, *Haalett v. Wotherspoon*, 1 *Strob. Eq.* 209.

76. The plaintiff induced certain persons to become the promoters of a railway company and co-operate with him in obtaining an act of incorporation, upon an express agreement that he would pay all the costs of obtaining and passing it. The act passed, and provided that all the costs of obtaining and passing it should be paid by the company,—*Held*, that the plaintiff was bound by his agreement, and could not recover the costs. *Exch.* 1865, *Savin v. Hoylake Railway Co.* 4 *Hurlb. & C.* 67.

II. HOW IT IS EFFECTED.

77. Under a general statute for incorporation, which provides that persons desiring to form any corporations of certain classes, may present their articles, &c., to a judicial tribunal, who shall certify their opinion of the lawfulness of the objects, articles, and conditions proposed, and upon their doing so the applicants shall become a body corporate, with the powers incident to every corporation, these being specified in the statute,—when the requisite approval has been obtained, and the instrument, specifying the name and object of the association, the names of officers and other required facts, has been enrolled or filed according to the law, the persons associated become a corporation, according to the specifications of such instrument. This instrument (taken in con-

nexion with the provisions of the general act), becomes the charter of the association, and has the same effect as a special charter granted by act of the legislature. An incorporation thus perfected cannot be questioned collaterally. *Pa. Supreme Ct.* 1866, *Society &c. v. Commonwealth*, 52 *Pa. St.* 125.

78. It is not competent for the tribunal to which such an application is made, to approve a proposed charter which grants larger powers than those specified in the statute. Thus, where by the terms of the constitution of a medical college, which was submitted to the court, authority was given to the college to confer degrees in medicine upon students and others, the court declined certifying in favor of the application; this power not being specified in the statute. *Pa. Supreme Ct.* 1888, *Medical College Case*, 3 *Whart.* 445.

79. In cases of corporations formed under general statutes, it is no objection to the validity of the organization that the articles of association contain a provision not authorized by the act. The articles must contain the statements affirmatively required by the act, because those statements constitute conditions precedent to the right of the company to become incorporated. If unauthorized provisions are added, all acts done pursuant to such provisions will be void; but until the company is proceeded against for an abuse of its franchises, its rights as a corporation will not be affected by such unauthorized provisions. *N. Y. Ct. of Appeals*, 1856, *Eastern Plank Road Co. v. Vaughan*, 14 *N. Y. (4 Kern.)* 546.

80. A substantial compliance with all the forms prescribed by a general statute authorizing incorporation, is a prerequisite to corporate existence. *Cal. Supreme Ct.* 1865, *Harris v. McGregor*, 29 *Cal.* 124; *S. P.* 1859, *Mokelumne &c. Mining Co. v. Woodbury*, 14 *Cal.* 424.

81. That non-compliance on the part of a company, with the statutes relating to the formation of corporations, is fatal to the act of incorporation,—see *Field v. Cooks*, 16 *La. Ann.* 153.

82. Under a statute which authorizes the organization of banking companies and provides that the number to be formed and permitted to engage in business in a certain county shall not exceed four, when that number of companies has been formed, and

have engaged in business, the power given by the statute is exhausted, and even though some of them subsequently cease to do business, new companies cannot be formed under the statute to take their places. *Ohio Supreme Ct.* 1856, *State v. Chase*, 5 *Ohio St.* 528.

83. Under a statute declaring that persons associating under articles of agreement according to the statute, and who should comply with all the provisions thereof, should constitute a body politic and corporate, and providing that before any corporation so formed should commence business, the officers should cause the articles to be published in two newspapers, &c., such an association may be a corporation for all the purposes of bringing an action, without publication. The publication is not, by the statute, a portion of the proceedings for the formation of a corporation. *N. Y. Supreme Ct.* 1864, *Holmes v. Gilliland*, 41 *Barb.* 568.

For decisions on the character and interpretation of Articles of association, see that head.

For a view of the law applying to the Charter considered as an instrument, see CHARTERS.

84. Incorporation may be implied. Direct words are not necessary to constitute a corporation. Incorporation may arise by necessary implication from the language of a legislative act. *Ark. Supreme Ct.* 1842, *Mahoney v. State Bank*, 4 *Ark. (Pike)*, 620; 1846, *Murphey v. State Bank*, 7 *Ark. (3 Engl.)* 57; *K. B.* 1829, *Conservators of River Tone v. Ash*, 10 *Barn. & C.* 349.

85. Thus, where no persons were named as corporators in an act incorporating a bank, but the fund was placed under the management of a given number of directors, who were required to be elected by the legislature, and upon whom the usual banking powers were conferred. *Held*, that a corporation was created. *Ark. Supreme Ct.* 1842, *Mahoney v. State Bank*, 4 *Ark. (Pike)*, 620.

86. — from legislative recognition. An act of the legislature, which by necessary implication* recognizes a corporation as an existing one, is, as far as individuals are con-

* That the implication of corporate existence, must be necessary; is unavoidable; see *Myers v. Irwin*, 2 *Serg. & R.* 368; *Green v. Seymour*, 3 *Sandf. Ch.* 285; *People v. Kingston & Middletown Turnp. Road Co.* 23 *Wend.* 198; *Stebbins v. Jennings*, 10 *Pick.* 173; *Society for the Propagation of the Gospel v. Town of Pawlet*, 4 *Pet.* 480.

earned, conclusive evidence of its being a valid corporation. *U. S. Supreme Ct.* 1890, *Society for the Propagation of the Gospel v. Town of Pawlet*, 4 *Pet.* 480, 502; *Ohio Supreme Ct.* 1889, *McIntyre Poor School v. Zanesville Canal &c. Co.* 9 *Ohio*, (*Hamm.*) 203; *Tenn. Supreme Ct.* 1841, *Williams v. Union Bank*, 2 *Humph.* 339; *Ill. Supreme Ct.* 1864, *People v. Farnham*, 35 *Ill.* 562.

87. A statute annexing other territory "to the town of A," must, by implication, make it a town, if it was not a town before. *N. H. Supreme Ct.* 1857, *Bow v. Allenstown*, 34 *N. H.* 85.

88. An unincorporated place cannot, by its acts only, place itself in such a position as to entitle itself to the rights and privileges, or subject itself to the liabilities of towns. But evidence that the inhabitants of a particular place have exercised the rights and performed the duties of a town corporation, and that it has been recognized as such by acts on the part of the government, may be submitted to a jury on which to find an incorporation in fact. *N. H. Superior Ct.* 1841, *New Boston v. Dunbarton*, 12 *N. H.* 409; 1844, *New Boston v. Dunbarton*, 15 *N. H.* 201.

89. — from grant of lands. A royal charter granting lands to a society, recognizes or confers a corporate capacity to take and hold lands; and this, with a statute of the State, reciting that the society are a corporation holding lands, is sufficient *prima facie* proof that they are a corporation with such power. *U. S. Supreme Ct.* 1880, *Society for Propagation &c. v. Town of Pawlet*, 4 *Pet.* 480.

90. A grant from the sovereign authority, to a body of men with their associates and successors, of lands to be held for public purposes of a municipal nature, confers a quasi corporate capacity. *N. O. Supreme Ct.* 1840, *Commissioners of Bath v. Boyd*, 1 *Ired. Law*, 194; *N. Y. Chancery*, 1817, *Denton v. Jackson*, 2 *Johns. Ch.* 320; *N. Y. Ct. of Errors*, 1828, *North Hempstead v. Hempstead*, 2 *Wend.* 109; *N. Y. Supreme Ct.* 1855, *People v. Schermerhorn*, 19 *Barb.* 540. Compare *Hornbeck v. Westbrook*, 9 *Johns.* 78; *Jackson v. Hartwell*, 8 *Johns.* 422.

91. — from grants of power. Under the constitution of New Hampshire, which confines representation in certain cases, to towns, a grant by the legislature, to a place within the constitutional designation, of the power to send a representative, by implication makes

the place a town, *N. H. Supreme Ct.* 1857, *Bow v. Allenstown*, 34 *N. H.* 851.

92. A legislative act which authorized the judges of a particular court to take bonds to themselves in their official capacity,—*Held*, to confer on them, as to such bonds, a corporate character. *N. O. Supreme Ct.* 1831, *Justices of Cumberland v. Armstrong*, 3 *Dev.* 284.

93. An act "relative to the common and undivided lands and meadows in S." authorizing the owners to appoint trustees with power to sue for their penalties, &c.—*Held* not to create a corporation, or give any corporate capacity to sue. *N. Y. Supreme Ct.* 1844, *Proprietors &c. of Southold v. Horton*, 6 *Hill*, 501.

94. — grant to "successors." An act for making the river Tone navigable, provided that thirty persons and their successors should be conservators of the river, with power to cleanse, &c., and keep it navigable, and also to make a new channel, making recompense to landowners; and in case the owners and conservators could not agree, or the title were in an infant, &c., that the sheriff should summon a jury, whose determination should bind all parties, and vest an estate in *fee simple in the conservators and their successors*. The conservators were also enabled, by name of "The Conservators of the River Tone," to take gifts or grants of money or lands; and it was made lawful for any person to convey an estate to the *conservators and their successors* without license to alien in mortmain. And the conservators were authorized to make contracts in writing under their hands and seals, and to sue and be sued by the name of "The Conservators of the River Tone,"—*Held*, that, as it manifestly appeared that the conservators were to take lands by succession, and not by inheritance, they were a corporation by implication, though not created so by express words. *K. B.* 1829, *Conservators of River Tone v. Ash*, 10 *Barn. & C.* 849.

95. A statute authorized the inhabitants of H. to elect three trustees, whose duty it should be to take charge of the gospel lot of the town, and declared the trustees and their successors a body politic and corporate, and provided that the trustees should have "full power and authority to enter upon and take possession of the said lot of land, and to lease or sell the same,"—*Held*, that the power was conferred upon the trustees as individuals,

and not as a corporation; and that their individual deed was effectual to pass the title. *N. Y. Supreme Ct.* 1842, *De Zeng v. Beekman*, 2 *Hill*, 489.

96. When incorporation takes effect. The charter declared that certain persons named, and subsequent associates, "shall be a corporation," and that the persons named "are hereby appointed trustees." Subsequent provisions made it their duty to receive applications, and provided that when a certain amount was received, the company might be organized.—*Held*, that they were, by force of the charter, created a corporation; and the omission to do the acts prescribed to organize the institution, did not, as against one contracting with the corporation, affect its existence or rights. *N. Y. Superior Ct.* 1847, *Brouwer v. Appleby*, 1 *Sandf.* 158.

97. Where certain specified directors are declared by charter, a corporation *ab initio*, the requirement concerning the organization of the company is merely directory, and a subscription made prior to such organization is valid. *Ind. Supreme Ct.* 1857, *Stoops v. Greensburgh & Co. Plank Road Co.* 10 *Ind.* 47.

98. A statute constituting such persons as shall become stockholders in the manner prescribed by it, a corporation, and requiring that if the subscriptions exceed the amount of stock the commissioners shall distribute the stock among the subscribers, does not create an immediate corporation. Under such an act there can be neither stockholders nor a corporation, until the stock is distributed by the commissioners. *N. Y. Supreme Ct.* 1839, *Crocker v. Crane*, 21 *Wend.* 211. And see *Walker v. Devereaux*, 4 *Paige*, 229.

III. HOW IT MAY BE QUESTIONED.

99. Direct proceeding necessary. An inquiry as to the right of a company to act as a corporation, can only be had at the suit of the State on information by the attorney general. *Cal. Supreme Ct.* 1867, *Rondell v. Fay*, 32 *Cal.* 354.

100. An allegation by a corporator, that a company, which claims to have become incorporated, has never been legally organized as a corporation, and has never existed as such, can be ascertained in no other way than by a direct proceeding; a *scire facias* or an

information in the nature of a *quo warranto*; in a court of law. It furnishes no ground for the interposition of a court of chancery. Such a court can be specially empowered by statute to divest a corporation of its corporate character and capacity; but in the absence of a statutory power, the mode of proceeding is in all cases by one of the remedies at law before mentioned. *Ill. Supreme Ct.* 1868, *Baker v. Backus*, 32 *Ill.* 79.

101. In an action by a municipal corporation to collect a fine, the validity of the organization cannot be inquired into. It is only to be questioned upon *quo warranto* or the like direct proceeding. And evidence that the corporation has acted as such is sufficient for the purposes of the action. *Ill. Supreme Ct.* 1860, *Hamilton v. President & Co. of Carthage*, 24 *Ill.* 22.

102. Although a company fails to file the necessary certificate at the office of the secretary of state, in pursuance of the statutes, yet it is to be deemed a corporation with respect to third parties in all proceedings except a *quo warranto* or some direct proceeding to try the validity of the organization. *Ill. Supreme Ct.* 1860, *Tarbell v. Page*, 24 *Ill.* 46.

103. A *certiorari* will not be allowed to bring before a court a certificate of incorporation of a school district, or any other proceeding, for the purpose of enabling the court to determine the legal existence of the alleged corporation. *N. J. Supreme Ct.* 1865, *State v. Brown*, 31 *N. J. Law* (2 *Vroom*), 355.

104. It cannot be questioned collaterally. That the validity of the existence, organization, &c., of a body acting as a corporation *de facto* cannot be questioned collaterally, see *Dannenbroke Mining Co. v. Barrett*, 26 *Cal.* 286; *President, Trustees & Co. v. Thompson*, 20 *Ill.* 197; *Thornbury v. Newcastle & Danville R. R. Co.* 14 *Ind.* 499.

For the parallel rules that a Forfeiture cannot be set up collaterally, but can only be shown in a direct proceeding instituted by the State for the purpose, see *FORFEITURE*, 12-25.

105. Impeaching charter for fraud. The fact that the charter of a corporation was obtained by false and colorable representations to the legislature, cannot avail as a defence in an action brought by the corporation. If fraud was practised the charter can be revoked only on a process of *quo warranto*.

Mass. Supreme Ct. 1829, Charles River Bridge v. Warren Bridge, 7 *Pick.* 844.

106. In the case of public institutions for public purposes—*e. g.* turnpike companies—the fact that the charter was fraudulently obtained is no defence to an action by the corporation. Until the State chooses to interfere, the charter is a subsisting one, and the corporation may sue and be sued. To make such fraud a defence even in an action to compel payment of a subscription for stock, the defendant must show that a fraud was committed on him. *Pa. Supreme Ct.* 1827, Kishacoquillas &c. Turnpike Co. v. McConahy, 18 *Serg. & R.* 140; 1830, S. C. again *sub nom.* McConahy v. Turnpike Co. 1 *Pa.* 426; S. P. *Miss. Ct. of Errors*, 1846, Smith v. Miss. & Ala. R. R. Co. 6 *Smed. & M.* 179; *U. S. Supreme Ct.* 1828, Minor v. Mechanics' Bank of Alexandria, 1 *Pet.* 46.

107. If he shows that the organization of the corporation was effected by fictitious subscriptions to a large part of the stock, of the character of which he was ignorant, and by which he was defrauded, his acceptance of the charter does not bind him. *Pa. Supreme Ct.* 1830, McConahy v. Turnpike Co. 1 *Pa.* 426.

108. There is a class of cases where the contract,—*e. g.* a subscription for stock,—is necessarily conditional upon the completion of the organization according to the statute; but in the case of a contract with a company which had, at the time of making it, a charter or color of organization under a general law authorizing it to act as a body corporate, and was in fact in the exercise of corporate powers at the time of its dealing with the plaintiffs, then it was, as to them and all third persons, a corporation *de facto* and the validity of its corporate existence can only be tested by proceedings in behalf of the people. [7 *Wend.* 553; 6 *Cow.* 23.] *N. Y. Supreme Ct.* 1855, Jones v. Dana, 24 *Barb.* 395.

109. Where a bank was organized and bills issued without the actual payment in of the specie required by its charter, so that by reason thereof the State might at any time have recalled its corporate franchise, or a stockholder have resisted the payment of stock, or a debtor his liability to the bank, provided the rights of third persons were not prejudiced,—*Held*, that it was still a valid corporation, so far as to make it liable to creditors for its own acts, and its stockholders liable to in-

nocent bill holders under its charter for the ultimate redemption of the bills put in circulation by the bank. *Ga. Supreme Ct.* 1855, McDougald v. Bellamy, 18 *Ga.* 411; McDougald v. Lane, 18 *Ga.* 444.

110. In a proceeding in chancery against a corporation incorporated by another State, to set aside conveyances of real estate, alleged to have been obtained by the fraud and misrepresentation of the company, the question, whether the company ever had any corporate existence, so as to enable it, in its corporate name, to take, hold, and convey the property, may be raised. But irregularities which might be ground for forfeiture, if inquired of in the State where it was organized, cannot be passed upon in another State. *Iowa Supreme Ct.* 1857, Carey v. Cincinnati &c. R. R. Co. 5 *Clarke*, 357.

111. As against a corporation, it is to be presumed that the forms required by the charter have been complied with, and, therefore, where they seek to set up any default in this respect, the burden is on them to give strict proof thereof. *K. B.* 1832, Clarke v. Imperial Gas Light Co. 4 *Barn. & Ad.* 315; 1833, Hill v. Manchester Water Works Co. 5 *Barn. & Ad.* 866; 2 *Nev. & M.* 573.

112. In an action by a corporation, upon a bond given to them, it appeared that the charter incorporated all such persons as should become stockholders, and appointed commissioners to receive subscriptions; that all the stock had been taken; that officers had been chosen; that a deposition had been filed pursuant to the act; and that the company had actually commenced business. *Held*, that the defendant could not show an irregularity in the manner of obtaining subscriptions; that the commissioners had not met, or that the subscribers did not pay down the amount required by the act. Although the subscriptions were not properly taken there was a good corporation, so far as third persons are concerned. And if there was a corporation, the bond was well taken, and the suit properly brought. *N. Y. Supreme Ct.* 1847, McFarlan v. Triton Ins. Co. 4 *Den.* 392.

113. Formal defects in proceedings to organize a corporation are not available to defeat an action brought by the corporation for a trespass in wrongfully taking property out of their possession. *N. Y. Superior Ct.* 1863, Perse & Brooks Paper Works v. Willett, 1 *Robertson*, 131.

114. Defects in the organization and con-

duct of a corporation are not a defence in an action by it on a contract made with it. *N. Y. Superior Ct.* 1857, *Eagle Works v. Churchill*, 2 *Bosw.* 166.

115. Where a charter provides that if, upon the return to the commissioners of the subscriptions for stock, it appear to them that a certain sum has been subscribed, the subscribers shall be a corporation, the determination of the commissioners that the condition has been performed, even though it be alleged that they were mistaken, must be deemed true until the sovereign power interposes. A wrong doer, sued by the corporation, cannot show the falsity of such declaration. *N. C. Supreme Ct.* 1825, *Tar River Nav. Co. v. Neal*, 8 *Hawks*, 520.

116. Wherever it is shown that a charter has been granted, persons who are in possession and actually in the exercise of those corporate rights must be considered rightfully there, against all wrong doers, and all who have treated or acted with them in their corporate character, even where it is shown that the charter was granted on a *precedent condition*; for, as against all but the sovereign, the precedent condition shall be taken to be performed. *N. C. Supreme Ct.* 1825, *Tar River Nav. Co. v. Neal*, 8 *Hawks*, 520. Followed 1885, *Turnpike Co. v. McCarson*, 1 *Dev. & B. Law* 306; 1846, *Elizabeth City Academy v. Lindsey*, 6 *Ired. Law*, 476.

117. In public affairs, where the people have organized themselves under color of law into the ordinary municipal bodies, and have gone on year after year raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence, as on the regularity of their origin, and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can be no longer open to question. *Mich. Supreme Ct.* 1867, *People v. Maynard*, 15 *Mich.* 468.

118. Where a company was incorporated for the purpose of removing from a river all obstructions to the free passage of logs, &c., and were authorized to demand tolls of the owners of logs, &c., for freely passing down the river, —*Held*, in an action to recover tolls for logs that passed the river freely, that the defendant could not show that the corpora-

tion had not removed the obstructions, even though the act of incorporation was to be void if they should not be removed within a year, and more than a year had elapsed before the action was brought. *Me. Supreme Ct.* 1824, *Bear Camp River Co. v. Woodman*, 2 *Me. (2 Greenl.)* 404.

IV. PROOF.

119. Who is precluded from demanding proof of incorporation. What will estop a plaintiff, who, in a former suit, recognized the defendants as forming a company, from showing the illegality of their corporate existence. *Field v. Cooks*, 16 *La. Ann.* 153.

120. Testimony tending to show that a company is a corporation *de facto*, dispenses with strict proof of the corporate character, and precludes the party offering it from afterward disputing the company's right to act as a corporation. *Cal. Supreme Ct.* 1867, *Rondell v. Fay*, 32 *Cal.* 354.

121. In an action by a banking association organized under the act of Congress, the defendant has a right to deny in his answer the legal existence of the plaintiff as a corporation. *N. Y. Supreme Ct.* 1867, *National Bank of the Metropolis v. Orcutt*, 48 *Barb.* 256.

122. Member cannot. Where individuals hold themselves out as a corporation and hold meetings as such, and, in one, duly called, employ a person to render services for them, they cannot, in his action against the corporation for his compensation, require him to prove their corporate power to act as they have assumed to do. *Vt. Supreme Ct.* 1842, *Stone v. Berkshire Cong. Society*, 14 *Vt.* 86.

123. One who was active in the organization of a corporation, being an original member, and having induced others to become members, and to deal with it as a corporation, and who has borrowed money from it and given his obligation payable to it therefor, cannot evade the enforcement of such obligation by an objection to the validity of the original organization. He is bound by an equitable estoppel. [11 *Cush.* 285.] *Conn. Supreme Ct.* 1858, *West Winsted Savings Bank &c. v. Ford*, 27 *Conn.* 282; *People's Savings Bank v. Collins*, *Id.* 142; *Pa. Supreme Ct.* 1827, *Kishacoquillas &c. Turnpike Co. v. McConaby*, 16 *Serg. & R.* 140.

124. A subscriber to the stock of a corporation by its corporate name, who has paid

installments of assessments called for by the directors, is estopped from denying the legal existence of the corporation, in an action against him for the balance of his assessments. *Mo. Supreme Ct.* 1864, *Ohio & Mississippi R. R. Co. v. McPherson*, 85 *Mo.* 18.

125. A stockholder, in an action by a railroad company against him for installments upon his subscription for stock, cannot in a collateral way question the regularity of the organization of the company. *Ill. Supreme Ct.* 1859, *Rice v. Rock Island & Alton R. R. Co.* 21 *Ill.* 93; *S. P.* 1863, *Goodrich v. Reynolds*, 81 *Ill.* 490.

126. Where a certificate of incorporation omitted to state the names and number of the trustees for the first year,—*Held*, that, after the lapse of twenty years, and a judicial dissolution of the company, as a corporation, one who was a stockholder could not deny that it ever had a legal existence. *N. Y. Supreme Ct.* 1857, *Mead v. Keeler*, 24 *Barb.* 20.

127. Grantor cannot. That a deed of grant to a prescriptive corporation is evidence (against those claiming under the grantor) that they were, at the time of the grant, a corporate body by the name given them therein,—see *Mayor &c. of Carlisle v. Blamire*, 8 *East*, 487.

128. Where a charter has been granted, by which individuals are to be incorporated upon performance of certain acts, a person who contracts with the company by their corporate name, cannot, in their action against him on the contract, deny the performance by them of the acts necessary to give them a corporate existence. *Mo. Supreme Ct.* 1829, *Hamtramck v. Bank of Edwardsville*, 2 *Mo.* 169; *N. C. Supreme Ct.* 1825, *Tar River Nav. Co. v. Neal*, 8 *Hawks*, 520; *N. H. Superior Ct.* 1838, *Congregational Society in Troy v. Perry*, 6 *N. H.* 164; *Ind. Supreme Ct.* 1880, *John v. Farmers & Mechanics' Bank of Indiana*, 2 *Blackf.* 367.

129. Party to contract. One who has contracted with a corporation as such cannot deny its existence in a suit by it to enforce the contract. *Ind. Supreme Ct.* 1860, *Jones v. Cincinnati Type Foundry Co.* 14 *Ind.* 89; *Hubbard v. Chappel*, *Id.* 601; *Evansville &c. R. R. Co. v. City of Evansville*, 15 *Ind.* 395.

130. A person who contracts in writing with an association, using the name by which the association is known, is not thereby estopped from denying their corporate ca-

capacity. *N. Y. Supreme Ct.* 1832, *Welland Canal Co. v. Hathaway*, 8 *Wend.* 490.

131. Nor is such a contract an admission of their incorporation, unless so expressed, or unless the name is one which could only belong to a corporation.* *Id.*

But compare cases on the Degree of proof required against a party to a contract, *infra*.

132. Mortgagor cannot. Where a mortgage, or other instrument, is given to a corporation, as such, the party thus contracting thereby admits the corporate existence of the mortgagee, &c., and no further proof thereof is necessary till such proof is contradicted. [2 *Ld. Raym.* 1535; 14 *Johns.* 245.] *N. J. Supreme Ct.* 1829, *Den v. Van Houten*, 5 *Halst.* 270. And see *Franklin v. Twogood*, 18 *Iowa*, 515.

133. Grantee cannot. One who has taken a conveyance from a corporation cannot deny its corporate existence. *Mass. Supreme Ct.* 1862, *Dooley v. Wolcott*, 4 *Allen*, 406.

134. Maker of note. That the execution of a note to a company, drawn payable to them as a corporation, is an admission of their existence as such,—see *Jones v. Bank of Tennessee*, 8 *B. Monr.* 122; *Blake v. Holley*, 14 *Ind.* 383.

135. General reputation that the plaintiffs were conducting business as a corporation, coupled with the fact that the note mentioned in the complaint is payable to the plaintiffs, is sufficient evidence of the existence of the corporation to prevent a dismissal of the complaint. *N. Y. Supreme Ct.* 1864, *Holmes v. Gilliland*, 41 *Barb.* 568.

136. In an action upon a note made by defendant to a corporation, in its corporate name, it is not necessary for the corporation to prove a corporate charter. The note being made payable in the corporate name is an admission of the corporate capacity. *So held*, when the defendant pleaded *nul tiel* corporation, as well as *non assumptit*. *Ala. Supreme Ct.* 1846, *Montgomery R. R. Co. v. Hurst*, 9 *Ala. N. S.* 513.

137. By giving a note to a corporation in their corporate name, as payees, the maker admits their legal existence and capacity to make and enforce the contract declared on, so far, at least, as to render proof on that point unnecessary in the opening of the plain-

* To the same effect are some of the opinions in the court of errors, in *Williams v. Bank of Michigan*, 7 *Wend.* 539.

tiff's case, in an action against him thereon. Hence in an action on a note given to a foreign corporation by their corporate name, the production of the note, duly indorsed to the plaintiff, is sufficient evidence that the corporation was duly organized and competent to transact business, if these facts are not denied in the answer. *Mass. Supreme Ct.* 1855, *Williams v. Cheney*, 3 *Gray*, 215.

138. Proof of the execution of a note to the "C. Ins. Co." is sufficient, *prima facie*, to establish the legal existence of a corporation bearing that name, in an action by an indorsee of the note against the maker. *Mass. Supreme Ct.* 1862, *Topping v. Bickford*, 4 *Allen*, 120.

139. One who has made a proposition for insurance to a mutual insurance company, and given it a premium note in advance as security for its dealers, and has been credited and paid for the use of his credit as a part of the capital of the company, cannot resist payment on the ground that the company was not regularly incorporated. *N. Y. Supreme Ct. Sp. T.* 1858, *Hill v. Reed*, 16 *Barb.* 280. Compare *Jones v. Dana*, 24 *Barb.* 395.

140. That in a suit by the receiver of an insurance company against one of its members, upon a premium note, the existence of the company must be taken to be sufficiently established,—see *Hyatt v. Whipple*, 87 *Barb.* 595.

141. Trespasser. The rule that a trespasser who does not appear to have any interest in the title to the land, cannot require proof as to the regularity of the proceedings of a corporation plaintiff, does not apply to the case of a tenant in a real action. Being in possession is good title as against all except such as can show a better right [3 *N. H.* 49]. *N. H. Supreme Ct.* 1856, *Goulding v. Clark*, 34 *N. H.* 148.

142. Presumptions as to corporate existence. The same presumptions which by general rules of evidence are continually made in respect to private persons and public officers that all things are rightly done, are applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted,

and alight acts on their part which can be reasonably accounted for only upon the supposition of such acceptance of, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed. [Reviewing many authorities.] *U. S. Supreme Ct.* 1827, *Bank of United States v. Dandridge*, 12 *Wheat.* 71; *S. P. Pa. Chancery*, 1846, *Bank of Kentucky v. Schuylkill Bank*, *Pars. Sel. Cas.* 180, 251; *Pa. Supreme Ct.* 1850, *Commonwealth v. Cullen*, 13 *Pa. St.* 133; *Mass. Supreme Ct.* 1841, *Narragansett Bank v. Atlantic Silk Co.* 3 *Meta.* 282; *Middlesex Husbandmen & Manuf. v. Davis*, *Id.* 133; *Md. Ct. of Appeals*, 1820, *Hagerstown Turnp. Co. v. Creeger*, 5 *Harr. & J.* 122. See also, *State v. Helmea*, 2 *Penning.* 764; *Methodist Ep. Ch. v. Pickett*, 19 *N. Y.* 482; *British American Land Co. v. Ames*, 6 *Meta.* 391.

143. Incorporation proved by reputation. The existence and organization of a school district may be proved by reputation, where there is no record. *Vt. Supreme Ct.* 1884, *Barnes v. Barnes*, 6 *Vt.* 388.

144. In Missouri the existence of a banking corporation may be proved by reputation in a criminal case, and this rule is applicable to a banking company organized under the general laws of another State. *Mo. Supreme Ct.* 1860, *State v. Fitzsimmons*, 30 *Mo.* 236.

145. Acts of the legislature, incidentally recognizing a place as a town, are admissible as evidence of reputation, and also as evidence of the assent of the legislature to the exercise of the powers of a town. *N. H. Supreme Ct.* 1857, *Bow v. Allentown*, 34 *N. H.* 351.

146. It being a well known fact that by two fires in Boston, a great part of the public records of the late province were burnt,—*Held*, that upon evidence that no act incorporating a parish which had existed more than forty years could be found, the existence of the corporation could be proved by reputation, otherwise many towns and parishes would lose all their corporate rights

and privileges. *Mass. Supreme Ct.* 1809, *Dillingham v. Snow*, 5 *Mass.* 547.

147. By user. The existence of a corporation may be proved by an exemplification (or an admission) of the act of incorporation, and acts of user under it. *N. Y. Supreme Ct.* 1828, *Utica Ins. Co. v. Tillman*, 1 *Wend.* 555; 1829, *The Same v. Cadwell*, 3 *Id.* 296; *N. Y. Ct. of Errors*, 1831, *Williams v. Bank of Michigan*, 7 *Id.* 589; *People v. Beigler*, *Hill & D. Supp.* 183; *Mich. Supreme Ct.* 1845, *Ca-hill v. Kalamazoo Mut. Ins. Co.* 2 *Dougl.* 124; 1852, *Way v. Billings*, 2 *Mich.* 397. See also, *People v. Frank*, 38 *Cal.* 507; *Abbott v. Aspinwall*, 26 *Barb.* 202; *President, Trustees, &c. v. Thompson*, 20 *Ill.* 197.

148. As against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto*. Two things are necessary to be shown for this purpose. 1. The existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and, 2. A user by the party to the suit, of the rights claimed to be conferred by such charter or law. [15 *Wend.* 314.] The rule established by law as well as by reason is, that parties recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization, or any subsequent abuse of their powers, not connected with such dealing. As long as these are overlooked or tolerated by the State, it is not for individuals to call them in question. *N. Y. Ct. of Appeals*, 1859, *Methodist Ep. Union Church v. Pickett*, 19 *N. Y.* 482; *S. P. N. Y. Supreme Ct.* 1855, *Jones v. Dana*, 24 *Barb.* 395.

149. In an action by a corporation for the ordinary purposes of enforcing its rights against a stranger, either by enforcing a contract made with the supposed corporation as such, or of protecting the property of such corporation from tortfeasors, it is enough to show a corporation *de facto*. A corporation by prescription is but a corporation *de facto*; and the production of a charter is at least as good as that presumption. If the charter is produced and existence in fact is shown, the corporation are subject to the duties and rights of the charter, and as a consequence are entitled to the corresponding rights, until the charter is duly vacated. *Vt. Supreme*

Ct. 1834, *Searsburgh Turnpike Co. v. Cutler*, 6 *Vt.* 314.

150. The acts of an association of individuals done through a series of years, though lawful, do not necessarily warrant the presumption of incorporation. If such acts bear on their face the impress of corporate acts—are such as individuals cannot, but corporations are competent to perform,—the association may be presumed to be incorporated. But if such acts were within the competency of individuals to perform, they furnish no ground to presume that they were other than the acts of individuals. Therefore, where a yearly meeting composed of individuals whose names were known, had existed for nearly two centuries, and it appeared that during that term it had kept a record of its votes and proceedings, appointed a clerk and treasurer, raised funds by voluntary contribution, disbursed sums of money for the building of meeting houses, celebrated marriages, had burying places, admitted and rejected members, &c.; but it had done no acts which it could not have performed without being incorporated,—*Held*, that the meeting was a voluntary association, and, as such, incapable of taking a charitable gift. *Conn. Supreme Ct.* 1826, *Greene v. Dennis*, 6 *Conn.* 202.

151. What is sufficient to show user. Proof that shortly after the passage of the act, and ever since, the company had an office or place of business, where the business for which they were incorporated was carried on, and that the affairs of the company had been managed by directors from time to time chosen, is sufficient proof of user. *N. Y. Supreme Ct.* 1828, *Utica Ins. Co. v. Tillman*, 1 *Wend.* 556. To the same effect, *N. C. Supreme Ct.* 1855, *Wilmington &c. R. R. Co. v. Saunders*, 3 *Jones L.* 126.

152. So is testimony of an officer that the company had an office where they had carried on business for many years under their charter. *N. Y. Supreme Ct.* 1836, *United States Bank v. Stearns*, 15 *Wend.* 314.

153. Slight proof of user,—*Held*, sufficient, under the circumstances, to establish the existence of a corporation for the purpose of enabling it to recover from a subscriber to its capital stock. *Buffalo & Alle-gany R. R. Co. v. Cary*, 26 *N. Y.* 75.

154. — as to bank. It is not necessary, in order to maintain an action by an incorporated bank, that such bank should show a

regular organization. It is in general sufficient to give evidence of the act of incorporation, and of actual use of the powers and privileges thereby conferred. *Mass. Supreme Ct.* 1844, *Farmers & Mechanics' Bank v. Jenks*, 7 *Metc.* 592.

155. In an action by a bank, if their corporate existence is put in issue, it is sufficient for them to show the charter, and to give parol evidence that they are transacting business as a bank. Even if the charter contains a condition that it should be void unless the corporation should commence business within a year, the fact that the bank are transacting business, and exercising corporate powers under the charter, is *prima facie* evidence of the fact that they performed the condition of the charter. *Vt. Supreme Ct.* 1839, *Bank of Manchester v. Allen*, 11 *Vt.* 802.

156. As against one who has dealt with a banking association, organized as such under the general law, its incorporation is sufficiently proved by the recording of its articles in the county clerk's office, and its user of corporate powers under color of incorporation, without proof that the articles were filed in the banking department. *N. Y. Ct. of Appeals*, 1862, *Leonardsville Bank v. Willard*, 25 *N. Y.* 574.

157. — as to school district. When the question arises in proceedings between third persons, and collaterally, the existence and organization of a school district may be proved by reputation, and by their exercise of corporate powers, and the discharge of corporate duties. *Vt. Supreme Ct.* 1855, *State v. Williams*, 27 *Vt.* 755.

158. Evidence that the usual business of a school district has been carried on in the same locality and under the same name for more than forty years, and that the record of its organization cannot be found, is sufficient to raise a presumption that the district was duly organized and has a legal corporate existence. [2 *Kent*, 277; *Ang. & A. on Corp.* 57; 7 *Mass.* 547; 12 *Id.* 400.] And the further inference of course follows, that it had all the powers belonging to corporations of that character, and was capable of owning and holding real estate suitable to the purposes and objects of its creation. *N. Y. Supreme Ct.* 1861, *Robie v. Sedgwick*, 35 *Barb.* 819.

159. — as to town. Proof that many years ago a town appointed town officers,

and conducted its affairs as an organized town, is *prima facie* evidence of its legal organization. *Vt. Supreme Ct.* 1856, *London-derry v. Andover*, 28 *Vt.* (2 *Wms.*) 416.

160. Where no charter or act of incorporation of a place can be found, its incorporation as a town may be proved by reputation, or by user of the corporate powers of a town with the knowledge or assent of the legislature, for a period so long as to furnish evidence of a prescriptive right. *N. H. Supreme Ct.* 1857, *Bow v. Allentown*, 34 *N. H.* 351.

161. The unquestioned user of the corporate powers of a town, for the period of twenty years, without interruption, and with the knowledge and assent of the legislature, furnishes a conclusive presumption of a charter. [18 *N. H.* 860; 10 *Fost.* 434; 2 *Greenl. Ev.* § 539.] *Id.*

162. — as to foreign corporation. User of corporate franchises, under color of an act authorizing the incorporation, together with recognition of such a character by the defendant in his dealings, is available as evidence of incorporation *de facto*, in favor of a foreign corporation suing in this State, as well as of a domestic one. *N. Y. Ct. of Appeals*, 1860, *Bank of Toledo v. International Bank*, 21 *N. Y.* 542.

163. Proof that a company has attempted to form an organization under the statutes of another State, and has transacted business as a corporation *de facto*, and that its certificates of shares contain a recital that it was organized under the general laws of that State, is sufficient, in the absence of anything to control it, to authorize a jury to find that the company was duly incorporated, in a case where the fact is only collaterally in issue. *Mass. Supreme Ct.* 1865, *Barrett v. Mead*, 10 *Allen*, 337.

164. Necessity of proving organization. The legal existence of a corporation capable of performing corporate acts, may be inferred from the grant of a charter, and proof that the persons named, or they and associates with them, have held meetings, chosen officers, adopted by-laws, and performed other corporate acts; without the production of a legal record of the first meeting, or a formal acceptance of the charter. *Me. Supreme Ct.* 1834, *Trott v. Warren*, 11 *Me.* (2 *Fairf.*) 227; 1853, *Sampson v. Bowdoinham Steam Mill Corp.* 36 *Me.* 78; 1854, *Came v. Brigham*, 39 *Id.* 35.

165. In an action against a corporation it is not incumbent on the plaintiff to prove that the defendants have complied with the requisitions of the statutes, where they are not, in terms, or by necessary or reasonable implication, conditions precedent to their existence. In regard to business corporations, it is generally sufficient to prove, besides the act of incorporation, the actual use of the powers and privileges of an incorporated company under the name designated in the act. This is especially so where the plaintiff is a stranger, not presumed to know the records and proceedings of the company. *Mass. Supreme Ct.* 1841, *Narragansett Bank v. Atlantic Silk Co.* 8 *Metc.* 282.

Followed in the case of a suit by the corporation against the maker of a stock note. 1844, *Farmers & Mechanics' Bank v. Jenks*, 7 *Id.* 592.

S. P. 1855, *Williams v. Cheney*, 8 *Gray*, 215.

166. The rule, that a corporation created by a statute which requires certain acts to be done before it can be considered *in esse*, must show the performance of such acts to establish its existence, does not apply where a corporation is declared to be such by the act of incorporation. *Minn. Supreme Ct.* 1864, *St. Paul Division No. 1 v. Brown*, 9 *Minn.* 157.

167. Where a body of men are by statute declared to be a corporation, without condition, proof of user is not necessary to enable them to maintain an action; though it is otherwise in case of those corporations created by statute, and to become entitled to corporate powers by something to be done by them *in futuro*. *N. Y. Supreme Ct.* 1833, *Fire Department of N. Y. v. Kip*, 10 *Wend.* 266; S. P. 1820, *Bank of Auburn v. Aiken*, 18 *Johns.* 137.

168. Even conceding that it is necessary for a corporation plaintiffs to prove their incorporation under the general issue; where the charter provides that when the commissioners certify certain subscriptions to have been made the governor shall then create the subscribers a body corporate, from the moment that letters patent are issued by the governor, the subscribers become a corporation. [10 *Wend.* 267; 8 *Greenl.* 805; 2 *Watts & S.* 79.] And the subsequent formal organization of the corporation by the election of officers is not necessary to perfect the corporate being. And even if the organization

be alleged by the plaintiffs, proof of the certificate of commissioners, and of letters patent issued by the governor is sufficient to show the incorporation; and it is unnecessary to prove that the company was organized by election of officers. *Pa. Supreme Ct.* 1850, *Grubb v. Mahoning Navigation Co.* 14 *Pa. St.* 302.

169. In an action by a company on a contract made by the defendant with them in their corporate name, proof of the act of incorporation, of action by the plaintiffs under it, and of such contract, is sufficient proof of the corporate character, without reference to the regularity of the proceedings to organize the corporation. *Ma. Supreme Ct.* 1853, *Worcester Med. Inst. v. Harding*, 11 *Cush.* 285; S. P. *Miss. of Ct. Errors*, 1846, *Smith v. Miss. & Ala. R. R. Co.* 6 *Smed. & M.* 179.

170. The existence of a corporation formed under a general statute, cannot be proved without proof of at least a substantial compliance with the requirements of the statute; otherwise, with respect to a corporation formed under a special charter, whose existence is proved *prima facie* by production of the charter, and proof of a user under it. *Cal. Supreme Ct.* 1859, *Mokelumne & C. Mining Co. v. Woodbury*, 14 *Cal.* 424.

171. A distinction exists with respect to such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. Any material omission in the former will be fatal to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation can properly be called in question; but in the latter the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter. *Id.*

172. Thus where a statute provided that a certificate of incorporation should be filed with the county clerk, and a duplicate with the secretary of state, and that when a certificate was filed the persons should be a corporation,—*Held*, that as to third persons, the filing in the clerk's office was all that was required; and that the failure to file the duplicate was an omission, the remedy for which rested with the State alone, in a direct proceeding to take away the corporate privileges. *Id.*

173. Proof of an organization in fact, and user under it, is sufficient in collateral proceedings, to show a corporation in fact, although there may have been irregularities or omissions in such organization.* *Ill. Supreme Ct. 1862, Marsh v. Astoria Lodge, 27 Ill. 421.*

174. — of bank. Evidence of acts of user under a bank charter is *prima facie* proof of the performance of the conditions required to be performed precedent to the time the bank was to go into operation.† *Tenn. Supreme Ct. 1841, Williams v. Union Bank, 2 Humph. 389.*

175. — of railroad company. In an action against a subscriber to the stock of a railroad company, on a bond for the payment of an installment of such stock,—*Held*, that the existence of a president and an engineer, acting for the corporation, and of a charter authorizing the appointment of such officers, were sufficient to establish its organization, as against the defendant and all others dealing and treating with the corporation in their corporate capacity. *N. C. Supreme Ct. 1860, Wilmington & C. R. R. Co. v. Thompson, 7 Jones's Law, 387.*

176. — of plank road company. Letters patent from the governor of Pennsylvania reciting that an act incorporating a certain plank road company had been passed, and all the conditions therein named complied with, and creating the subscribers to the stock of said company, and those who should thereafter subscribe, a corporation, together with proof that subscriptions were taken, and a plank road built, and tolls taken thereon, is sufficient evidence of the existence of such a corporation to enable it to maintain a suit in Maryland, against a subscriber for

its stock. *Md. Ct. of Appeals, 1858, Wellersburg & West Newton Plank Road Co. v. Young, 12 Md. 476.*

177. The declaration of the governor in the letters patent, that an act incorporating the plaintiff had passed the legislature, is sufficient evidence of its passage if there be no proof to the contrary. *Id.*

178. — of turnpike company. In an action by a turnpike company, evidence limited to the appointment of inspectors by the governor, and the certificate of the inspectors that the road was completed, and that gates were erected, is not sufficient to prove the existence of the corporation. *So held* in an action on a contract with the corporation. *N. Y. Supreme Ct. 1817, Bill v. Fourth Great Western Turnpike Co. 14 Johns. 416.*

As to What steps are necessary to constitute organization, and how they are proved, &c., see ORGANIZATION.

179. Proving organization by corporate record. The organization of a corporation is a matter which is properly proved by the books of the corporation, even in a suit against a stranger. *Ala. Supreme Ct. 1846, Duke v. Cahawba Navigation Co. 10 Ala. N. S. 82.*

180. Under a bank charter authorizing the election of officers after distribution of stock, and forbidding issue of notes until after making and filing a certain affidavit,—*Held*, that the production of the records showing an election, and proof that the affidavit was filed, was sufficient *prima facie* evidence of due organization and power to issue notes, &c. *N. Y. Supreme Ct. 1828, Wood v. Jefferson County Bank, 9 Cow. 194.* And see *Penobscot & Kennebec R. R. Co. v. Dunn, 39 Me. 587*; *Wellersburg & C. Plank Road Co. v. Bruce, 6 Md. 457.*

181. Where the records of a society which owns a meeting house, when taken as a whole, indicate that the members have regarded themselves as a corporate body of proprietors of their house of worship, rather than as a religious society, the society will be deemed to be a corporation of the former character; and, as such, a meeting may be called in the manner prescribed by its by-laws. *Mass. Supreme Ct. 1866, Cogswell v. Bullock, 13 Allen, 90.*

182. Proving charter. Charter of corporation—*Held* presumptive evidence of its legal existence. *Merchants' Bank of St. Louis v. Harrison, 39 Mo. 438.*

183. The enactment of an act incorpora-

* Any errors or informalities in the mode of the formation of a corporation, under a general act for the organization of corporations, are cured by a special act of the legislature, recognizing the existence of the corporation. *White v. Ross, 15 Abbott's Pr. 66*; *White v. Coventry, 29 Barb. 305*; *Black River & Utica R. R. Co. v. Barnard, 81 Id. 258.*

† On an issue to the plea of no such corporation to a suit in the corporate name of a bank, it appeared that the charter of the bank had expired by limitation, but that it had made a general assignment of its assets to trustees, who were authorized by law to sue in the corporate name of the bank on all *chooses in action*, &c., due to it. *Held*, that the bank was so far a corporation as to make it competent, on the part of the trustees, to sue in its corporate name on any of the *chooses in action* transferred to them, notwithstanding the expiration of the charter. *State v. Bank of Washington, 18 Ark. 554.*

ting a town does not raise any conclusive presumption that the town was not before a corporate town. It is evidence to be weighed by a jury. *N. H. Supreme Ct.* 1857, *Bow v. Allenstown*, 84 *N. H.* 351.

184. Where there was no distinct evidence that the corporation named in a charter had accepted the charter, but there was evidence of some of their own proceedings declining it; and in a *quo warranto* against them, for assuming to act as a body politic, they had traversed the allegation, and the attorney general had thereupon, entered a judgment of preclusion,—*Held*, that these facts proved that they had not accepted the charter, and were conclusive against strangers on the point that they did not become a body corporate. *N. Y. A. V. Chan. Ct.* 1846, *Thompson v. N. Y. & Harlem R. R. Co.* 8 *Sandf. Ch.* 625.

185. In proving the charter, at least an exemplified copy must be produced; or the act must be read or produced in the statute book. But where a suit is brought in a State court by a foreign corporation (and this includes a corporation enacted by a statute of the United States), an exemplified copy must be produced if required. *N. Y. Supreme Ct.* 1836, *United States Bank v. Stearns*, 15 *Wend.* 314.

186. The statute book, as printed by the State printer,—*Held*, evidence of the act of incorporation of a domestic corporation. *N. Y. Supreme Ct.* 1828, *Wood v. Jefferson County Bank*, 9 *Cow.* 194. Compare *Bank of Wilmington v. Woolaston*, 8 *Harring.* 90; *Worcester Med. Inst. v. Harding*, 11 *Cush.* 288; *Durham v. Daniels*, 2 *Greene*, 518.

187. That the journals of the legislature are competent evidence to show that the charter of a corporation received the requisite number of votes,—see *Skinner v. Denning*, 2 *Ind.* 558.

188. Parol proof of the existence and loss of an act incorporating a town, is admissible, the inhabitants having acted as a town for more than thirty years. *Mass. Supreme Ct.* 1815, *Stockbridge v. West Stockbridge*, 12 *Mass.* 400.

189. Evidence of the destruction or disappearance of part of the public records is admissible toward accounting for the loss of a charter. *N. H. Supreme Ct.* 1857, *Bow v. Allenstown*, 84 *N. H.* 351.

190. Proving certificate. The existence of a corporation formed under the general incorporation laws of California, is proved by

its articles of association or incorporation, executed and filed in accordance with the statute. A strict, literal compliance with the requirements of the statute is not essential, and the proceedings will not be held invalid for slight defects or omissions. *Cal. Supreme Ct.* 1863, *Spring Valley Water Works v. San Francisco*, 22 *Cal.* 434.

191. The certificate of incorporation of a company claiming in good faith to be a legally constituted corporation, and doing business as such, is admissible in evidence in a private suit to which the company is a party, although it is not acknowledged by all the corporators. *Cal. Supreme Ct.* 1864, *Dannebrog Mining Co. v. Barrett*, 26 *Cal.* 286.

192. Under the statutes of New York authorizing the incorporation of plank road companies, a duly certified copy of the articles of association, and of the affidavit required by the act to authorize the articles to be filed, is *prima facie* evidence of the incorporation of the company. Other evidence that the payment of five per cent. was made in good faith and in cash, prior to the filing of the articles, is not required, unless something to the contrary is proved. *N. Y. Ct. of Appeals*, 1856, *Eastern Plank Road Co. v. Vaughan*, 14 *N. Y. (4 Kern.)* 546.

193. The certificate of incorporation of a religious society is, in New York, the proper evidence of the fact of incorporation; the record of the certificate is not sufficient. *N. Y. Supreme Ct.* 1831, *Jackson v. Leggett*, 7 *Wend.* 377.

194. Proof of the incorporation of a manufacturing company may be made by producing a sworn copy of the articles of the association, and evidence that the originals were filed in the office of the county clerk and that they have been lost, and by production of a certified copy of the duplicate filed in the office of the secretary of state. *N. Y. Supreme Ct.* 1860, *N. Y. Car Oil Co. v. Richmond*, 6 *Bore.* 213; 10 *Abb. Pr.* 185; 19 *How. Pr.* 605.

INDICTMENT.

1. A corporation is indictable for neglecting or refusing to perform duties directly cast upon them by statute;—*e. g.* for refusing to obey a lawful order of magistrates requir-

ing them to execute works.* *Q. B.* 1842, *Regina v. Birmingham & Gloucester Railway Co.* 3 *Q. B.* 223; 3 *Eng. Railw. Cas.* 148; *S. P.* 1811, *Rex v. Mayor &c. of Stratford*, 14 *East*, 848; 1846, *Regina v. Great North of England Railway Co.* 9 *Q. B.* 815. See also *Mayor &c. of Lyme Regis v. Henley*, 3 *Barn. & Ad.* 77; 5 *Bing.* 91; 3 *Moore & P.* 278; *Commonwealth v. Nashua & Lowell R. R. Corp.* 2 *Gray*, 54.

2. That a corporation may be indicted for a misfeasance, as well as for a non-feasance,—see *Commonwealth v. New Bedford Bridge*, 2 *Gray*, 339; *State v. Vermont Central Railroad Co.* 27 *Vt.* 108.

To the contrary, in Indiana,—see *The State v. President &c. of Ohio & Mississippi R. R. Co.* 23 *Ind.* 882.

8. Under a statute declaring that a corporation, if convicted for neglect to perform a corporate duty, after notice, shall be fined—the proper mode of proceeding is by indictment.† *N. Y. Supreme Ct.* 1834, *People v. Goshen & Minisink Turnpike Co.* 11 *Wend.* 597.

4. In what cases a railroad corporation may be indicted for obstructing a public highway contrary to the powers granted in their charter. *Louisville & Nashville R. R. Co. v. State*, 3 *Head*, 523.

5. An incorporated railroad company is indictable for a nuisance, in erecting and continuing a building, and also for leaving their cars in the public highway. *N. J. Supreme Ct.* 1852, *State v. Morris & Essex R. R. Co.* 3 *Zabr.* 860.

6. A railway company were empowered by statute to make obstructions in public or private roads, for the purposes of their undertaking, doing as little damage as might be; and a subsequent section enacted, that wherever it was found necessary to use that power, they should, before any such road should be cut through, &c., make a good and sufficient road thereof, as convenient for passengers as the road to be cut through, or as near thereto as may be. The company

obstructed a public road, *without making a new one*, equally convenient, or as nearly so as might be,—*Held*, that they were indictable for a nuisance on the old highway. *Q. B.* 1842, *Regina v. Scott*, 3 *Q. B.* 543; 3 *Eng. Railw. Cas.* 187.

7. That an indictment cannot be sustained against a railroad company for a nuisance in the obstruction of a highway, by the stoppage therein of the trains run upon the railroad, while it is being run under the sole management of a receiver, appointed by the court of chancery, over whose acts the company have no control,—see *State v. Vermont Central Railroad Co.* 30 *Vt.* 108.

8. Indictments may be brought against a turnpike corporation in its corporate name, for permitting its road to be and remain out of repair. *Tenn. Supreme Ct.* 1853, *Red River Turnpike Co. v. State*, 1 *Sneed*, 474.

9. A turnpike company is indictable at common law for a nuisance, in suffering its road to fall into decay; and a provision of its charter, giving a penalty for neglect to repair after notice, does not take away the remedy by indictment. Nor is the fine upon conviction limited to the amount of the penalty given by such provision. *N. Y. Supreme Ct.* 1886, *Susquehanna &c. Turnpike Co. v. People*, 15 *Wend.* 267; 1850, *Waterford & Whitehall Turnpike Co. v. People*, 9 *Barb.* 161.

10. The want of funds is no answer to the indictment, as it might be in the case of public officers. And under the indictment, the company may be punished for contracting its road within the limits prescribed by its charter, as a nuisance. *N. Y. Supreme Ct.* 1850, *Waterford & Whitehall Turnpike Co. v. People*, 9 *Barb.* 161.

11. When the corporation should be indicted. An indictment to recover the fine imposed by statute upon a railroad corporation, where the life of a person is lost by carelessness thereon, must be against the company, and not against the individual stockholders. *N. H. Superior Ct.* 1852, *State v. Gilmore*, 4 *Fost.* 461.

12. — and when, individuals. When an offence is committed by individuals under the guise or color of a corporate authority, the individuals actually participating in it, and not the corporation, should be indicted. *Me. Supreme Ct.* 1841, *State v. Works &c. Manuf. Co.* 20 *Me.* 41.

* There are many cases upon the form of indictments against corporations, and on the mode of procedure in prosecuting them, which are not regarded as within the scope of this work. They should be sought in works treating upon the Law of Remedies.

† That where an act incorporating a turnpike company, prescribes a penalty against the individual intrusted with the repairing of the road, and a method of recovering the penalty, the prescribed remedy must be pursued, and the company is not criminally liable,—see *Commonwealth v. Turnp. Co.* 3 *Va. Cas.* 361.

18. The mayor, aldermen, and councilmen of the city of New York, as officers of the city government, may be indicted as for a violation of the charter, for giving a lease of city real estate for a longer period than ten years, or without having complied with the requirements of the charter relative to such leases; and also for a conspiracy so to do. But the misdemeanor is not completed by their voting for and passing resolutions authorizing those acts to be done by the comptroller. *N. Y. Oyer & T.* 1858, *People v. Wood*, 4 *Park. Cr.* 144.

INDIVIDUAL LIABILITY.

[This title embraces the doctrine of the individual or personal liability of members or officers of companies to third persons, for company debts or defaults. The subject depends almost entirely upon the peculiar provisions, charters and other statutes; and the cases are here arranged, not so much with reference to elucidating the system in force, here or there, in any one State, as with a view to show the characteristics of the liability, and to contrast the effect given by the courts to differently framed provisions touching the same point. The questions what are debts, who are creditors, and who are deemed members or officers within this rule, is included here, but these questions may be further illustrated in the cases found under the titles of *DEBTS*, *MEMBERS*, and *OFFICERS*.]

I. LIABILITY OF PROMOTERS AND PROVISIONAL COMMITTEES.

II. LIABILITY IN CASES OF TORT.

III. LIABILITY DECLARED BY STATUTE.

1. *Its nature and grounds.*
2. *Who are liable as stockholders or members.*
3. *Liability of officers.*
4. *What debts and demands are within the statute.*
5. *Extent of the liability.*
6. *Defences and set-offs.*
7. *Contribution between those individually liable.*
8. *Modes of procedure to enforce the liability.*
 - A. *What is the appropriate remedy.*
 - B. *Effect of judgment against company.*
 - C. *Execution or other proceeding, founded on judgment against company.*
 - D. *Actions at law against members, &c.*
 - E. *Bill in Equity.*
 - F. *Special proceedings.*

IV. LIABILITY OF MEMBERS OF ENGLISH JOINT STOCK COMPANIES, AS CONTRIBUTORIES.

I. LIABILITY OF PROMOTERS AND PROVISIONAL COMMITTEES.

1. Where persons meet together for the purpose of forming an association for a purpose of public utility, and hold meetings preliminary to its formation, the attendance and activity of one of such persons at the meetings are some evidence to go to a jury to fix him with the liability for expenses necessarily incurred.* *Q. B.* 1844, *Lake v. Argyll*, 14 *Law J. N. S. Q. B.* 73; 9 *Jur.* 295.

2. A member of a committee formed for the purpose of promoting an improvement bill in Parliament is not liable to the solicitor of the committee for services before he became a member of the committee, but only for those done afterward. *Nisi Prius*, 1848, *Bremner v. Chamberlayne*, 2 *Carr. & K.* 560.

3. A person, by accepting shares and paying his deposit, does not thereby authorize the expenditure of any part of his deposit in the expense of forming the company. And no person, by merely agreeing to take shares and pay his deposit enters into any agreement to contribute to any expenses incurred, or to be incurred, before the company is finally established. *V. Chan. Ct.* 1850, *Capper's Case*, 15 *Jur.* 145; 2 *Eng. L. & Eq.* 77.

4. Provisional committee. *Prima facie*, the members of a provisional committee act for the promoters, and therefore orders given by them are presumptively the orders of all the projectors; and one of the projectors who has given his services,—e. g. a secretary,—cannot recover from the committeemen unless he shows that he gave credit to the one whom he seeks to render liable. *Exch.* 1846, *Wilson v. Curzon*, 15 *Mees. & W.* 532; 11 *Jur.* 47; 16 *Law J. N. S.* 122; 5 *Eng. Railw. Cas.* 24.

5. The mere fact of the appointment of a managing committee of a projected railway company by the provisional committee, does not amount to an authority to such managing committee to bind the provisional committee by contracts. *Exch.* 1848, *Williams v. Pigott*, 12 *Jur.* 318; 17 *L. J. N. S.* 196.

* That mere identity of name is not sufficient evidence of identity of person,—see *Giles v. Cornfoot*, 2 *Carr. & K.* 653.

6. The mere fact of a man's consenting to become one of a provisional committee for the establishment of a corporation, does not imply any authority given by him to each other member of the committee to make contracts or give orders, even though it be shown that no money was supplied for the expenses of the committee. Such consent means nothing more than an agreement to act on the committee; if afterward he does act, he is then responsible for his acts. *Exch.* 1846, *Reynell v. Lewis*, 10 *Jur.* 1097; *S. P. Q. B.* 1847, *Cooke v. Tonkin*, 11 *Jur.* 804; 16 *Law J. N. S.* 158.

7. If, however, such committeeman authorizes his name to be inserted in the prospectus of the company, publicly circulated with his consent, his liability upon contracts made on the faith of that prospectus will depend on the contents of it and the inference which a reasonable man might draw from it. *Reynell v. Lewis, supra.*

8. A railway company having been formed, the secretary wrote to the defendant inviting him to be a member of the provisional committee, to which he wrote a letter of assent. His name was then published as one of the provisional committee, and he afterward presided at a meeting of that committee. An action having been brought against him for the price of stationery supplied by order of the secretary,—*Held*, that he was liable for the stationery supplied by the plaintiff, and used by the committee, after the date of his letter of assent. *Exch.* 1846, *Barnett v. Lambert*, 4 *Eng. Railw. Cas.* 808; 15 *Mees. & W.* 489.

9. Contracts by committee. In an action against a railway provisional committeeman upon a contract entered into by the committee, to render defendant liable, it is necessary to prove, not only that he was a member of the committee, but that he knew it to be still in operation, and also that the expenses incurred were reasonable and usual. *Nisi Prius*, 1846, *Barrett v. Blunt*, 2 *Carr. & K.* 271. Compare *Maudslay v. Le Blanc*, *Id.* 409, *note*.

10. The directors of a joint stock company agreed by deed to purchase a mine of the plaintiff, the purchase money to be paid within twelve months, by installments, out of the subscriptions, with a proviso, that, in case they should not have received the deposit from the shareholders at the stipulated time, the directors should be allowed a further

time of six months,—*Held*, that this was a personal undertaking on the part of the directors to pay at the expiration of the additional time. *C. P.* 1827, *Hancock v. Hodgson*, 4 *Bing.* 269; 13 *Moore*, 504.

11. Omission to contradict advertisement. Provisional committeemen were appointed, but without their consent, members of the acting committee, and advertisements to that effect were published, and became known to them, but they never attended any meetings of the company or committees. *Held*, that they were not liable for the contracts made in their absence. No one is bound to contradict an advertisement. *Nisi Prius*, 1847, *Griffin v. Beverley*, 2 *Carr. & K.* 648. See also *Cooke v. Tonkin*, 11 *Jur.* 804; 16 *Law J. N. S. Q. B.* 158; 9 *Q. B.* 986; 4 *Eng. Railw. Cas.* 704.

12. An admission, by a provisional committee man, of his liability may be qualified by the jury in view of the circumstances, and of erroneous opinions as to the law, in making it. *Q. B.* 1848, *Newton v. Belcher*, 12 *Q. B.* 921; 18 *Law J. N. S.* 58; 6 *Eng. Railw. Cas.* 88.

Especially where the other party has not acted on the admission. *Newton v. Liddiard*, 12 *Q. B.* 921; 18 *Law J. N. S.* 58; 6 *Eng. Railw. Cas.* 42. Compare also *Barker v. Lyndon*, 2 *Carr. & K.* 651.

13. Thus the resolutions of the vestry of a church resolving that "the vestry, or those of them who will consent to the plan, will agree to complete the church edifice on their own responsibility," and pledging corporate funds of the church to those who should undertake to build it, were *Held* to impose no personal liability on the members of the vestry; and the subsequent manifestation of their own impression that such liability existed, without any act to fix it, will not vary the legal interpretation of the act on which it depends. *Md. Ct. of Appeals*, 1838, *Vincent v. Chapman*, 10 *Gill & J.* 279.

14. Novation. Where an association formed in contemplation of becoming incorporated, does so become, and the corporation assumes the debts of the association, and all parties for a long time act on the faith of the merger of all the property and liabilities in the corporation, creditors having notice of these facts, and who treat the corporation as their debtor, pressing it to judgment, and receiving payments from it, cannot subsequent-

ly go back to receive and enforce a liability on the part of the members of the association as partners, unless at least fraud or mistake be shown. *Vt. Supreme Ct.* 1848, *Whitwell v. Warner*, 20 *Vt.* 425.

II. LIABILITY IN CASES OF TORT.

15. **Illegal business.** Where the entire business, carried on by persons in the name of a corporation, is such as the corporation is prohibited by law from doing, the corporate privileges will not protect such individuals from personal liability. This liability does not attach to the stockholders of such corporation as partners, but to those only who engage in such business and those who sanction it. *Ohio Supreme Ct.* 1866, *Medill, v. Collier*, 16 *Ohio St.* 599. Compare *Lawler v. Walker*, 18 *Ohio*, 151; *Lawler v. Burt*, 7 *Ohio St.* 340.

16. That an officer or stockholder of a foreign banking corporation, who issues and puts in circulation, in Alabama, its notes, is individually liable for their payment,—see *Bank of St. Mary's v. St. John*, 25 *Ala. N. S.* 566.

17. A statute under which an organization was formed as a corporation to carry on banking business being adjudged unconstitutional, the members of the organization cannot be held liable on the contracts of the supposed corporation, if they were contracts which were illegal by reason of being made in the business of unauthorized banking. *Mich. Chancery*, 1846, *State v. How*, 1 *Mich.* 512.

18. **Fraud.** To render the members of a corporation personally liable for its debts, on account of fraud, creditors must show that they were induced to become creditors by something said or done by its members, amounting to the perpetration of deceit upon them. Merely to show fraud in a petition upon which the act of incorporation was obtained, is not enough to enable creditors to recover, where they do not show fraudulent representations made to themselves. *Ga. Supreme Ct.* 1856, *Sisson v. Matthews*, 20 *Ga.* 848.

19. The stockholders in a corporation are not liable as such, either on account of any misrepresentations made by the company before incorporation, or for the non-disclosure of the company's indebtedness, on its application for a charter. *Ga. Supreme Ct.* 1855, *Matthews v. Stanford*, 17 *Ga.* 543.

20. Stockholders of a corporation cannot be held individually liable for its debts, upon the ground of fraud, merely because they have availed themselves of their superior advantages for the purpose of obtaining security from the property of the corporation, for debts due to themselves, whether it be done by attachment, or by assigning the property to a trustee, by vote. *Vt. Supreme Ct.* 1848, *Whitwell v. Warner*, 20 *Vt.* 425.

21. **False reports and representations.** The directors of a joint stock company, in order to sell their shares to advantage, represented in their reports, and by their agents, that the affairs of the company were in a very prosperous state, and declared large dividends, at a time when the affairs of the company were greatly embarrassed. A person who had been induced, by these means, to purchase shares of one of the directors, filed a bill against that director, praying to be paid his purchase money and offering to re-transfer the shares; and a demurrer for want of equity, and because all the other partners in the transaction ought to have been made parties, was overruled. *V. Chan. Ct.* 1889, *Stainbank v. Fernley*, 9 *Sim.* 556.

22. Where a bill was filed against the public officer of a joint stock bank, alleging that the plaintiff through the fraudulent representations of the directors, in their reports, as to the prosperous state of the company's affairs, had thereby been induced to purchase five hundred shares in the bank, and praying that the sale might be declared void as between him and the company, and that they might be decreed to repay the purchase money,—*Held*, that as the litigation was between one member of the partnership and the other members, the public officer was improperly made a party, as representing the company; and a demurrer was allowed. *V. Chan. Ct.* 1840, *Seddon v. Connell*, 10 *Sim.* 58.

23. The defendant was one of the promoters and managing directors of a joint stock company, and in order to induce the public to become purchasers, he fraudulently caused it to be made known, by a prospectus issued by him as such director, that the company would guarantee a certain semi-annual dividend to all who should purchase. He made no other communication to the plaintiff personally, and the plaintiff purchased stock upon the faith of such general

guarantee or representation. *Held*, that the plaintiff could not maintain an action upon the guarantee, but that he might recover in tort, as for a fraudulent representation; no privity between the parties being necessary to support such an action. *Q. B.* 1853, *Gerhard v. Bates*; 20 *Eng. L. & Eq.* 129; 22 *Law J. N. S.* 384; 17 *Jur.* 1097.

24. An action for false representation, contained in the prospectus of a company, of which the defendant is a director, may be maintained, although such representations may be capable of a meaning in which it would not be literally false. In such a case it is for the jury to say whether the representation was made in the sense necessary to maintain the action. *C. P.* 1859, *Clarke v. Dickson*, 5 *Jur. N. S.* 1029; 28 *Law J. N. S.* 225.

25. In order to maintain such action, it is not necessary that there should have been any direct personal representation made by the defendant to the plaintiff, it being sufficient, if the defendant authorized the circulation of the prospectus to the public, with knowledge of its false statement; nor will the fact that other inducements were held out by other persons in addition to such false representations, by which the plaintiff was partially influenced to take the shares, in itself constitute a defence. *Id.*

26. A person wrongfully in possession within the State of New York of the assets of a foreign corporation which was insolvent,—*Held*, liable to creditors in an action in that State. *N. Y. Supreme Ct.* 1860, *Tinkham v. Borst*, 31 *Barb.* 407; reversing *S. C.* 15 *How. Pr.* 204.

III.—LIABILITY DECLARED BY STATUTE.

1. Its nature and grounds.

27. Statute necessary. The personal liability of members of business corporations, for the corporate debts, depends solely on provisions of positive law, which are to be construed strictly, and not extended by implication. *Mass. Supreme Ct.* 1852, *Gray v. Coffin*, 9 *Cush.* 192. See also *Shaw v. Boylan*, 16 *Ind.* 384.

As to the application of such a statute to pre-existing corporations and contracts,—see *Gray v. Coffin*, 9 *Cush.* 192, and *infra*.

28. By-law. When neither the charter of a corporation, nor any general statute,

imposes on the individual members a liability to pay its debts, such liability cannot be imposed by a by-law of the corporation. *Mass. Supreme Ct.* 1847, *Trustees of Free Schools in Andover v. Flint*, 13 *Metc.* 539.

29. Contract. That a creditor of a bank who receives bills on an agreement not to put them into circulation, cannot enforce them against individual stockholders,*—see *Johnston v. Southwestern Railroad Bank*, 3 *Strobh. Eq.* 263.

30. An agreement among associates not to be personally liable upon their subscriptions, would be void; but could not invalidate the subscriptions. *N. Y. Superior Ct.* 1849, *Palmer v. Lawrence*, 3 *Sandf.* 161.

31. That one contracting with a joint stock company cannot be affected by an agreement among the shareholders qualifying their legal individual liability, unless he had notice of it and contracted with reference to it,—see *Hallett v. Dowdall*, 9 *Eng. L. & Eq.* 347.

32. Towns, parishes, &c. Although, in general, members of aggregate corporations are not individually liable, yet towns and parishes in Massachusetts (and elsewhere) are, by immemorial usage, an exception; and the body or estate of an inhabitant may be taken on execution against the town, or against a parish with territorial limits. But although a person may be a member of a parish at the time judgment is recovered against it, if he withdraws before execution is issued, he is not liable. *Mass. Supreme Ct.* 1837, *Chase v. Merrimack Bank*, 19 *Pick.* 564; 1826, *Merchants' Bank v. Cook*, 4 *Pick.* 405.

33. The members of an incorporated *poll parish* are not individually liable on a judgment and execution against the corporation. The doctrine of the individual liability of members of quasi corporations, such as towns, &c., which is said to rest on immemorial usage, is not to be extended. *Mass. Supreme Ct.* 1850, *Richardson v. Butterfield*, 6 *Cush.* 191; *Conn. Supreme Ct.* 1844, *Jewett v. Thames Bank*, 16 *Conn.* 511; 1854, *Second Eccl. Soc. of Portland v. First Eccl. Soc. of Portland*, 23 *Conn.* 255.

34. Private corporations. Although the private property of members of *quasi* corporations, as towns, counties, &c., which have

* As to the effect of a proviso against individual liability, inserted in the contract on which the creditor proceeds,—see *Hickman v. Cambrian*, 5 *Harle. & N.* 939.

no corporate funds, is liable to be taken to satisfy a judgment against the corporate body; it is otherwise, in case of corporations, properly so called, unless by special provision of a statute. Hence, in an action against a banking company, in which a deputy sheriff was a stockholder, a service of process by another deputy of the same sheriff was *Held* good, under a statute, providing for service of process by a coroner whenever the sheriff or his deputies were parties. *Me. Supreme Ct.* 1821, *Adams v. Wiscasset Bank*, 1 *Me.* (1 *Greenl.*) 364; *S. P. Mass. Supreme Ct.* 1826, *Merchants' Bank v. Cook*, 4 *Pick.* 405. See also, *Inhabitants of Brewer v. Inhabitants of New Gloucester*, 14 *Mass.* 216.

35. In the absence of any statute provision, the bodies of the members and officers of a corporation cannot be taken on an execution against the president, directors, and company of, &c. *Mass. Supreme Ct.* 1808, *Nichols v. Thomas*, 4 *Mass.* 232. And see *Riddle v. Proprietors of Locks and Canals*, 7 *Id.* 169.

36. Where the company goes into operation, without the subscription of the capital required by the charter, the irregularity will not necessarily render liable those shareholders who do not acquiesce in the act. *Each.* 1839, *Pitchford v. Davis*, 5 *Mees. & W.* 2; 8 *Law J. N. S.* 157; 3 *Jur.* 408. See also *Tredwen v. Bourne*, 6 *Mees. & W.* 461; 4 *Jur.* 747.

37. Where there is no statute prohibition against commencing business before the capital is paid in, and no fraud on the part of the stockholders or corporation, the solvent stockholders are not bound to make up the deficiency of insolvent and defaulting stockholders, for the benefit of the creditors of the company. *S. C. Ct. of Appeals*, 1854, *South Carolina Manufacturing Company v. Bank of South Carolina*, 6 *Rich. Eq.* 227.

38. Unauthorized contracts. The shareholders at large of a joint stock company are not liable in respect of the bonds of the company unauthorized, and not issued in pursuance of a general meeting, although in the hands of a *bona fide* purchaser for value without notice of their infirmity. *V. Chan. Ct.* 1858, *Athenæum Life Assurance Society v. Pooley*, 31 *Law Times*, 70; 4 *Jur. N. S.* 371.

39. The dissolution of a corporation by a decree does not make the stockholders part-

ners, and personally liable, except so far as such liability has been imposed by statutes. *Ill. Supreme Ct.* 1860, *Tarbell v.* Page, 24 *Ill.* 46.

40. Statutes authorizing suits against officers. Under a statute authorizing creditors to maintain actions against the managing director for the time being as a nominal party, or against any one director for the time being, as the nominal defendant, together with a subsequent act authorizing execution on judgments to be levied on the reserve fund of the company,—the managing director so sued is not to be regarded as personally liable upon a judgment recovered; but the effect of the statute is to make liable the joint property of all who were members at the time of execution, but not to create any individual liability. *Each.* 1839, *Harrison v. Timmins*, 4 *Mees. & W.* 510; 7 *Dowl. P. C.* 28; 8 *Law J. N. S.* 94; 3 *Jur.* 173. Compare *Dewers v. Pike*, *Mur. & H.* 181, and *Beech v. Eyre*, 6 *Scott, N. R.* 327; 5 *Mann. & G.* 415.

41. Object of the statute. A provision in a bank charter that the stockholders "shall be personally and individually liable for all losses, deficiencies, and failures of the capital stock of said bank," is not to be regarded as for the benefit of the corporation, to enable it to keep the capital good, but for the benefit of creditors, and makes the stockholders personally liable to the creditors for the debts, in proportion to their respective shares in the stock of the same; especially where the bills issued by the bank contain a clause—"stockholders' private property holden." *R. I. Supreme Ct.* 1850, *Atwood v. Rhode Island Agricultural Bank*, 1 *R. I.* 376.

42. Nature of the liability of members. A liability imposed by a general statute upon the stockholders of a corporation in their individual capacity, in general terms, and in proportion to the amount of their stock, is distinct from the corporate liability, and is of the same character as that incurred by an association of individuals where there is no corporate existence; and although upon principle they should be liable to suit as in other cases of associate liability, yet as such liability is peculiar because unequal and limited, and a joint judgment against all is impossible, their liability must be treated as several, and they must be sued severally.* *Conn. Ses-*

*As to several liability in cases of tort,—see *Att. Gen. v. Wilson*, 1 *PA. & Cr.* 1, 28; *Society for the Illustration of Practical Science v. Abbott*, 3 *Essex.* 571.

preme Ct. 1866, *Paine v. Stewart*, 38 *Conn.* 516.

43. Under a provision "that the persons and property of said corporation shall be holden to pay their debts, and when any execution shall issue against such corporation, the same may be levied on the persons or property of any individual thereof," is to be regarded as making the corporation primarily liable, and the members are not liable as if partners, but their liability is *created* by the statute, and is secondary like that of a guarantor or surety; and proceedings must be had against the corporation before the liability of the stockholders accrues. *Vt. Supreme Ct.* 1852, *Dauchy v. Brown*, 24 *Vt.* 197.

44. Where the charter of an incorporated company provided that nothing therein contained should exempt the members "from all liabilities pertaining to general partners;"—*Held*, that the members were liable to creditors of the company, as partners, and might be sued as such, under the corporate name. *S. O. Ct. of Appeals*, *Planters' Bank v. Bivingsville Cotton Man. Co.* 10 *Rich. Law*, 95.

45. Under a provision that if there be no property of the corporation on which execution can be levied, the stockholders "shall be liable in their own persons and estates as if the contract had been made or liability incurred by them personally," the liability of the stockholders is not secondary like that of a guarantor, but, although contingent, it is absolute and primary, importing a liability in the nature of that of copartners. *R. I. Supreme Ct.* 1859, *New England &c. Bank v. Newport Steam Factory*, 6 *R. I.* 154.

46. The remedy of a creditor in such a case against stockholders is by action at law as against other copartners, averring, of course, the deficiency of corporate property. But in case of the death of one or more stockholders the remedy against their estates must be in equity, which, for the sake of the remedy, construes the liability to be several as well as joint. *Id.* And see *Coleman v. White*, 14 *Wis.* 700.

47. Where judgment was obtained, and execution issued against a plank road company organized under the general plank road act of 1831 (*Mich.*), for work and labor done for the company and for other indebtedness, and the execution was returned unsatisfied, and a bill filed against the stockholders,—*Held*, that the liability created by the statute was in

no sense joint, and that the stockholders were severally liable (except for labor) for demands against the company, to the amount of the stock held by them when the debt accrued. *Mich. Supreme Ct.* 1859, *Pettibone v. McGraw*, 6 *Mich.* 441.

48. The liability imposed by the N. Y. act to enforce the liability of stockholders in banking corporations (*Laws of 1849*, ch. 226) upon the stockholders of banking associations, is a several liability for a ratable and equal share of the debts, in proportion to the whole debts and the whole capital stock, and not a liability to each creditor until he is paid, limited only by the amount of stock held by the stockholder. The statute gives no authority or jurisdiction to make more than one judgment, the first apportionment and judgment remaining unreversed. *N. Y. Ct. of Appeals*, 1868, *Matter of Hollister Bank of Buffalo*, 27 *N. Y.* 393.

49. Where the charter of an incorporated company provides that the stockholders shall be liable for its debts, and that a creditor may, after judgment obtained against the corporation, and execution returned unsatisfied, sue any stockholder and recover any demand, such stockholders are liable in an original and primary sense, like partners or members of an unincorporated association. Their liability is not *created* by the statute of corporation. *N. Y. Ct. of Appeals*, 1847, *Corning v. McCullough*, 1 *N. Y.* (1 *Comst.*) 47. See also, *Worrall v. Judson*, 5 *Barb.* (*N. Y.*) 210; *Abbott v. Aspinwall*, 26 *Id.* 202; *Wickson v. Nesmith*, 46 *N. H.* 871; and *Coleman v. White*, 14 *Wis.* 700.

50. Hence such an action is not within the operation of a statute of limitations which restricts the commencing of an "action upon a statute, for a forfeiture or cause the benefit and suit whereof is limited to the party aggrieved," to three years,—but it is rather to be deemed within that provision of the statute which regulates the bringing of any "action founded on contract, express or implied." *N. Y. Ct. of Appeals*, 1847, *Corning v. McCullough*, 1 *N. Y.* (1 *Comst.*) 47.

51. Under a statute forbidding certain contracts and declaring them void if made, and declaring every stockholder, &c., in a corporation making any such contracts, to be individually liable for the whole amount thereof, the individual liability is not to be regarded as on contract. None of the tests

afforded by the definition of a contract apply to such a case. The liability is in the nature of a penalty, and the statute of limitations is to be applied accordingly. *Ohio Supreme Ct.* 1857, *Lawler v. Burt*, 7 *Ohio St.* 340.

52. A bank charter restricted the amount of indebtedness, which the bank might incur, to a certain sum, and provided that, in case of that limit being exceeded, the directors who participated in the violation should be individually liable for the excess, at the suit of creditors. *Held*, that the remedy thus given to creditors against the directors was a penal action, and not an action of contract, and that the measure of damages was the amount of the excess of the debts incurred by the directors, above the statute limit. *Ohio Superior Ct.* 1858, *Sturges v. Burton*, 8 *Ohio St.* 215.

53. Where a personal liability for the debts of a corporation is imposed upon its officers for their failure to perform a duty with which they are charged by the charter, such liability is in the nature of a penalty. *N. Y. Supreme Ct.* 1868, *Bird v. Hayden*, 1 *Rob.* 383; 2 *Abb. Pr. N. S.* 61.

54. The distinction between such a liability and the liability of stockholders for the debts of the company,—explained. *Id.*

55. That a stockholder in an incorporated company is liable as principal and not as surety or guarantor,—see *Moss v. McCullough*, 7 *Barb. (N. Y.)* 279; *Moss v. Averell*, 10 *N. Y. (6 Seld.)* 449. Compare *Moss v. Oakley*, 2 *Hill*, 265; *Moss v. McCullough*, 5 *Id.* 131; *Mokelumne &c. Mining Co. v. Woodbury*, 14 *Cal.* 265.

56. A statute of a State (*e. g.* *N. Y. Laws* of 1845, 256, ch. 284), which provides that on the return of execution against a foreign corporation, unsatisfied, the creditor may sue any debtor to the corporation, the subscribers to its stock, shareholders, or any or all of them, and recover any sums to the amount due the plaintiff, "which such defendant or defendants could be liable to pay in any event in the State or government where such corporation is located," will not be construed as establishing any new liability on the part of stockholders or debtors of such corporations, but only as making a provision for subrogating creditors of the corporation in the State making the enactment, to such rights as the corporation itself, under the local law, or

the *lex loci contractus*, might have enforced against the stockholder or debtor. A plaintiff, under the terms of the act, must establish a present debt and liability to the corporation from the person sought to be charged—if as a stockholder, then, according to the *lex domicilii* of the corporation, and if under any other contract, then under the *lex loci contractus*. *N. Y. Ct. of Appeals*, 1862, *Seymour v. Sturges*, 26 *N. Y.* 134.

57. Creditor also a stockholder. In an action by a creditor of a corporation, to recover the amount of his debt from stockholders, under a statute provision making the stockholders jointly and severally liable for the debts of the corporation until the cash capital is paid in, it is a good defence that such creditor himself, at the time of acquiring his demand against the corporation, was a stockholder therein. Under such a statute, the personal liability of members is to be regarded as that of partners until complete compliance with the statute; and subject, upon prosecuting each other, to all the provisions of law attaching to that relation; one of those rules being that one member of a partnership cannot maintain an action against his copartners for a debt due from all. *N. Y. Com. Pl. Sp. T.* 1862, *Wait v. Ferguson*, 14 *Abb. Pr.* 379.

58. A creditor of a manufacturing or mining corporation, organized under the general law (*Laws* of 1848, ch. 40), may, notwithstanding he is himself a stockholder therein, maintain an action against another stockholder to enforce the individual liability of the latter for the debt. The stockholder's liability in this case is not that of a partner, but merely a liability to the amount of the stock. [15 *Wend.* 548.] *N. Y. Superior Ct.* 1859, *Woodruff &c. Works v. Chittenden*, 4 *Bow.* 406. Compare *Remington v. King*, 11 *Abb. Pr.* 278.

59. In such an action the defendant cannot, unless he is himself a creditor of the corporation, reduce the amount of the plaintiff's recovery by showing that he is a stockholder. He cannot enforce his right to contribution in such an action. *Id.*

60. Remedy to reach unpaid stock. A stockholder of a bank, who has not paid his subscription, is regarded by the courts of Mississippi as in the nature of a trustee to the extent of the amount due from him, and cannot object the statute of limitations,

to a bill by a creditor of the bank, to subject that amount to his debt; at least the statute does not begin to run until the bank ceases to elect a directory. *Miss. Ct. of Errors*, 1851, *Payne v. Bullard*, 23 *Miss.* 88. See also *Adler v. Milwaukee &c. Co.* 13 *Wis.* 57.

61. Where a party subscribes for a certain number of shares of stock in a bank, and does every thing that is necessary in order to secure his right to the stock, but does not fully pay it up, he cannot afterward, by any agreement with the bank, diminish the number of his shares, so as to affect the rights of existing creditors of the bank; and in a contest between such stockholder and a judgment creditor of the bank, the former cannot avoid his obligation to pay up all the stock for which he originally subscribed, by proof that the number of his shares has been reduced by an agreement with the directory, unless he shows, affirmatively, that such reduction took place before the claim of the creditor originated. *Miss. Ct. of Errors*, 1851, *Payne v. Bullard*, 23 *Miss.* 88.

62. Surrender of part. A holder of scrip who by arrangement with the company takes full scrip for a part and relinquishes the residue to the company, may yet be held by creditors of the corporation, to pay in full for the original number of shares. *N. Y. A. V. Chan. Ct.* 1845, *Mann v. Pentz*, 2 *Sandf. Ch.* 257.

63. When a stockholder of a corporation is garnished as a debtor of the company, and answers that he has paid all the calls made by the company upon him, he cannot be made responsible upon the residue of his stock, upon which no calls have been made. *Ala. Supreme Ct.* 1843, *Bingham v. Rushing*, 5 *Ala. N. S.* 403.

64. Under section 7 of the *N. Y.* act of 1811, the obligation is not to pay one creditor to the exclusion of the rest, nor to pay any creditor the amount of his debt absolutely. It is to devote a particular fund,—viz. an amount equal to the stockholder's share of the stock—to the payment of "all debts due and owing by the company at the time of its dissolution." Though one creditor may sue for his debt in an action at law and get a judgment, equity declares and adjusts the liability precisely according to the statute, by devoting the fund to the payment

of all debts due from the corporation, &c. *N. Y. Supreme Ct.* 1853, *Walker v. Crane*, 17 *Barb.* 119.

65. Insurance companies. Where the charter of an insurance company provides that each member is bound to pay for losses and expenses, in proportion to the amount of his deposit note, although the assessment should, in the first instance, be made upon all the deposit notes, good and bad, and upon their original amount, and an effort should be made to collect all, yet the makers of those notes which are collectible may be charged with the shares of those whose notes are not collectible. The statute should be so construed as to afford complete indemnity to persons insured. *N. Y. Ct. of Appeals*, 1855, *Bangs v. Gray*, 12 *N. Y. (2 Kern.)* 477.

66. Effect of certificate. Section 9 of the Pennsylvania act of April 7, 1849 (*P. L.* p. 566), relating to manufacturing corporations, provide that the stockholders of a company organized under the act shall be individually liable for the corporate debts to the amount remaining unpaid on their shares of stock. The company's certificate showed unpaid stock to a considerable amount, and there was no evidence that such amount had ever been paid. In an action against the stockholders to recover a debt to the amount of such stock remaining unpaid,—*Held*, that it was no defence that the stockholders had paid for the shares held by them, and that the unpaid balance had been subscribed for by them as the agents of the corporation, which it was to hold and sell at pleasure for its benefit. The certificate which showed that the original stock was subscribed by and for the stockholders, was conclusive as between them and the public, and could not be contradicted by any undisclosed arrangements between the stockholders and the corporation. *Pa. Supreme Ct.* 1863, *Allibone v. Hager*, 46 *Pa. St.* 48.

67. The stockholders of the company sued represented one-third of a larger company whose property and stock had been divided into three portions, the defendants taking one-third of the original stock as the capital of their new organization.

Held. That the certificate thereof, setting forth the reduction of the capital stock, and that so much was paid, leaving a balance unpaid, could not be contradicted by show-

ing that the stock was all paid; and that the knowledge by the plaintiffs of the division of the original company did not prevent them from recovering from the defendants for the full amount of stock unpaid after a failure to recover from the company of which they were members. 2. That the defendants could not plead the statute of limitations either against the plaintiffs or against the company for calls upon the unpaid stock, though it had not been called in for eleven years: for the subscriptions unpaid were not only held in reserve to be drawn as needed, but the statute declares the continuing of the stockholders' liability until the whole amount of the capital stock shall have been paid in. *Id.*

68. The omission of the stockholders of a manufacturing corporation in Pennsylvania, to pay their stock in money, in pursuance of the provisions of the statute relating to such corporations, is a violation of the law, in fact and in substance, and the immunity furnished by the charter is void as against creditors, as to all stockholders who were voluntarily parties to this wrong; but not as to stockholders who came into the corporation by transfer of stock, and without knowledge of the violation of law under which the charter was obtained. *Pa. Supreme Ct.* 1863, *Paterson v. Arnold*, 45 *Pa. St.* 410.

69. In an action of assumpsit by the creditors of an association incorporated under the Pennsylvania manufacturing law of 1849, against the stockholders under the personal liability clause of that statute,—*Held*, to be competent for the plaintiffs to show, 1. That the certificate required by law in order to obtain the charter was essentially untrue; or, 2. That a portion of the stock was not paid in money according to law, if the declaration recognizes the validity of the charter as granted. *Pa. Supreme Ct.* 1863, *Paterson v. Arnold*, 45 *Pa. St.* 410.

70. In Massachusetts, the members of a manufacturing corporation are jointly and severally liable for the debts and contracts of the corporation, until the whole amount of the capital stock shall have been paid in; and the certificate of the officers of such a company prescribed by the Revised Statutes, stating the amount of the capital fixed and paid in, sworn to and recorded, within the time prescribed in the registry of deeds, is conclusive evidence, for the stockholders, of

the facts therein stated, so as to exempt them from personal liability for the subsequent debts of the company. *Mass. Supreme Ct.* 1843, *Stedman v. Eveleth*, 6 *Metc.* 114.

71. Filing. Under section 6 of the N. Y. act for formation of ocean steamship companies, even if a stockholder has fully paid up his subscription, or is an assignee of full paid stock, he is responsible up to the entire amount he holds, for all debts contracted while he owned the stock, until not only the stock is fully paid up, but also until the certificate is duly filed. *N. Y. Superior Ct.* 1856, *Eaton v. Aspinwall*, 6 *Duer*, 176; 3 *Abb. Pr.* 417; 13 *How. Pr.* 184.

72. Posting by-laws. Under the statute of Iowa requiring corporations to publish their organization, amount of stock, and conditions of its payment, its name and place of business, &c., and to post up a copy of their by-laws in their office, &c., and providing that its failure to comply substantially with the "requisitions in relation to organization and publicity, renders the individual property of all the stockholders liable for the corporation debts;"—*Held*, that a failure to post the by-laws as required, was not such a failure to comply with the requisitions as to organization and publicity, as would render an individual stockholder liable for a corporation debt. *Iowa Supreme Ct.* 1862, *McKellar v. Stout*, 14 *Iowa*, 359.

73. Reclaiming illegal dividends. A common law action as for a tort does not lie against stockholders of a corporation who after the expiration of the charter, receive dividends out of the capital stock, by reason of which there were not corporate funds sufficient to redeem outstanding demands held by the plaintiff, unless fraud be shown. The remedy, if any, is in equity. *Mass. Supreme Ct.* 1819, *Vose v. Grant*, 15 *Mass.* 505; *Spear v. Grant*, 16 *Mass.* 9.

74. A company may recover money paid to a director of the company as dividends illegally declared; and a judgment creditor of such company, with a return of his execution unsatisfied, may, when the company is insolvent, subject to the satisfaction of his demand money so paid, and need not bring the other creditors and stockholders of the company before the court. *Ky. Ct. of Appeals*, 1843, *Gratz v. Redd*, 4 *B. Monr.* 178. Compare *Osgood v. Laytin*, 5 *Abb. Pr. N.* S. 1.

See *Lexington & Ohio R. R. Co. v. Bridges*, 7 B. Monr. 556.

75. A plaintiff who has no claim against a manufacturing company, cannot sustain a suit against a director thereof for assenting to a dividend impairing the capital of the company. *Pa. Supreme Ct.* 1853, *Hill v. Frazier*, 22 Pa. St. 320.

76. As to the liability of stockholders to repay capital withdrawn,—see also *Lewis v. Robertson*, 13 Smed. & M. 558.

77. No legislation can constitutionally operate to impose, retrospectively, increased individual liabilities upon the stockholders of a corporation. Their liabilities must be found in statutes passed previous to the charter.* *Mass. Supreme Ct.* 1861, *Commonwealth v. Cochituate Bank*, 5 Allen, 42. See also *Gray v. Coffin*, 9 Cush. 192; *Marcy v. Clark*, 17 Mass. 335; *Child v. Coffin*, 17 Id. 64.

78. A statute making the stockholders of existing banks liable for the debts of the bank is a valid law as to debts thereafter contracted, and binding, to that extent, upon all stockholders, subsequent to the passage of the law. *Ma. Supreme Ct.* 1846, *Stanley v. Stanley*, 26 Me. 191. Compare *Wheeler v. Frontier Bank*, 23 Me. 308.

79. The provision of the N. Y. constitution (1846, art. 8, § 7), imposing personal liability upon the stockholders of banks, is not limited to banks thereafter to be created, but applies equally to all banks of circulation existing from January 1, 1850. The language of the provision does not discriminate between the two classes. The purpose of the provision requires that it should be extended to both. The proceedings of the convention of 1846 show that this was intended. [Debates, Argus ed. 664-666.] *N. Y. Ct. of Appeals*, 1860, *Matter of Lee & Co.'s Bank*, 21 N. Y. 9; *Matter of the Reciprocity Bank*, 22 N. Y. 9. And see *Came v. Brigham*, 39 Me. 35. Compare *Megargee v. Wakefield Manuf. Co.* 48 Pa. St. 442.

80. Impairing obligation of contracts. The provision of the constitution of 1846 (art. 8, § 7),—imposing a personal liability on stockholders of banks,—may be applied to banking corporations then already existing, without violating the prohibition of the federal constitution relative to the obligation of contracts. It is true that the

charter of a corporation is to be regarded as a contract between the State and the members of the corporation [4 Wheat. 518; 8 Id. 2; 8 How. Pr. 183; 16 Id. 369; 18 Id. 331], and that the change of a State constitution can no more be allowed to impair the obligation of contracts than a statute; but the provision of the New York general banking law, and of the various bank charters, reserving to the legislature the right to alter or repeal them, renders the constitutional prohibition inapplicable. *N. Y. Ct. of Appeals*, 1860, *Matter of Lee & Co.'s Bank*, 21 N. Y. 9; *Matter of the Reciprocity Bank*, 22 Id. 9; *U. S. Supreme Ct.* 1861, *Sherman v. Smith*, 1 Black, 587. And see *Case of Empire City Bank*, 8 Abb. Pr. 192; 18 N. Y. 199; *Hawthorne v. Calef*, 2 Wall. S. Ct. 10, overruling *Coffin v. Rich*, 45 Me. 507.

81. The fact that the articles of association of the corporation exempted the stockholders from personal liability, makes no difference. It is not competent to the stockholders thus to establish a private contract which can put them beyond the power of the legislature under the reservation contained in the general act. *N. Y. Ct. of Appeals*, 1860, *Matter of Lee & Co.'s Bank*, 21 N. Y. 9; *Matter of the Reciprocity Bank*, 22 Id. 9.

82. That the individual liability of stockholder may be extended by legislatures after his death,—see *Bailey v. Hollister*, 26 N. Y. 112.

For the provisions of the constitutions of the several States, in reference to the individual liability of corporators,—see CONSTITUTIONS.

83. Waiver by agreement. A clause of the constitution providing for the personal liability of stockholders of corporations, may be waived, by the insertion of a stipulation to that effect in all the contracts of the corporation. This is a question of private right rather than of public policy. *Cal. Supreme Ct.* 1864, *French v. Teschemaker*, 24 Cal. 518.

84. Agreement to be liable. A contract by a member of a corporation to pay a debt due from it, where no personal liability is imposed by the charter or general law, must be in writing, in conformity to the statute of frauds, the debt being the debt of another. *Mass. Supreme Ct.* 1847, *Trustees of Free Schools in Andover v. Flint*, 13 Metc. 539.

85. Corporation continuing partnership business. If, upon the incorporation of an association or partnership, the corporation

* Not applicable, when a general power to alter the charter is reserved to the legislature.

continues the business under the partnership name, without giving notice of the dissolution of the partnership, the members are liable upon contracts made in such business with third persons ignorant of the dissolution. *Mass. Supreme Ct.* 1885, *Goddard v. Pratt*, 16 *Pick.* 412. Compare *Whitwell v. Warner*, 20 *Vt.* 425.

2. *Who are liable as stockholders or members.*

86. English joint stock company. A shareholder in a mining company, which is not strictly a trading partnership, to whom it did not appear that any interest in the mine had passed, who had not held herself out to the world as partner or interfered with the management, and had not signed any deed, but had merely paid money on her shares, is not liable for goods and work applied to the mine. *K. B.* 1857, *Vice v. Anson*, 7 *Barn. & C.* 409; 1 *Mann. & R.* 118; 8 *Car. & P.* 19. Compare *Braithwaite v. Skofield*, 9 *Barn. & C.* 401; *Ellis v. Schmoeck*, 5 *Bing.* 521; 3 *Moore & P.* 220.

But if there is some evidence to show the defendant had a legal interest in the mine, a verdict may be sustained. *C. P.* 1841, *Steigenberger v. Carr*, 3 *Man. & G.* 191; *Scott, N. R.* 466.

87. The mere circumstance of applying for shares and paying the deposit thereon, does not constitute a person partner in the concern, he not having signed the deed, nor done any other act to identify himself with the company; and the fact of his name appearing (without his knowledge or assent) in the book, shown to the plaintiffs, is not a holding of himself out to the world as partner, so as to render him liable for the debt. *K. B.* 1880, *Fox v. Clifton*, 4 *Moore & P.* 676; 6 *Bing.* 776.

88. Although the words of the prospectus of a joint stock company may speak of the concern as one then formed, in the present tense, yet, if the language of the whole imports something to be done before the partnership is formed, signing it does not amount to a representation that the signer is a member, and liable as a partner. *K. B.* 1827, *Bourne v. Freeth*, 9 *Barn. & C.* 632; 4 *Mann. & R.* 512.

89. Incorporation abandoned. Where persons are induced by false representations to unite in the formation of a corporation under the act, and as a step thereto sign and file a certificate in the office of the county

clerk, but discover the falsehood of the representations, and abandon the enterprise of forming the corporation before any stock is subscribed, and without filing any certificate in the office of the secretary of state—these facts exempt them from liability for debts contracted in the name of the company, on a subsequent default to make and file the annual certificate. They are not liable because:

1. There never was any such company, and the defendant never did any thing to create any belief that the company was organized.

2. At the time the alleged default arose, the company had been abandoned. *N. Y. Superior Ct.* 1861, *Squires v. Brown*, 22 *How. Pr.* 35.

90. Forfeiture of charter. Although by the rule of the common law a forfeiture of a bank charter may extinguish all debts due by the corporation, yet the collateral undertaking of the stockholders, under a section of its charter which makes them individually liable for the redemption of the notes of the bank, will remain unimpaired. *Ga. Supreme Ct.* 1856, *Robinson v. Lane*, 19 *Ga.* 337.

91. Statute description. No one can be charged as a stockholder under a statute imposing individual liability, who does not come within the description given in the statute of the persons declared chargeable. *N. Y. Ct. of Appeals*, 1867, *Diven v. Lee*, 36 *N. Y.* 802; *S. C.* 34 *How. Pr.* 197.

92. The word "subscriber" in a statute imposing personal liability upon the subscribers to the capital stock of an incorporated company,—*Held*, to include stockholders of every description. *Ill. Supreme Ct.* 1868, *Gay v. Keys*, 30 *Ill.* 413.

93. Charter. In an action to enforce the individual liability clauses of the Pennsylvania general manufacturing law of April 7, 1859, and supplements, the charter of incorporation is *prima facie* evidence that all the persons named therein were, at the commencement, members of the corporation. *Pa. Supreme Ct.* 1868, *McHose v. Wheeler*, 45 *Pa.* 34, 32.

94. If a person named in the certificate and charter as a member, afterward acts as such, or, upon discovering the use of his name, does not promptly disavow it, he cannot evade liability as a member, by showing that he was not one in fact, and never paid any stock: the disavowal must be imme-

diate, or he will be deemed as ratifying the relation as to creditors. *Id.*

95. Certificates not necessary. If one have subscribed for stock and agreed to pay for it in a particular manner, and have attended the meetings of the corporation, and have admitted himself to be a member, these facts are sufficient to prove him to be such, without the issue of a certificate of stock. [16 Mass. 94; 14 Wend. 20; 2 Price Ex. 93; 34 Me. 366.] *Me. Supreme Ct.* 1853, Chaffin v. Cummings, 37 Me. 76. See also, Chase v. Merrimack Bank, 19 Pick. 564.

96. To make one an owner of stock in a corporation, it is not sufficient that he was named in the act as one of the corporators, but on the other hand it is not necessary that a certificate should have been issued, or that the fact should appear on the books of the corporation. It may be proved by parol. *Id.*

97. The stock books of a corporation are not admissible in evidence, in an action by a creditor to charge a stockholder with the liability for a debt of the corporation, as proof that he was a stockholder, at least unless it be shown that the entries were made by the proper officer of the corporation. [Citing many authorities]. *N. H. Supreme Ct.* 1858, Haynes v. Brown, 36 N. H. 545.

98. A shareholder in a corporation having a by-law providing that transfers of stock should be noted on the stock book and "subscribed by members," must be considered as owner of his shares, so as to be personally liable until he has so transferred them upon the books. *Me. Supreme Ct.* 1852, Fowler v. Ludwig, 34 Me. 455.

99. The statutes of Maine (Rev. Stat. ch. 76) are to be construed as making the transfer books of a corporation conclusive, so far as creditors of the corporation are concerned, as to who are to be considered stockholders. *Me. Supreme Ct.* 1846, Stanley v. Stanley, 26 Me. 191.

100. A transfer of stock on the books of an incorporated company, is merely to pass it to the transferee. It is as good between the parties, if made without consideration, as if made with it. It does not profess to disclose the consideration which induced it, nor the terms of the contract from which it emanates, and of which it is the consumma-

tion. *Md. Ct. of Appeals*, 1847, Hall v. United States Ins. Co. 5 Gill, 484.

101. The defendant's name appearing on the stock book as a stockholder, is presumptive evidence that he is so, and, in an action against him, the burden of proof is thrown on him. *N. Y. Supreme Ct.* 1861, Hoagland v. Bell, 36 Barb. 57.

102. That a book list of members containing the requisite particulars to charge one person as a member, is competent against him, although it does not contain all the names of the original subscribers,—see London Grand Junction Railway Co. v. Graham, 1 Q. B. 271.

103. Power of the court to rectify the register of a joint stock company, by removing therefrom the name of a shareholder, upon the ground of a material variance between the prospectus of the company and the memorandum of association subsequently registered—considered. *Re Russian Ironworks Co.* (Stewart's Case), 1 Law Rep. Ch. App. 574; 12 Jur. N. S. 755; 14 Law Times, N. S. 817.

104. Conduct showing membership. In an action on the general liability for all the debts of the corporation—*e. g.* in case of omission to pay in the capital stock—the presence of the defendant at the organization of the company, and his subsequent election and action as president, is evidence that he was a stockholder; the absence of the proper documentary evidence being first accounted for. *N. H. Supreme Ct.* 1858, Haynes v. Brown, 36 N. H. 545.

105. A party who has paid an installment on his subscription to the capital stock of a corporation, and voted at an election of officers, is concluded from denying that he was a stockholder. *Cincinnati Superior Ct.* 1855, Dayton & Cincinnati R. R. Co. v. Hatch, 1 Disney, 84.

106. Attending in the character of a shareholder a meeting of the members of a joint stock company is sufficient *prima facie* evidence that the party is a shareholder, to charge him with an engagement entered into by a majority of the shareholders present at a subsequent meeting, which he does not attend. *C. P.* 1843, Harrison v. Heathorn, 6 Mann. & G. 81. See also Beech v. Eyre, 6 Scott, N. R. 327; 5 Mann. & G. 415.

107. Explanation of conduct. Where a subscriber to the capital stock of a railroad

company, who has been released from the obligation of his subscription, subsequently votes at an annual election for directors, is himself elected a director, acts as director and as stockholder, and pays money to the company—his acts are evidence of a subscription of some kind, and in the absence of proof of a special contract, warrant the inference that he has reassumed his original obligation. But they are shorn of their importance where a special contract accounting for them is shown. *Pa. Supreme Ct.* 1861, *Pittsburgh & Connellsville R. R. Co. v. Stewart*, 41 *Pa. St.* 54.

108. *Informalities.* In an action against a corporation and some of its stockholders, seeking to charge them individually, mere irregularities in the mode of becoming stockholders cannot avail such individuals, if the corporation had waived such informalities, and recognized them as legal stockholders. *Mass. Supreme Ct.* 1852, *Holyoke Bank v. Goodman Paper Manuf. Co.* 9 *Cush.* 576.

109. The individual members of a manufacturing corporation in Pennsylvania, when sued, cannot set up their own faults or mistakes of organization as a defence against creditors. *Pa. Supreme Ct.* 1863, *McHose v. Wheeler*, 45 *Pa. St.* 82.

110. The defendant had subscribed for additional stock, and his subscription was procured by the directors, after the organization of the company, without the intervention of the commissioners named in the charter. The defendant had afterward acted as a director. *Held*, that by so doing he should be deemed to have waived all objection, if any existed, to the regularity of his subscription. *Conn. Supreme Ct.* 1862, *Lane v. Brainard*, 80 *Conn.* 565, 576.

111. *Wrongful issue.* In proceedings under the statute of 1849 (Laws of 1849, §40, ch. 226), to enforce the individual liability of a stockholder in a bank for its debts, one who actually purchased stock and voluntarily suffered his name to appear as stockholder on the books, cannot impeach his title to the stock,—*e. g.* by objecting that the stock was improperly purchased by the bank and re-issued to defendant. *N. Y. Ct. of Appeals*, 1860, *Matter of Reciprocity Bank*, 22 *N. Y.* 9. Compare *Berry v. Matthews*, 1 *Ga.* 519.

112. *Illegal contract.* A stockholder cannot resist apportionment on the ground that he became such by an illegal contract, or that he was induced to become such by fraud of the di-

rectors. *N. Y. Ct. of Appeals*, 1858, *Case of Empire City Bank*, 8 *Abb. Pr.* 192; 18 *N. Y.* 199.

113. *Subscription in child's name.* The owner of stock does not escape his liability therefor, by taking it in the name of infant children. *Ky. Ct. of Appeals*, 1881, *Roman v. Fry*, 5 *J. J. Marsh.* 684; 1880, *Castleman v. Holmes*, 4 *Id.* 1.

114. *Subscription by agent.* J. subscribed for stock in a manufacturing corporation on behalf of W., and at his request the stock was apportioned to J. for W., and W. paid the installments thereon. The stock, however, was never transferred to W. on the books.

Held, 1. That W. was a stockholder within the provisions of the statute, rendering stockholders personally liable for debts.

2. That he was to be deemed a stockholder from the date of the apportionment, and not merely from the date when the certificate was issued. As soon as the corporation has any property or valuable franchise, the members become stockholders in proportion to their respective interests. The certificate or scrip is not a transfer from the corporation, but merely evidence of an existing right. *N. Y. Ct. of Appeals*, 1860, *Burr v. Wilcox*, 22 *N. Y.* 551.

115. That a married woman may be individually liable for the debts of a corporation (a New York banking association) in which she is a stockholder,—see *Matter of Reciprocity Bank*, 22 *N. Y.* 9.

116. *Husband.* A married woman, with the consent of her husband, the defendant, purchased with the proceeds of her separate estate, shares in a joint stock banking company, and was registered as owner. Her husband received some dividends and signed receipts as the agent of his wife; he also attended a meeting of the company, at which none but shareholders were entitled to be present. The company's deed of settlement provided, that the husband of any female shareholder should not be a member in respect of such shares, but should be at liberty to sell them, or at his option to become a member on complying with certain requisitions, which the defendant, in this case, did not do. *Held*, that the defendant was not a member of the company for the time being for the purpose of execution by *sc. fa.* on a judgment against the public officer under the 7 *Geo. 4, ch. 44, § 13. Eoch.* 1849, *Ness v. Angus*, 3 *Eoch.* 805; 6 *Dowl. & L.* 645.

117. Superfluous subscriptions. Where all the capital is taken, at the time the articles of incorporation are filed, and the certificate of incorporation made and filed as required by law, specifies the names of all the stockholders, no subsequent subscribers, by merely writing their names in the corporation book with a number of shares affixed, can acquire a right to any shares, or become stockholders, and liable as such for its debts. When the stock is once all taken no person can become a stockholder, except by transfer. *N. Y. Supreme Ct.* 1866, Lathrop v. Kneeland, 46 *Barb.* 482.

118. Such a superfluous subscriber is not stopped, by his signature of the books, from denying that he was a stockholder. *Id.*

119. A forfeiture by a corporation under the terms of its charter, of stock partially paid up, dissolves the connection of the stockholders, with the corporation; and a creditor cannot charge them with the amount unpaid.* *Ala. Supreme Ct.* 1847, Allen v. Montgomery R. R. Co. 11 *Ala. N. S.* 437. And see Macauley v. Robinson, 18 *La. Ann.* 619.

120. Incomplete subscription. A member cannot avoid liability on the ground that the whole amount of stock, on the taking of which his subscription was conditioned, had not been taken, if he authorized the directors to proceed with a smaller amount. *Exch.* 1840, Tredwen v. Bourne, 6 *Mees. & W.* 461; 4 *Jur.* 747. See also *Wisswell v. Starr*, 48 *Me.* 401.

121. Non-payment. Though the statute provide that when the ten per cent. is paid the company shall be a body corporate, this does not allow members, when sued on their individual liability, to raise the objection that ten per cent. was never paid. *N. Y. Supreme Ct.* 1857, Abbott v. Aspinwall, 26 *Barb.* 303.

122. Prior debts. Under a general provision making stockholders liable to creditors until the whole capital is paid in, &c.,—a stockholder is not liable for debts contracted before he became a stockholder. A transfer of the stock does not operate as a transfer of the liability, nor can the creditor be deemed to trust persons who, when the

credit is given, are not yet stockholders. *N. Y. Supreme Ct.* 1854, Tracy v. Yates, 18 *Barb.* 152.

123. One who agrees to take stock and gives the corporation a note, to be, when paid, in full of the price, is not a stockholder, within the rule, until payment of the note and issue of the certificate. *Id.*

124. Effect of transfer. A stockholder who in good faith transfers his stock to another person, who is accepted by the corporation as the holder of the stock, is discharged from future liability to the corporation or its creditors.* *Ala. Supreme Ct.* 1847, Allen v. Montgomery R. R. Co. 11 *Ala. N. S.* 437. See also, *Cowles v. Cromwell*, 25 *Barb.* 413.

Otherwise if the transfer is to the corporation itself. *Matter of Reciprocity Bank*, 22 *N. Y.* 9.

125. Ignorance. Where shares are transferred without the transferee's consent, and without consideration, such transferee can only be made liable, on the ground of fraud, as where he acquiesces, for the benefit of a third person, and to injure the creditors of the bank. *Ga. Supreme Ct.* 1856, Robinson v. Lane, 19 *Ga.* 337. Compare *Matter of Reciprocity Bank*, 22 *N. Y.* 9.

126. Intent to evade liability. Under a statute rendering the members of a corporation individually liable, a transfer of the interest in the stock, not made *bona fide*, but for the purpose of defeating the creditors of the company, is fraudulent and void, as against them. *Mass. Supreme Ct.* 1821, Marcy v. Clark, 17 *Mass.* 330; *N. Y. Supreme Ct.* 1862, Otis v. Harrison, 36 *Barb.* 210; *Conn. Supreme Ct.* 1866, Paine v. Stewart, 33 *Conn.* 516. But compare *Hyatt v. Whipple*, 37 *Barb.* 595; *Holyoke Bank v. Burnham*, 11 *Cush.* 183. And see *Dauchy v. Brown*, 24 *Vt.* 197.

127. Form. A mere transfer of interest not enough to exonerate a transferor from liability unless the statute formalities have been complied with in the transfer. *Ga. Supreme Ct.* 1857, Force v. Dahlonga Tanning & Co. 22 *Ga.* 86.

Otherwise where the language of the statute prescribing the mode of transfer is permissive. *Mass. Supreme Ct.* 1837, Eames v.

* A forfeiture declared after the time for making it had passed,—*Held*, unauthorized, and ineffectual to discharge the shareholder. *Stewart's Case*, 1 *Law Rep. Ch. App.* 511; 12 *Jur. N. S.* 611; 14 *Law Times, N. S.* 841.

* That the transferee may be liable, though the transfer be made after the bank was insolvent, and notwithstanding the charter continues the liability of the transferor,—see *Robison v. Beall*, 26 *Ga.* 17.

Wheeler, 19 *Pick*. 442. Compare Bank of Utica v. Smalley, 2 *Cow*. 770.

128. Pledge. The person liable as a stockholder is the one in whose name the stock stands on the books of the bank, although in fact it belonged to another person, who had transferred it to the person charged, by way of hypothecation. *N. Y. Ct. of Appeals*, 1858, Case of Empire City Bank, 8 *Abb. Pr.* 192; 18 *N. Y. (4 Smith)*, 199; *Mass. Supreme Ct.* 1858, Holyoke Bank v. Burnham, 11 *Cush.* 183. See also, Crease v. Babcock, 10 *Metc.* 525; Grew v. Breed, *Id.* 569.

129. Thus on a transfer of stock to one of a firm, by its debtor, as security,—*Held*, that the partner who took the transfer was liable to a creditor of the company to the full amount of the stock, though the firm debt was less than the amount of the stock. *N. Y. Ct. of Appeals*, 1854, Rosevelt v. Brown, 11 *N. Y. (1 Kern.)* 148.

130. Assignees in insolvency. The words of the Massachusetts statute rendering the estates in the hands of trustees, &c., liable, are to be deemed controlled by the subsequent statutes regulating proceedings in insolvency, which define the debts which may be proved, but do not enumerate among them claims upon the individual liability of corporators; so that the assignees of an insolvent estate, a portion of whose assets consists of shares in a manufacturing corporation, are not liable for the debts of the corporation. *Mass. Supreme Ct.* 1852, Gray v. Coffin, 9 *Cush.* 192; 1858, Bangs v. Lincoln, 10 *Gray*, 600.

131. Executors and administrators. The statute is not to be extended by construction to authorize the proceedings to be continued against an executor of the deceased stockholder who was summoned; nor, *it seems*, can an executor be summoned originally. Proceedings are to be regarded as abated by the stockholder's death, and the peculiar form of liability does not survive. *Mass. Supreme Ct.* 1860, Dane v. Dane Manuf. Co. 14 *Gray*, 488. Compare Crease v. Babcock, 10 *Metc.* 525; Grew v. Breed, *Id.* 569; Noble v. Halliday, 1 *N. Y. (1 Comst.)* 380.

132. The Massachusetts statute of 1808, ch. 65, regulating manufacturing corporations, does not by itself render the estate of a deceased member liable for the corporate

debts; and his administrator cannot be allowed, in a probate account, for payments to make up a deficit found in the corporate funds, on closing the concern, unless perhaps for payments to redeem valuable shares from a lien. *Mass. Supreme Ct.* 1830, Ripley v. Sampson, 10 *Pick.* 371.

133. Conflicting principles as to time of membership. Where the charter declared that "the stockholders shall be personally liable for all debts contracted by the corporation," those who were stockholders at the time a debt was contracted are the ones who are liable for it, not those who were stockholders at the time of suit brought. Upon general principles, this should be the rule, apart from the form of the statute provision; for the nature of the individual liability is that of partners unincorporated. *N. Y. Supreme Ct.* 1842, Moss v. Oakley, 2 *Hill*, 265; *S. P. Chancery*, 1842, Judson v. Rosalie Galena Co. 9 *Paige*, 598; *N. H. Supreme Ct.* 1855, Chesley v. Pierce, 32 *N. H.* 388.

Otherwise under the N. Y. banking laws. *N. Y. Ct. of Appeals*, 1858, Case of Empire City Bank, 8 *Abb. Pr.* 192; and under the N. Y. manufacturing companies act of 1811, Cushman v. Shepard, 4 *Barb.* 113.

134. Where the words of the statute are general, making the persons and property of the members "at all times liable for all debts due" by the corporation, they are to be construed with reference to the general policy of the act, and the purpose of such charter, *viz.* the effective power of the corporation and the security of the creditors; and they must be held to apply only to those persons who are members at the time the suit is brought. [8 *Mass.* 472.] *Conn. Supreme Ct.* 1823, Middletown Bank v. Magill, 5 *Conn.* 28. But compare Southmayd v. Russ, 8 *Id.* 54.

135. A provision that "all the members" shall be liable, extends to those who are members when the liability of the company is sought to be enforced. *Mass. Supreme Ct.* 1846, Curtis v. Harlow, 12 *Metc.* 8.

136. A provision that an execution against a corporation may be levied upon the body or estate of any member, must be understood of such as were members at the time of the commencement of the action; and does not apply to the estate of one who died before suit brought. *Mass. Supreme Ct.* 1820, Child v. Coffin, 17 *Mass.* 64. Com-

pare *Marcy v. Clark*, 17 *Mass.* 330; *Middle-town Bank v. Magill*, 5 *Conn.* 57; *Nixon v. Green*, 11 *Esch.* 550; 33 *Eng. L. & Eq.* 522, *Dodgson v. Scott*, 2 *Esch.* 457.

137. Under the provision of the Revised Statutes of Massachusetts—that all the members of an incorporated company shall be jointly and severally liable in certain cases for the corporate debts,—a member of a manufacturing company may be liable for the debts of the company contracted while he was a member, although he ceases to be such before the debts become payable; but he is not liable for debts contracted before he became a member, if his membership expires before the debts become payable, and action brought. *Mass. Supreme Ct.* 1853, *Holyoke Bank v. Burnham*, 11 *Cush.* 183. See also *Milldam Foundry v. Hovey*, 21 *Pick.* 417, 454.

138. Under a provision declaring that for the non-payment of bills on demand, "the original stockholders, their successors, assigns, and the members of the corporation," should be liable, such only of the original stockholders, their successors, &c., as were members at the time payment was refused, are liable. *Mass. Supreme Ct.* 1812, *Bond v. Appleton*, 8 *Mass.* 472. Compare *McDougald v. Bellamy*, 18 *Ga.* 44.

139. Delay. A court of equity will not hold the stockholders and debtors of an insolvent corporation liable for the payment of its debts, in favor of creditors who have suffered a number of years, during which important changes have taken place, to elapse without attempting to enforce their rights. *Ohio Supreme Ct.* 1837, *Gilmore v. Bank of Cincinnati*, 8 *Ohio (Hamm.)*, 62; 1861, *Merchants' Bank v. Bliss*, 18 *Abb. Pr.* 225; 21 *How. Pr.* 365.

140. Goods delivered. That a member of a joint stock company is not liable for goods ordered to be made before he became a member, although such goods were delivered afterward,—see *Whitehead v. Barron*, 2 *Moody & R.* 248.

141. Rent. That no action can be maintained against a stockholder for the rent due on a lease, for a quarter which commenced after he had sold his shares, although the lease was executed before such sale, because rent does not accrue to the lessor as a debt until the lessee has enjoyed the use of the

land,—see *Bordman v. Osborn*, 23 *Pick.* 295. And compare *Lewis v. Ryder*, 13 *Abb. Pr.* 1.

142. Where negotiable paper is accepted in settlement of a corporation debt, and a receipt given therefor, the original liability is regarded by the law of the State of Maine, as extinguished; and the date of the note must be regarded as the day of the accruing of the liability in a subsequent action thereon against stockholders, &c. *Me. Supreme Ct.* 1860, *Miliken v. Whitehouse*, 49 *Me.* 527; *S. P. Ky. Ct. of Appeals*, 1830, *Castleman v. Holmes*, 4 *J. J. Marsh.* 1. But compare *Moss v. McCullough*, 7 *Burb. (N. Y.)* 279.

143. Where a note, payable within one year, is given by a corporation in satisfaction of an old debt, the note creates a new indebtedness, and on a suit brought on the note, against the company within one year after the same becomes due, the stockholders are personally liable under a statute—*a. g.* *N. Y. Laws of 1848*, 60, *ch.* 40, § 24—which provides that no stockholder shall be individually liable for a debt which is not to be paid within one year from the time it is contracted, nor unless suit is brought against the company within one year after it is due. *N. Y. Supreme Ct.* 1866, *Fisher v. Marvin*, 47 *Burb.* 159.

3. Liability of officers.

144. Officers' and members' liability distinguished. The policy of the Massachusetts statutes, at least previous to the general statutes of 1862, is to make a distinction between the liability of stockholders and that of officers, making the former liable only after judgment recovered against the corporation, and the latter, who have a personal knowledge of the affairs of the corporation, liable in the first instance. And under § 31 of the Revised Statutes, chap. 88, giving a remedy by a bill in equity against either, the bill does not lie against stockholders until after judgment recovered in an action at law against the corporation. *Mass. Supreme Ct.* 1862, *Cambridge Water Works v. Somerville Dyeing & Bleaching Co.* 4 *Allen*, 239. See also *Denny v. Richardson*, 4 *Gray*, 274.

145. Who is a director. A joint stock company's deed provided that no person should be a director unless he held stock of the company to the amount of £100. The company's business was managed by a London board of directors, but they had branch

offices in country places, managed by "provincial directors." *Held*, that one of the latter, who was not in fact a shareholder, was not a director within the meaning of the deed, and was not a contributory.* *Chancery*, 1863, *Exp. Cotterell*, 82 *Law J. N. S.* 66.

146. *Informalities.* Persons elected and acting as officers of a corporation, may incur the statute liability for corporate debts, if an act of incorporation has been granted by the legislature, although the call for the first meeting was not signed by a majority of the persons named in the charter, as required by statute (*Mass. St.* 1855, ch. 140). *Mass. Supreme Ct.* 1866, *Newcomb v. Reed*, 12 *Allen*, 362.

147. *Evidence.* Under the New York manufacturing companies act (*N. Y. Laws* of 1848, 56, ch. 40), in an action to charge trustees of a manufacturing corporation with a debt of the company, the production of the certificate of incorporation filed and certified by the county clerk, naming the defendants as trustees, together with proof that the company acted under the corporate name, that they became indebted to the plaintiff, and that no annual statement was filed as required by the act, makes out a *prima facie* case. *N. Y. Superior Ct.* 1861, *Squires v. Brown*, 22 *Hov. Pr.* 85.

148. *Nature of the liability.* Under a provision that the directors under whose administration an excess of debts shall happen, shall be liable for the same in their private and individual capacity, and may be sued for the same, &c.,—the liability of the directors is joint, and not several. Since, neither absence nor dissent constitutes a legal excuse for a director under the charter, all the directors must be joined in any action to enforce this liability, unless, at least, sufficient averment be made showing why others were left out. *Ga. Supreme Ct.* 1855, *Banks v. Darden*, 18 *Ga.* 318.

149. Under 1 *N. Y. Rev. Stat.* 602,—providing that the directors shall be liable, &c., if the debts of a corporation exceed three times its paid stock,—if the total amount of

the debts exceed, at any time, three times the amount of the stock then actually paid in, the directors, under whose administration it was incurred, except only those whose dissent was entered on the minutes, or who were absent when the indebtedness was incurred, are liable for such excess to all its creditors upon its dissolution, without reference to the question as to when the creditors' demand accrued. Since such directors are liable to the corporation during its existence, the provision which continues the same liability in favor of creditors, after dissolution, should be construed to extend to any creditor who might, before dissolution, have participated in the benefit to be derived by an action by the corporation. *N. Y. Supreme Ct.* 1848, *Tallmadge v. Fishkill Iron Co.* 4 *Barb.* 382.

150. An action to enforce the personal liability for debts of a corporation, imposed by its charter upon its officers for failing to perform a duty with which they are charged is an action upon a statute for a penalty or forfeiture within the meaning of the statute of limitations. *N. Y. Superior Ct.* 1863, *Merchants' Bank of New Haven v. Bliss*, 1 *Rob.* 391. Compare to the contrary *Neal v. Moultrie*, 12 *Ga.* 104.

151. Since such liability is *quasi* penal, the courts of this State have no jurisdiction to enforce it where the charter creating it was granted by another State. *N. Y. Superior Ct.* 1863, *Bird v. Hayden*, 1 *Rob.* 383; 2 *Abb. Pr. N. S.* 61.

152. *How related to stockholders' liability.* Where the charter of a bank provided that in case of an over issue of bills, "the directors, under whose administration it shall happen, shall be liable for the same in their private and individual capacity," and also that the stockholders should be liable for the ultimate redemption of all the bills issued, the liability of the stockholders for such excess is not secondary and collateral to that of the directors, so as to require their personal liability to be first exhausted. *Ga. Supreme Ct.* 1855, *McDougald v. Lane*, 18 *Ga.* 444.

153. And the bills will not be required to be deposited in court before final judgment or payment of the same. *Id.*

154. *Assumed powers.* Although it appears that the charter of a corporation created primarily for making insurance, does not

* That persons who have accepted office as directors of an unincorporated company may be held liable on its contracts though they had absented themselves and not authorized making such contract,—see *Doubleday v. Muskett*, 4 *Moore & P.* 750; 7 *Bing.* 110.

As to the rule respecting officers not members, in the case of an unincorporated company. See *Greenup v. Barbee*, 1 *Babb.* 320; *Johnson v. Goulet*, 3 *C. R. N. S.* 569.

extend to confer banking powers, yet as between the corporators and the officers of the company, the fact that the latter have (in good faith) assumed to exercise banking powers, does not render them individually liable to the corporators for losses which may be incurred as a remote consequence of their having done so. *N. Y. V. Chan. Ct.* 1833, *Scott v. Depeyster*, 1 *Edu. Ch.* 513.

155. False representations. The directors of an insurance company who fraudulently permit false statements to be officially made and published by the president and secretary, as to assets and condition, by which the plaintiff was induced to insure in the company, are not saved from personal liability to him, when the company proves insolvent and his claim worthless, by reason of the fact that they were acting officially; nor is it any objection to a recovery that there was no privity between them, for plaintiff's claim against the directors is not on the contract, but for the fraud. *Conn. Supreme Ct.* 1862, *Salmon v. Richardson*, 80 *Conn.* 360.

156. False certificate. The officers of a manufacturing corporation cannot, under *Mass. Rev. Stat. ch. 38, § 28*, be made individually liable for its debts for making a false certificate that the capital stock has been paid in, unless it is willfully false. *Mass. Supreme Ct.* 1858, *Stebbins v. Edmands*, 12 *Gray*, 203.

157. Surrendering capital. If a bank allows its stockholders to withdraw its funds to the amount of their subscriptions, and to use them, without security, in their private business, such conduct is a fraud on its creditors, which renders the directors liable in equity for the amount so withdrawn, and each agent who participated in the fraud individually responsible for the amount traced to his hands and all profits made from its use. *Ala. Supreme Ct.* 1854, *Bank of St. Mary's v. St. John*, 25 *Ala. N. S.* 566.

158. Spurious stock. Directors of a corporation, who issue unauthorized certificates of stock, are not liable directly to ultimate purchasers of the stock, who made no contract with them, and did not act on their representations. The remedy of such purchasers must be against those from whom they directly purchased. *N. Y. Supreme Ct.* 1860, *Seizer v. Mali*, 32 *Barb.* 76; 11 *Abb. Pr.* 129.

159. Questions of time. In an action to enforce the personal liability of a director of a New York manufacturing corporation for a default in filing the annual report required by Laws of 1848, 57, ch. 40, § 12, the plaintiff must show that the debt was contracted during a period while the company were in default, or that it existed during a subsequent default. *N. Y. Ct. of Appeals*, 1858, *Garrison v. Howe*, 17 *N. Y.* 458.

160. The default of a manufacturing corporation organized under the New York manufacturing companies' act of 1848, to publish during the first twenty days of January the statement required by section 12 of that act, imposes a personal liability upon the trustees in office for all corporate debts existing while they are in default. A trustee coming into office after a default is personally liable for such debts only as are contracted while he is in office, and before a report is made and published. *N. Y. Ct. of Appeals*, 1860, *Boughton v. Otis*, 21 *N. Y.* 261; *S. P. N. Y. Com. Pl.* 1860, *Shaler & Hall Quarry Co. v. Brewster*, 10 *Abb. Pr.* 464.

161. "Annually." Under a statute requiring the certificate to be filed annually, "in the month of," &c., the directors are not liable for debts incurred after the expiration of the corresponding month in a subsequent year. *Mass. Supreme Ct.* 1863, *Bond v. Clark*, 6 *Allen*, 361.

162. Time of wrongful act. A trustee of a moneyed corporation will not be held liable personally for a debt of the corporation, upon the ground of wrongful acts of the defendant committed before the corporation incurred any obligation to the plaintiff. To sustain a recovery, it should appear that the plaintiff was a creditor of the corporation at the time the violation of law is alleged to have been committed. *N. Y. Supreme Ct.* 1861, *Ogden v. Rollo*, 18 *Abb. Pr.* 300.

163. The liability for omission to make annual report is in the nature of a penalty, and attaches to the individuals in office at the time, and not to the office. Trustees who have neglected to report are not personally liable for debts contracted after they ceased to hold office as such. *N. Y. Supreme Ct.* 1861, *Shaler & Hall Quarry Co. v. Bliss*, 34 *Barb.* 309; *S. C. sub nom.* *Quarry Co. v. Bliss*, 12 *Abb. Pr.* 470; *S. P. Andrews v. Murray*, 33 *Barb.* 354; *N. Y. Superior Ct.* 1861, *Squires v. Brown*, 22 *How. Pr.* 35.

164. To whom liable. Under the usual provision making the directors of a corporation, liable for all the debts of the corporation, in case of certain acts—such as declaring dividends during insolvency, or creating debts in excess of capital—the directors are not liable to stockholders in respect to the injury to the corporate property by such acts. The object of the provision is simply to protect creditors. *Mo. Supreme Ct.* 1854, *Kritzer v. Woodson*, 19 *Mo.* 327.

165. Double liability. Since the Massachusetts statutes do not make any provision for summoning in the officers of a corporation in a writ issued against a bank, a *superseedeas* on an execution as respects stockholders does not affect any liability that may rest upon them in the capacity of officers. *Mass. Supreme Ct.* 1855, *Denny v. Richardson*, 4 *Gray*, 274.

166. That the losses of a joint stock company, declared by articles of copartnership to be deemed sufficient to dissolve the company, include such losses as may arise through the fraud of the directors, and for which the directors may be personally liable,—see *North British Bank v. Collins*, 28 *Eng. L. & Eq.* 7.

167. Public officers. As to the distinction between the individual and the official or corporate liability of local officers, such as overseers of the poor, &c. See *Flower v. Allen*, 5 *Cow.* 654, 670.

168. Remedy. The officers of a manufacturing corporation who have neglected to file the certificates of organization, &c., required (*Mass. St. ch. 60 § 24*), are not liable, in an action at law for the debts of the corporation contracted during the continuance of such neglect; but the remedy against them, as provided in *ch. 68, § 17*, is by a suit in equity. *Mass. Supreme Ct.* 1866, *Cochrane v. Reed*, 18 *Allen*, 455.

169. Contribution. A trustee of a corporation, who by his negligence in failing to perform an act required of him by law, has become liable for the debts of the corporation, and has paid some of them, cannot sue his co-trustees, though they are jointly liable with him, either for the whole amount [8 *Hill*, 188], or for contribution to the amount which he has paid on the joint liability. [11 *Paige*, 18; 2 *Johns. Ch.* 181; 1 *Mees. & W.* 504.] *N. Y. Supreme Ct.* 1861, *Andrews v. Murray*, 88 *Barb.* 354.

4. *What debts and demands are within the statute.*

170. What is a "demand." A charter made the stockholders liable for all debts contracted by the company, and declared that any person having a "demand" against it might recover from any stockholder, providing, however, that the stockholder should not be liable to pay, in all, more than the amount of stock held by him when the "debt" accrued. *Held*, that the word "demand," in its connection was to be construed as importing a demand arising upon contract, and that a stockholder was not liable for damages arising from a neglect of the corporation to repair a bridge. *N. Y. Supreme Ct.* 1835, *Heacock v. Sherman*, 14 *Wend.* 58.

171. What is a "debt." A claim for damages against a corporation, arising from the negligence or misfeasance of its servants, is not a "debt" of the corporation within the meaning of the provisions of a general law concerning corporations, making stockholders jointly and severally liable in case of the failure of the corporation to give notice annually of all its existing debts. These provisions are of a penal character. *Mo. Supreme Ct.* 1858, *Cable v. McCune*, 26 *Mo.* 371. To similar effect *Cable v. Gaty*, 34 *Mo.* 573.

172. A judgment for costs against a manufacturing corporation is a "debt" of the corporation (within the provisions of *N. Y. Laws of 1848, 57, ch. 40, § 12*, rendering trustees personally liable in certain cases, for debts of the corporation.)* *N. Y. Com. Pl. Sp. T.* 1859, *Andrews v. Murray*, 9 *Abb. Pr.* 8.

173. "Debts and contracts." Under a statute declaring a liability for all "debts and contracts" it is not necessary that the claim against the corporation should be liquidated, in order to charge a stockholder. *N. H. Supreme Ct.* 1858, *Haynes v. Brown*, 86 *N. H.* 545.

174. An unliquidated claim for damages is a debt, within such a statute. *Mass. Supreme Ct.* 1839, *Mill Dam Foundry v. Hovey*, 21 *Pick.* 417, 454.

175. Foreign contracts. The members of a corporation established under the laws of Massachusetts are liable upon contracts

* But compare on this mooted question, *Lewis v. Ryder*, 13 *Abb. Pr.* 1; and *Belmont v. Coleman*, 21 *N. Y.* 96.

entered into by the corporation in another State, with citizens of that State, in like manner and to the same extent, as upon contracts entered into in the State where the corporation is created, with the citizens of that State. *Mass. Supreme Ct.* 1862, *Hutchins v. New England Coal & Co.* 4 *Allen*, 580.

176. Contributories on winding up. At the formation of an insurance company, it was resolved, that no director should be personally liable for the salaries of the officers, and that no officer should obtain payment for his services until a sufficient sum should have been obtained by the funds of the company for that purpose. *Held*, that though the members of the committee were not personally liable, yet they were bound to contribute as members to the payment of the salaries.* *V. Chan. Ct.* 1850, *Exp. Cope*, 1 *Eng. L. & Eq.* 87; 20 *Law J. N. S.* 28; and see *Exp. Terrell*, 8 *Eng. L. & Eq.* 64; 15 *Jur.* 1078; 21 *Law J. N. S.* 222.

177. Wages. A provision of a general railroad act which makes stockholders of a company "jointly and severally liable for all debts due and owing to any of its laborers and servants, for services performed for such corporation,"—construed as operating to provide for the payment of the immediate servants, laborers, and employees of the company itself, in contradistinction to the laborers employed by contractors in the construction of the railroad, or of any part of the work. *N. Y. Supreme Ct.* 1857, *Gallagher v. Ashby*, 26 *Barb.* 143.

178. A contractor with a railroad company for the construction of a part of its road, is not a "laborer" or a "servant" within such a provision. The intention of the legislature was to throw a special protection around that class of persons who should actually perform the manual labor of the company. *N. Y. Ct. of Appeals*, 1862, *Akin v. Wasson*, 24 *N. Y.* 482. *N. Y. Supreme Ct.* 1860, *Boutwell v. Townsend*, 87 *Barb.* 205. Compare *Bill v. Spaulding*, 8 *Allen*, 485.

179. A. contracted with the defendants for the construction of a part of their railroad. B. by an agreement with A. contracted to do a portion of the work, and employed the plaintiff as a laborer thereon. *Held*,

that B. was a contractor within the meaning of the act, and the plaintiff could maintain an action under it against the company. *N. Y. Ct. of Appeals*, 1855, *Kent v. N. Y. Central R. R. Co.* 12 *N. Y.* (2 *Kern.*) 628.

180. All persons employed in the service of the company who have not a different, proper and distinctive appellation, such as officers and agents of the company, are "servants" of the company, within the statute. *N. Y. Supreme Ct.* 1857, *Conant v. Van Schaick*, 24 *Barb.* 87.

181. Bank bills. For the rules applicable to the liability to the holders of bank bills, bought at a discount under agreement not to circulate, or bought at usurious discount from the bank, or in case of the appointment of a receiver, and an injunction forbidding payment, or in case of neglect to present the bills to a receiver,—see *Grew v. Breed*, 10 *Metc.* 569.

182. Member of a coal club,—*Held*, liable on a contract signed by the secretary, for purchase of coals when there were not sufficient funds in the hands of the treasurer to pay for them. *C. P.* 1857, *Cockerell v. Aucompte*, 2 *C. B. N. S.* 440.

183. Debts ultra vires. The stockholders of a corporation do not become liable as partners, on notes given by the treasurer of the corporation, merely because after organizing under the act of incorporation, no corporate business is transacted, or because the notes were given for debts beyond the corporate authority of the company. *Mass. Supreme Ct.* 1853, *Trowbridge v. Scudder*, 11 *Cush.* 88.

184. Under a statute provision that the officer of a corporation making a false certificate shall be liable for all the debts of the corporation contracted while he is an officer or stockholder, such liability extends to a debt contracted by the corporation in favor of the officer during that period, so that he cannot recover upon it from the stockholders. *N. Y. Com. Pl. Sp. T.* 1862, *Wait v. Ferguson*, 14 *Abb. Pr.* 879.

185. Assignees. A general statute making the members liable "for all debts of the corporation" inures to the benefit of assignees of such debts, and they may maintain actions against the members. *Mo. Supreme Ct.* 1854, *Came v. Brigham*, 39 *Mo.* 85.

186. Indorsee. Upon a note of a corporation given for its debt upon simple contract, the indorsee of the original holder may

* A resolution of a provisional committee that they would not be liable for salaries,—*Held*, under the circumstances of plaintiff's assent thereto, to include his claim for work and labor as engineer. *Giles v. Smith*, 14 *Jur.* 384.

sue in his own name to enforce the individual liability of a stockholder; and an averment in the words of the charter creating such liability, that defendant was a stockholder at the time of the original contracting of the debt, may be deemed sufficient. *N. Y. Supreme Ct.* 1845, *Freeland v. McCullough*, 1 *Den.* 414.

187. **Creditor also stockholder.** In the absence of any statute provision on the point, a member who is a creditor of the corporation, has the same right as any other creditor, to secure his demand by attachment or levy on the corporate property, although he may be personally liable, by statute, to satisfy other judgments against the corporation. *Mass. Supreme Ct.* 1841, *Pierce v. Partridge*, 8 *Metc.* 44.

188. Under the Massachusetts statutes, a creditor of a corporation, who is also a stockholder individually liable for its debts, cannot attach on mesne process, or levy his execution in proceedings against the corporation upon the property of other stockholders also liable for its debts; but his sole remedy is a bill in equity against them for a contribution. *Mass. Supreme Ct.* 1855, *Thayer v. Union Tool Co.* 4 *Gray*, 75.

189. **Priority.** Section 10 of *N. Y. Laws* of 1850, 211, ch. 140,—which provides that stockholders in railroad corporations shall be individually liable for debts of their corporation in an action brought after judgment and execution unsatisfied against the corporation,—places all judgment creditors, whose judgments were not recovered for services rendered, upon an equal footing, without discrimination in respect to the times the debts were contracted, or the judgments therefor recovered. *N. Y. Supreme Ct.* 1856, *Rankin v. Elliott*, 14 *How. Pr.* 339, 377.

5. Extent of the liability.

190. **Who liable.** The original stockholders in a literary corporation, acting within the scope of its granted powers, are not to be made liable for the unauthorized acts of those who transcend the limits of such power; but the charter can furnish no protection from private responsibility to those who embark in, or assent to, such unauthorized acts. *Ohio Supreme Ct.* 1853, *Kearny v. Buttle*, 1 *Ohio St.* 362.

191. **Liability to the extent of stock.** A charter of an incorporated company which

declares that the individual property of each stockholder shall be bound for the debts of the corporation to the extent of his stock, subjects each stockholder, after the exhaustion of the general effects and capital stock, to individual liability to the extent of his stock. This liability is personal and cumulative. *Tenn. Supreme Ct.* 1850, *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.* 11 *Humph.* 1.

192. The individual liability of the subscribers for stock, to the corporation, is a part of the corporate property, and enforceable for the benefit of creditors. And a provision of the incorporating act, that each stockholder shall be liable for debts to the extent of his respective shares, gives an additional liability, to the extent of the amount of stock held, and not merely to the amount they have paid in. *N. Y. Ct. of Errors*, 1826, *Briggs v. Penniman*, 8 *Cow.* 387; *N. Y. Ct. of Appeals*, 1858, *Case of Empire City Bank*, 8 *Abb. Pr.* 192; 18 *N. Y.* 199.

193. A stockholder in a manufacturing or mining corporation, formed under the general law (*Laws* of 1848, ch. 40), is personally liable for its debts, in case of the capital not being paid in, only to the amount of his stock. *N. Y. Superior Ct.* 1859, *Woodruff & Beach Iron Works v. Chittenden*, 4 *Bow.* 406.

194. Under the Michigan plank road act of 1851, the stockholders of a plank road company are liable to the corporation creditors for demands other than for labor, to the full amount of their stock subscribed, and not merely for the balance unpaid on said stock. *Mich. Supreme Ct.* 1859, *Pettibone v. McGraw*, 6 *Mich.* 441.

195. What is "value" of stock. Under a provision that the persons and property of the stockholders shall be bound in proportion to the amount of shares, and the value thereof, which each holds, the value of the stock is to be estimated according to the par value fixed by the charter, rather than the actual or market value or amount actually paid in. *Ga. Supreme Ct.* 1851, *Lane v. Morris*, 10 *Ga.* 162.

196. **Proportionate liability.** That where a bank charter contains a personal proportionate liability clause, each corporator is liable for the redemption of the notes in circulation, in proportion to his individual share in the capital stock; and this, whether

the circulation be greater or less in amount than the capital of the bank,—see *Dozier v. Thornton*, 19 *Ga.* 325.

197. Reduction of stock. By an act supplemental to their charter the par value of the stock of a corporation was reduced from fifty to twenty-five dollars per share. The members of the company were made liable by charter for its liabilities to the amount of unpaid balances on their stock. Previous to the passage of such act, process in foreign attachment was issued against the company, but judgment in it was recovered after. Upon this attachment execution was issued, and a stockholder who had paid up in full the par value of his stock, as reduced, was summoned as garnishee. *Held*, that he was not liable under his original subscription for the remaining amount per share of his stock as originally taken, although he had given his note for it, the supplemental act having relieved him from liability to the corporation. *Pa. Supreme Ct.* 1867, *Woodhouse v. Commonwealth Ins. Co.* 54 *Pa. St.* 307.

198. Other actions pending, no defence. Under a statute making stockholders individually liable to creditors to the amount of their stock, but no more, it is not enough for a stockholder, when he is sued, to show that other creditors have moved against him before the plaintiff in that suit and others had laid the foundation for his liability to them. Nor is it enough to show that suits have been instituted and are pending on such prior claims. The liability must be legally established and fixed to an amount which exhausts it, and this must be *bona fide*, in order to bar the prosecution of other claims. *Me. Supreme Ct.* 1860, *Ingalls v. Cole*, 47 *Me.* 530.

199. Omission to assess other members. Under the New York bank laws, stockholders who are assessed no more than they would be if the referee assessed all the shares cannot object to his omission to assess certain shares. *N. Y. Supreme Ct. Sp. T.* 1859, *Matter of Reciprocity Bank*, 17 *How. Pr.* 323.

200. Interest. Where the charter of a bank makes the billholders only bound for the ultimate redemption of the bills, that is to say, after the assets of the bank and the capital stock have been exhausted, so that the remedy of the billholders against the stockholders is not through the corporation but directly against the stockholder, the

stockholder is not to be regarded as liable for interest until after a demand made upon him, for the reason that he does not know who is the holder of the bills of the corporation. *Ga. Supreme Ct.* 1851, *Lane v. Morris*, 10 *Ga.* 162.

201. Costs. The plaintiff, in a suit against a stockholder for a corporation debt, is entitled to costs in addition to the amount of the stock held by the defendant. Upon receiving notice required by the statute he may make payment of the sum for which he is liable without a levy or a suit, and if he neglects to do so costs are incurred by him by his own delinquency. *Me. Supreme Ct.* 1853, *Grose v. Hilt*, 26 *Me.* 22.

202. A charter provided that a person having any demand against the corporation, might sue any stockholder, &c., and recover the same with costs; but, that before suit shall be commenced upon any such demand judgment shall have been obtained against said corporation upon such demand. *Held*, that the action against a stockholder was based on the original demand, not on the judgment, so that he could not recover from the stockholder the costs of the judgment against the company.* *N. Y. Supreme Ct.* 1842, *Bailey v. Bancker*, 3 *Hill*, 188.

6. Discharges and set-offs.

203. Illegal act of company. A stockholder, sued for a debt of the company, cannot set up an illegal act of the company prior to the incurring of the debt. *N. Y. Supreme Ct.* 1835, *Spear v. Crawford*, 14 *Wend.* 20.

204. Acts objected to. If a member of a corporation objects to a transaction which is within its powers he is still not exonerated individually from the debts consequent on it, unless he seasonably sells out or withdraws as a member. *U. S. Circ. Ct. (Mass.)* 1847, *Sumner v. Marcy*, 3 *Woodb. & M.* 105.

205. Release. Where the directors are made by law liable to any creditor, and a stockholder redeems the bills of the bank, he becomes a creditor, and the directors are liable therefor to him: hence a release of the directors is a release of the stockholders in

* Limited to the special statute in this case, in *Withershead v. Allen*, 26 *Bord.* 661. And see *Fink v. Keesville Manuf. Co.* 10 *Polge*, 592.

such a case. *Ga. Supreme Ct.* 1856, Robinson v. Bealle, 20 *Ga.* 275.

206. That where the holder of such bills releases a stockholder, the amount of the consideration of the release is not material to the ascertaining of the proportionate liability of another stockholder. *Id.*

207. Where the liability of the stockholders (as under the New York act of 1811), is several and not joint [24 Wend. 478], a release by the creditor, given to one shareholder, does not release the others. *N. Y. Supreme Ct.* 1848, Bank of Poughkeepsie v. Ibbotson, 5 *Hill.* 461. Compare Robinson v. Bealle, 20 *Ga.* 275.

208. If, after the retiring of a stockholder from the corporation, by the sale of his stock, and due public notice thereof, as required by the charter, the creditor gives up old notes upon which the stockholder was liable, and takes new ones, especially if done for the purpose of absolving him from liability, and imposing it upon his successor in the stock, this operates as a complete release to him of the debt, both at law and in equity. *R. I. Supreme Ct.* 1859, New England &c. Bank v. Newport Steam Factory, 6 *R. I.* 154.

209. Extension of time to corporation. Stockholders, who by the charter are made jointly and severally liable for the debts of the corporation, are liable as principal debtors, and not as mere sureties, and therefore are not discharged by the creditor's extending the time of payment without their assent. *N. Y. Supreme Ct.* 1846, Harger v. McCullough, 2 *Den.* 119.

210. The abandonment of a railroad line is no defence to a suit for a stock subscription, in a proceeding supplementary to an execution against the company, inasmuch as the creditors of the company may pursue the stockholders, even after its corporate existence has ceased. *Ind. Supreme Ct.* 1861, Biah v. Bradford, 17 *Ind.* 490.

211. Assignment to secure. If a bank, whose charter makes the stockholders personally liable, makes an assignment which is ratified by the legislature, of sufficient assets to redeem its circulation, and those assets are afterward wasted, so that on *fiat facias* against the assignee, in favor of a billholder, *nulla bona* is returned, the stockholders are not discharged; but the billholder may have immediate recourse to them for payment.

Ga. Supreme Ct. 1856, Robinson v. Lane, 19 *Ga.* 837.

212. Sinking fund. A corporation, being indebted to the amount of seventy-five per cent. of its capital stock, voted that each stockholder should pay to the treasurer that proportion, to create a fund for discharging the debts, and should receive a certificate thereof. A and B were stockholders, and A, with B's knowledge, paid to the treasurer one hundred per cent. of his stock, and B seventy-five per cent., according to the vote, while many of the stockholders paid nothing. *Held*, in an action by B, who was also a creditor of the corporation (A and B being both stockholders at the time his debt accrued), against A, as a stockholder, under the statute rendering the stockholders liable to creditors for one hundred per cent. on their stock, that, as the vote contained no stipulation that stockholders making the payment voted should be released from the claims of creditors, these facts furnished no defence to the action, although B was present at and concurred in the vote. *Ma. Supreme Ct.* 1850, Fowler v. Robinson, 31 *Ma.* 189.

213. Limitations. Though a creditor of an incorporated company may be subrogated to its rights against a defaulting stockholder, yet the statute of limitations will bar his claim whenever it would that of the company. *S. C. Ct. of Appeals*, 1854, South Carolina Manuf. Co. v. Bank of South Carolina, 6 *Rich. Eq.* 227.

214. Consideration of judgment. A stockholder liable to execution for the debt of the corporation, cannot object to the validity of the levy, that the judgment was founded upon a contract in part usurious. *Ma. Supreme Ct.* 1853, Chaffin v. Cummings, 37 *Ma.* 76.

215. Variance. In an action against a member of a corporation, to recover a debt of the corporation, after judgment and execution exhausted against the company, the defendant cannot avail himself of a variance between the description of the corporation, in the writ and judgment and in the contract on which the judgment was recovered. *Ma. Supreme Ct.* 1854, Came v. Brigham, 39 *Ma.* 35.

216. Subscription induced by falsehood. Member discharged from liability to creditors by the fact that his subscription was made upon faith of a prospectus which

stated the objects of the company as being limited to banking; but the company was incorporated, without his knowledge, so as to include railway construction. *Scottish Universal Finance Bank (Ship's Case)*, 18 *Week. Rep.* 450.

217. Member of an incorporated company not released, at suit of a creditor, by fraud in the officers or agents of the company in procuring his subscription. *Saffold v. Barnes*, 39 *Mass.* 399.

218. Agreement. The directors of a company cannot, as against creditors, discharge the liability of a stockholder for his subscription by receiving property at an exaggerated valuation. Such transfer is to be regarded as payment only to the extent of the actual value of the property. *N. Y. Supreme Ct.* 1848, *Tallmadge v. Fishkill Iron Co.* 4 *Barb.* 382.

219. Judgment. When liability is extinguished by recovery of judgment against the corporation,—see *Handrahan v. Cheshire Iron Works*, 4 *Allen*, 396.

220. Set-off of advances. In an action against a stockholder in a manufacturing company, to enforce his personal liability for the debts of the corporation, it is a good defence that the stockholder has already paid, upon debts owing by the corporation a sum equal to the amount of his stock.* *N. Y. Ct. of Appeals*, 1858, *Garrison v. Howe*, 17 *N. Y.* 458.

221. A stockholder in a building association formed under ch. 122 of the N. Y. Laws of 1851, who has made advances or incurred liabilities for the benefit of the corporation, may, when sued upon his statutory liability by a judgment creditor of the corporation, set off such advances or liabilities in extinguishment thereof. As he is himself also a creditor, having the same right as the plaintiffs, and equally entitled with them to be paid, they have no greater equities to be paid than he, and the circumstance that one has obtained a judgment against the association before the other, does not change their legal rights. [8 *Cow.* 387.] *N. Y. Supreme Ct. Sp. T.* 1858, *Remington v. King*, 11 *Abb. Pr.* 278.

222. Directors who, by reason of permit-

ting the debts of the corporation to exceed the statute limit, have become liable to its creditors (1 *Rev. Stat.* 602, § 8), are entitled to a deduction for advances made by them to the company, as well against the demands of creditors after dissolution, as they would be against the demand of the corporation before dissolution. [8 *Cow.* 387.] *N. Y. Supreme Ct.* 1848, *Tallmadge v. Fishkill Iron Co.* 4 *Barb.* 382.

223. Where the defendants are sought to be charged, both as stockholders in respect of their unpaid subscription and as directors in respect of their misconduct, but plaintiffs are not deemed entitled to recover in the present suit, except upon one of these grounds,—the court will not allow defendants to set off their advances to the company against the liability on which a recovery is allowed. *Id.*

224. Action for accounting. One who is a stockholder in a corporation, the stockholders in which have become personally liable for the corporate debts, and who is also a judgment creditor of the corporation to an amount exceeding his liability as stockholder, may maintain an action against the corporation, its other stockholders, and its other creditors, to ascertain the rights and liabilities of the parties, and to set off his liability against his judgment, and to restrain other litigation among the parties and payments by the stockholders on their individual liability meanwhile. *N. Y. Supreme Ct. Sp. T.* 1861, *Geery v. N. Y. & Liverpool Steamship Co.* 12 *Abb. Pr.* 268.

225. The complaint in such an action should show that the plaintiffs were stockholders during all the time when the demands of the different creditors accrued. The time when the different stockholders acquired their stock, and the time when the demands of the creditors who are made defendants accrued, should be stated, or enough stated to show that all the defendants who are stockholders are liable to contribute to the payment of the demands of some of the creditors, and that some of the stockholders are liable to contribute to all the demands of all the creditors. The complaint must also show the grounds on which the stockholders are individually liable for the corporate debts. An allegation that the judgment creditors claim that the stock was not all paid in, &c., is not sufficient. *N. Y. Supreme*

* Otherwise under the assessment on a stockholder under the New York banking law. Case of *Empire City Bank*, 18 *N. Y.* 199.

Ct. Sp. T. 1861, *Geery v. N. Y. & Liverpool Steamship Co.* 12 *Abb. Pr.* 268.

7. Contribution between those individually liable.

226. Agreement to contribute. Certain stockholders of a manufacturing corporation signed an agreement to contribute in proportion to the amount of stock held by each respectively to the payment of all losses sustained by them through indorsements for the company. It was expected by those who signed the agreement that all the stockholders would sign it, but in fact a considerable number did not, and there was no stipulation that it should be signed by all. Some who signed were at the time insolvent and others had since become so. On a bill in equity, brought after the failure of the company, by one of the signers, who had paid a large amount upon indorsements for the company, to compel a contribution from the other signers of the agreement,—

Held, 1. That the obligation assumed by each of the signers, upon a fair construction of the instrument itself was to pay such proportion of the aggregate loss as his stock, owned at the time of executing the agreement, bore to the whole stock of the company, and not to the stock which was owned by the signers of the agreement.

2. That the share of each one being a fixed proportion of the whole loss, the proportion in which the solvent subscribers were to contribute was not affected by the insolvency of the others. *Conn. Supreme Ct.* 1861, *North v. Brace*, 30 *Conn.* 60. See also, *Andrews v. Callender*, 18 *Pick.* 484.

227. Where one of the signers, soon after the agreement was made, sold his stock and ceased to be a stockholder, but gave no notice to other subscribers that he should not consent to be holden for further liabilities,—*Held*, that he was not exempted from liability to contribute for losses incurred after he ceased to be a stockholder. *North v. Brace*, *supra*.

228. Where all the stockholders of a corporation execute and deliver to a creditor thereof their joint and several promissory note for money loaned to, and used by, the corporation, as between themselves they are co-sureties for the company. One of their

number, paying the note when it became due, may call upon his co-sureties for equal contributions as makers of the note. Their liability is not to be measured by their relative amounts of stock in such corporation. *N. Y. Ct. of Appeals*, 1866, *Coburn v. Wheelock*, 84 *N. Y.* 440.

229. The right of a stockholder who has paid, to require contribution from other stockholders, ought not to be extended by implication to cases where the claimant voluntarily paid the corporate debt when the statute did not make him primarily liable, unless it is shown that a judgment thereon has been obtained by the creditor against the corporation, and there has been a failure to satisfy the same on demand upon the corporation, or from property of the officers, or unless it appears that an attempt to collect the debt in the mode pointed out by the statute would have been unavailing, if made. *Mass. Supreme Ct.* 1861, *Cary v. Holmes*, 2 *Allen*, 498.

230. In Massachusetts a member of a manufacturing corporation, who voluntarily pays a company debt for which all are liable, has no claim upon the other members for contribution. *Mass. Supreme Ct.* 1833, *Andrews v. Callender*, 18 *Pick.* 484.

231. A suit in equity for contribution, brought by a member of a corporation, who has paid a debt of the corporation, against other members, cannot be maintained until the complainant has first applied and exhausted all property of the corporation bound to reimburse him. *Mass. Supreme Ct.* 1852, *Gray v. Coffin*, 9 *Cush.* 192.

232. In a bill in equity brought against the stockholders of a corporation for the purpose of charging them personally, upon their individual liability, for the debts of the corporation, an equitable contribution, if possible, will be made by the court. *N. H. Supreme Ct.* 1866, *Erickson v. Nesmith*, 46 *N. H.* 371.

233. Claim of officer against stockholder. Under the Massachusetts statutes, which make a distinction between the liability of officers and that of stockholders, an officer who has been compelled to pay a debt of the corporation, is not entitled to require contribution from the stockholders. The obligation of contribution rests upon community of duty or burden. *Mass. Supreme Ct.* 1863, *Stone v. Fenno*, 6 *Allen*, 579.

8. *Mode of procedure to enforce the individual liability.*

A. What is the appropriate remedy.

233. In general. Where a charter makes the responsibility for debts of a corporation to be exactly the same as if there were no incorporation, the remedy is as if there were no incorporation; and a *scire facias* does not lie against the members after judgment against the corporation. The action must be upon the original demand. *Conn. Supreme Ct.* 1819, *Southmayd v. Hubbard*, 8 *Conn.* 52; 1828, *Middletown Bank v. Magill*, 5 *Id.* 28.

234. Election of remedies. That the creditor may proceed either in equity or law where the charter is silent, and if at law, may elect any appropriate action,—see *Adkins v. Thornton*, 19 *Ga.* 325.

235. Statute remedy not exclusive. If the charter makes directors of a corporation individually liable, jointly and severally, for the corporate debts, though it also gives an action against them, the statute remedy by such action is not exclusive. The creditors of the corporation are creditors of the directors, and may pursue them, or their property, by the general methods of the law,—e. g. attachment. *N. Y. Supreme Ct.* 1839, *Exp. Van Riper*, 20 *Wend.* 614.

236. Assumpsit may be maintained in Maine by a creditor of a corporation against a stockholder, notwithstanding the statutory remedy is by an action on the case. *Me. Supreme Ct.* 1866, *Hathorn v. Calef*, 53 *Me.* 471.

237. The provisions of the New York statute of 1849,—allowing summary proceedings to enforce the personal liability of stockholders in banks,—are not unconstitutional, as conflicting with the provision that corporations may sue and be sued (Const. of 1846, art. 8, § 3). That provision is enabling, not restrictive; and does not preclude other forms of proceedings. *N. Y. Ct. of Appeals*, 1858, *Case of Empire City Bank*, 8 *Abb. Pr.* 192; 18 *N. Y.* 199.

238. Equity. That actions against stockholders for the debts of the corporation, since they involve complex contributions among the stockholders, are the proper subject of equity jurisdiction,—see *Atwood v. Rhode Island Agricultural Bank*, 1 *R. I.* 376.

239. The only remedy against stockholders of a manufacturing corporation who

are by statute jointly and severally liable for the debts of the corporation, is either to take their persons and property on a writ of attachment or execution issued against the corporation, or to bring a bill in equity against them; and no action at law will lie against the stockholders on a contract originally made with the corporation. *Mass. Supreme Ct.* 1851, *Knowlton v. Ackley*, 8 *Cush.* 93. See also, *Harris v. Dorchester*, 23 *Pick.* 112.

240. Accounting. Under a statute declaring that stockholders shall be “severally individually liable” to the creditors of a corporation to an amount equal to their stock, an action will not lie in favor of a creditor against the stockholders jointly, to have an accounting, and payment from each as may be proved liable. *N. Y. Supreme Ct.* 1861, *Young v. N. W. & Liverpool U. S. Mail Steamship Co.* 15 *Abb. Pr.* 69.

241. When judgment against corporation is first necessary. A creditor may maintain a bill in equity against officers to charge them with the debts of the company for which they are liable under Rev. Stat. ch. 38, § 25, without first recovering judgment against the corporation. This is authorized by the act, and is moreover the most convenient procedure. *Mass. Supreme Ct.* 1862, *Merchants' Bank v. Stevenson*, 5 *Allen*, 398. Compare, however, *Kinsley v. Rice*, 10 *Gray*, 325; *Exp. Wood*, 1 *Mont. D. & D.* 92; 9 *Law J. N. S. Bankr.* 20; *Davison v. Farmer*, 6 *Exch.* 242; 20 *Law N. S. Exch.* 177.

242. In Massachusetts, under Revised Statutes, ch. 38, § 31, a creditor of a corporation cannot maintain a bill in equity against stockholders, who are not officers thereof, to compel payment of his claim, until he has recovered judgment thereon in an action at law against the corporation, although the corporation is joined as a party defendant in the bill. *Mass. Supreme Ct.* 1862, *Cambridge Water Works v. Somerville Dyeing & Co.* 4 *Allen*, 239.

243. In order to charge the directors of the bank of East Tennessee personally, in accordance with section 12 of the charter of said bank, in case of certain violations of said charter, “voted for” or “sanctioned” by them, it is indispensable, 1. That such violations should be established in a direct proceeding in a court of record against the corporation; though it is not necessary that a forfeiture should have been first actually.

declared; and, 2. That the assets legal and equitable of the bank should have been exhausted. *Tenn. Supreme Ct.* 1858, *Johnson v. Churchwell*, 1 *Head*, 146.

244. A court of chancery has jurisdiction of such a proceeding against the bank, under act of 1846, ch. 55, though at common law forfeiture of a charter can only be enforced at law by *scire facias* or an information in the nature of a *quo warranto*. *Id.*

245. Subscribers for stock. The proper remedy of a creditor against delinquent stockholders to compel them to pay up unpaid subscriptions, independent of any statute liability, is by bill in equity, which should be brought on behalf of all the creditors who would come in, and, if practicable, all the stockholders must be made parties, so that no one may be compelled to pay more than his due proportion. *Wis. Supreme Ct.* 1860, *Addler v. Milwaukee &c. Co.* 13 *Wis.* 57.

246. When stockholders in a corporation, after calls regularly made, are in default, a judgment creditor has a complete remedy at law against them, and will not be allowed to proceed in equity. But as to such stockholders who are not in default to the corporation by reason of no call having been made, but whose subscriptions to the capital stock have not been paid, a court of equity has jurisdiction to compel payment at the instance of an execution creditor of the corporation. *Ala. Supreme Ct.* 1847, *Allen v. Montgomery R. R. Co.* 11 *Ala. N. S.* 437.

247. A section of a bank charter provided that "the persons and property of the stockholders shall be pledged and held bound, in proportion to the amount of shares and the value thereof that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by said bank, in the same manner as in common actions of debt; and no stockholder shall be relieved from such liability by sale of his stock, until he shall have caused to be given sixty days' notice of said sale, in some public gazette of this State." In an action against a stockholder to enforce this ultimate liability:—*Held*, that the liability of the stockholder to the billholder for the ultimate redemption of the notes of the corporation, survived the dissolution of the charter, and was not extinguished by the judicial forfeiture of the same; that the liability was a statutory one, in the nature of a specialty,

and was not barred until twenty years; that the value of the stock must be estimated according to the valuation put upon it by the charter, namely, one hundred dollars per share; that all the stockholders who had given notice according to the terms of the act, were exempt, unless the failure took place within six months thereafter; that all other stockholders, whether they had transferred their shares or not, were liable for the redemption of the bills; and that a judgment, *fi. fa.* and return of *nulla bona*, in a suit against the corporation, or its assignees, was sufficient to authorize the billholder to proceed against the stockholder personally. *Ga. Supreme Ct.* 1852, *Thornton v. Lane*, 11 *Ga.* 459.

248. In an action by a billholder against a stockholder of a bank, to enforce the ultimate liability of the latter to redeem the bills of the bank,—*Held*, that a transfer of stock made on the books of the bank, by the cashier, free access being secured to the defendant, by law, for the purpose of inspecting said books, was *prima facie* evidence of his ownership of the shares. *Id.*

249. Foreign corporation. Where the statutes of a State creating corporations make the stockholders liable, but without prescribing the mode of making this liability available to the creditors, the course of proceeding in another State, must be regulated by the laws of the State where the remedy is sought. *Ma. Supreme Ct.* 1841, *Drinkwater v. Portland Marine Railway Co.* 18 *Ma.* 35. Compare *Kelsall v. Marshall*, 1 *C. B. N. S.* 241.

250. A creditor of a foreign corporation, the stockholders of which are individually liable for its debts under the statutes of the State of its incorporation, by reason of the failure to pay in the whole amount of the capital stock, cannot maintain a bill in equity in Massachusetts, to enforce his claim against the stockholders, although some of them are residents of the latter State, and the bill is alleged to be brought in behalf of all the creditors. *Mass. Supreme Ct.* 1862, *Erickson v. NeSmith*, 4 *Allen*, 238.

251. A creditor of a corporation established in New York, under the statute of N. Y. of 1848, ch. 40, cannot maintain an action in Massachusetts to enforce his claim personally against a stockholder or officer of the corporation. *Mass. Supreme Ct.* 1866, *Halsey v. McLean*, 12 *Allen*, 438.

252. Suits against an association consisting of seven or more persons under the New York statute must be brought against the president or treasurer of such association, and the remedy against their joint property be exhausted before an action can be brought against the individual associates. *N. Y. Superior Ct. 1868, Robbins v. Wells, 1 Robertson, 666.*

253. Assignee in bankruptcy. The qualified liability of a member of a manufacturing corporation, for the debts of the corporation, is not a debt within the Massachusetts insolvent law of 1838, ch. 168, that can be proved against the estate of the insolvent. *Mass. Supreme Ct. 1841, Kelton v. Phillips, 8 Metc. 61.*

B. Effect of judgment against company.

254. As evidence. That a judgment recovered against a corporation is presumptive evidence of its indebtedness in a subsequent action against a stockholder to enforce his individual liability for the debt,—see *Belmont v. Coleman, 21 N. Y. 96*, and same case below, *1 Bosw. 186; Moe v. McCullough, 7 Barb. 279; Moss v. Averell, 10 N. Y. (6 Seld.) 449.*

255. A judgment against a corporation as acceptor of a draft is *prima facie* evidence, in an action against a stockholder on his individual liability, that the draft was properly drawn and accepted by a duly authorized officer of the company. *N. Y. Supreme Ct. 1861, Hoagland v. Bell, 36 Barb. 57.*

256. Upon trial of a motion for an execution against an alleged stockholder in a railroad corporation, upon a judgment rendered against the corporation, the judgment is conclusive evidence of the indebtedness of the corporation to the plaintiff, and its validity cannot be inquired into. But it is competent for the defendant to show that it has been discharged. *Iowa Supreme Ct. 1862, Corse v. Sanford, 14 Iowa, 235.*

257. In Maine a judgment against a corporation is binding upon the stockholders till reversed, and is conclusive upon them in a subsequent suit against them by the same plaintiff [*31 Me. 57; 39 Id. 85*]. *Ma. Supreme Ct. 1860, Milliken v. Whitehouse, 49 Me. 527.*

258. A stockholder in a railroad corporation, liable for the corporate debts, is so far privy to the proceedings to which the cor-

poration is a party, as to be entitled to bring error to reverse a judgment against it; but, until reversed, such judgment is valid as against him. *Me. Supreme Ct. 1854, Came v. Brigham, 39 Me. 35.*

259. Other proof. In an action against stockholders in a railroad corporation, to charge them personally, under the N. Y. act of April 15, 1854, the plaintiff must not only prove a judgment against the corporation, and that execution has been returned unsatisfied, but he must also prove that the debt for which the judgment was recovered was one of the sort named in the act. When this is done, the amount due on the execution is the rule of damages. *N. Y. Supreme Ct. 1857, Conant v. Van Schaick, 24 Barb. 87.*

260. What evidence of the indebtedness of a corporation upon drafts drawn upon and accepted by it, is sufficient to sustain an action against a stockholder to enforce his individual liability for the debt,—see *Belmont v. Coleman, 21 N. Y. 96.*

261. Rebutting evidence. In an action to charge trustees of a New York manufacturing corporation with personal liability for a debt of their corporation, a judgment against the corporation is complete evidence to prove the indebtedness. Whether execution has been returned or not is immaterial; if the judgment has been satisfied, that is matter of affirmative defence. *N. Y. Superior Ct. 1861, Squires v. Brown, 22 How. Pr. 35.*

262. Affidavit of defence. By the act of incorporation of a coal company, stockholders were made personally liable for all debts, &c., except loans. A judgment having been obtained against the company, on *scire facias* against stockholders, an affidavit of defence was filed, which did not aver that the debt sued for was a loan to the company, or that the defendants served were not stockholders. *Held*, that, as the judgment against the company was conclusive as to its rightfulness, the affidavit of defence was not sufficient. *Pa. Supreme Ct. 1862, Wilson v. Pittsburgh & Youghiogheny Coal Co. 48 Pa. St. 424.*

263. Creditor's bill necessary. Under a charter provision that the property of shareholders "shall at all times be liable and subject in law," in proportion to his interest, "to pay and satisfy all debts," &c., of the corporation, "upon a failure of the incorporate funds to discharge the same," judgment against the

corporation is not to be regarded as sufficient to authorize an execution against the shareholder; but a court of equity has jurisdiction to enforce a creditor's bill against the members of a corporation collectively, after judgment and return of execution against the corporation, concurrently with the cognizance of a court of law over separate actions against each of them, upon their several liability. *Ky. Ct. of Appeals*, 1836, *United States Bank v. Dallam*, 4 *Dana*, 574.

264. *Recovering back payment.* Where a demand is made upon a parishioner by an officer, to satisfy an execution against the parish, and it is paid by him, he may maintain an action against the parish to recover the same. *Mass. Supreme Ct.* 1838, *Keith v. Congregational Parish in Easton*, 21 *Pick.* 261.

C. Execution or other proceeding, founded on judgment against company.

265. *One judgment on several demands.* Under the Revised Statutes of Massachusetts, though a creditor who has two demands against a manufacturing company, one only of which the stockholders are liable to pay, recovers a single judgment on all the demands, yet he may levy his execution on the personal property of a stockholder, to the amount of the demand which the stockholders are liable to pay. *Mass. Supreme Ct.* 1843, *Stedman v. Eveleth*, 6 *Metc.* 114.

266. And if a person holds stock in a manufacturing corporation as trustee, and also holds other property on the same trust, such other property may be taken for the debts of such company, if the stockholders of the company are liable to pay its debts. *Id.*

267. *Municipal corporations.* An execution issued on a judgment against a municipal body, on a bond duly executed by that corporation imposing a legal obligation upon it, and constituting a valid debt against it, may be levied upon, and satisfied out of, the private property of an individual member of the corporation.* *Conn. Supreme Ct.* 1844, *Beardsley v. Smith*, 16 *Conn.* 368.

268. In Connecticut, the members of municipal corporations are by law considered as parties, individually as well as in their corporate capacity, to suits by or against the corporation, and are individually liable for its debts. But this doctrine does not affect

the established rules of evidence applicable to the competency of the confessions or admissions of such members. *Id.*

269. Where the inhabitants of towns are charged by law with the performance of duties, and made liable to a suit therefor, the individual members are liable to the satisfaction of the judgment. Hence an execution against the inhabitants of a school district may be levied on the property of an individual member of the district; and may be so levied, in the first instance, even if there be corporate property of the district, which can be taken and applied towards satisfaction of such execution. *Mass. Supreme Ct.* 1843, *Gaskill v. Dudley*, 6 *Metc.* 546.

270. Evidence that the property of a bank was in the hands of a receiver,—*Held*, to constitute sufficient proof, that corporate property could not be found, within the provision of the law exempting property of individual stockholders from payment of corporate debts, while corporation property could be levied upon for this purpose. *Conn. Supreme Ct.* 1866, *Paine v. Stewart*, 33 *Conn.* 516.

271. *Form of execution.* Under the statute (*Mass. act of 1818, ch. 65, § 6*), providing that an execution against a corporation, if not satisfied within a certain time after a demand on the president, &c., may be levied upon body or estate of members,—the execution served on a member's property &c., must be the same served on the officers of the corporation. A demand on one execution does not authorize an arrest or levy upon an *alias*,* nor an arrest or levy except against one who was a member at the time. *Mass. Supreme Ct.* 1820, *Leland v. Marsh*, 16 *Mass.* 389.

Otherwise by the act of 1817, ch. 183. 1821, *Marcy v. Clark*, 17 *Mass.* 330.

272. And upon the ordinary execution against the corporation, the sheriff may, by the instruction of the creditor, take the body of a stockholder; and it forms no objection to the arrest that, in his return, he described the person arrested as formerly an officer, without mentioning that he was taken as a stockholder. *Mass. Supreme Ct.* 1859, *Richmond v. Willis*, 13 *Gruz*, 182.

* Approved, Second Eccl. Soc. of Portland v. First Eccl. Soc. of Portland, 28 *Conn.* 255, 278.

* Compare *Hampson v. Weare*, 4 *Iowa* 13, where it is held that the execution should have a clause directing a levy on members' property.

273. **Previous demand.** Under statutes of Massachusetts of 1808, ch. 65, § 6, and 1817, ch. 183, an execution against a manufacturing corporation cannot be levied on the property of its members unless there has first been a demand on the president, treasurer, or clerk of the corporation, by the officer who holds the execution, to show to him property sufficient to satisfy and pay the sum due thereon; although on the original writ, property of the members was attached, after a default of the corporation to show to the officer who held the writ, property sufficient to satisfy the judgment which might be recovered thereon. *Mass. Supreme Ct.* 1842, *Stone v. Wiggin*, 5 *Met.* 316.

274. **Effect.** That an execution against a corporation, containing a clause directing a levy on the property of certain individual stockholders, does not make them "judgment debtors" within the meaning of the statutes relating to proceedings supplementary to execution,—see *Bailey v. Dubuque &c. R. R. Co.* 13 *Iowa*, 97.

275. **Return.** Under a statute which made the corporators individually liable on the return of no "property or estate" found of the corporation, a return of "no property found" is sufficient. Officers' returns are not required to be technically precise, moreover "property" comprehends estate. *Me. Supreme Ct.* 1846, *Stanley v. Stanley*, 26 *Me.* 191. And see *Chaffin v. Cummings*, 37 *Me.* 76.

276. **Execution protects officer.** If the only officer of a corporation who has any property has been adjudged liable in pursuance of the provisions of statute, as a stockholder, in a suit against the corporation for a debt, and judgment has been rendered and execution issued accordingly, he cannot maintain an action against a deputy sheriff for seizing his property upon the execution, after demand made upon the corporation, and refusal to pay the same. *Mass. Supreme Ct.* 1862, *Lee v. Dearborn*, 4 *Allen*, 164.

277. **Attachment.** A provision that the property of individual stockholders may be taken on execution where there is a deficiency of attachable corporate property or estate, does not authorize an attachment against the property of members before judgment against the corporation. *Me. Su-*

prems Ct. 1841, *Drinkwater* *Portland Marine Railway Co.* 18 *Me.* 35.

278. Under the English statutes allowing creditors of a corporation to require shareholders to show cause why they should not pay a judgment, a shareholder, whose name is properly inserted in the last return or memorial filed at the stamp office, cannot get rid of his liability under § 21 by a subsequent *bona fide* transfer of his shares. *C. P.* 1857, *Powis v. Harding*, 1 *C. B. N. S.* 533.

279. The registrar's return of the names of shareholders of a joint stock company under 7 & 8 Vict. ch. 110, being made in pursuance of a public duty, is sufficient *prima facie* evidence of the fact of those persons being shareholders to entitle a creditor to an order for execution against one so named, if he has opportunity to deny being a shareholder and does not. *Exch.* 1848, *Turner v. Metropolitan Live Stock Co.* 6 *Eng. Railw. Cas.* 45.

280. Since the statute is silent in respect to the mode of service of the notice required to be given to the shareholder, it need not be personally served on him. *Id.*

281. It is no answer to an application for a *scire facias* against a shareholder in a railway company, that the works have not been completed within the period limited by the special act, and that therefore the powers granted to the company "for making the railway, or otherwise in relation thereto," are at an end. *C. P.* 1858, *Edwards v. Kilkenney &c. Railway Co.* 3 *C. B. N. S.* 787.

282. On an application by a creditor, who had obtained judgment against a company, for leave to issue execution against a shareholder, under the 7 & 8 Vict. ch. 110, § 68,—*Held*, that a creditor seeking to avail himself of its provisions, must show that he has first used all due diligence to obtain satisfaction from the assets of the company, before he could be allowed to proceed for the whole debt against an individual shareholder. *Exch.* 1849, *Thompson v. Universal Salvage Co.* 6 *Eng. Railw. Cas.* 10; 6 *Dowl. & L.* 465.

283. The English statute (7 & 8 Vict. ch. 118, §§ 10, 18), providing that "it shall be lawful" for plaintiff to have execution by leave of court against members, after execution returned unsatisfied against a company, is to be construed as peremptory and not giving the court any discretion to refuse the execution when the creditor has complied with the conditions fixed in the statute.

C. P. 1856, *Morisse v. Royal British Bank*, 1 *C. P. N. S.* 87; 8 *Jur. N. S.* 137; 26 *Law J. N. S. C. P.* 62. And see *Hill v. London & C. Ass. Co.* 1 *Hurl. & N.* 398.

284. To a *scire facias* against a member of a joint stock company (7 & 8 Vict. ch. 110), to obtain satisfaction of a judgment and execution unsatisfied against the company, the plea was, 1. That due diligence had not been used to obtain satisfaction by execution against the effects of the company. 2. That no order of court had been obtained for leave to issue the *sci. fa.* *Held*, on demurrer, to a replication, that section 68 of the 7 & 8 Vict. ch. 110, was cumulative only, and did not preclude the plaintiff from proceeding by *sci. fa.* to obtain satisfaction of his judgment from the defendant under the 66th section. *Q. B.* 1851, *Marson v. Lund*, 18 *Q. B.* 344; 8 *Eng. L. & Eq.* 442; 20 *Law J. N. S. Q. B.* 190. Compare *Hitchens v. Kilkenny & C. Railw. Co.* 15 *Jur.* 386; 20 *Law J. N. S. C. P.* 81.

285. Where a plaintiff has recovered judgment, and sued out a fruitless execution against the public officer of a banking company, under 7 Geo. 4, ch. 46, the court will not give the plaintiff leave to proceed against former members by *sci. fa.* under section 18, unless it is made to appear that he has really and *bona fide* attempted to enforce the judgment against the members for the time being, as provided by the act. *Q. B.* 1840, *Eardley v. Law*, 4 *Per. & D.* 379; 13 *Ad. & El.* 802; *Each.* 1849, *Bank of England v. Johnson*, 3 *Each.* 598; 6 *Dowl. & L.* 458.

D. Actions at law against members, &c.

286. Demand before suit. In an action to recover from an individual stockholder, a debt due from a railroad corporation, under a provision making stockholders liable in case of neglect by the corporation to pay the debt, or expose sufficient personal property, within sixty days after demand, it is necessary to aver and prove that the stockholder sued had notice, before the suit, of the default of the corporation. The nature of the stockholder's liability is that of a guarantor, and all the rules which require notice to a guarantor of the default of a principal apply with full force to the contingent liability of the stockholder. *N. H. Supreme Ct.* 1859, *Hicks v. Burns*, 38 *N. H.* 141.

287. An officer, having given the notice of his intention to levy upon the private

property of a stockholder for a debt of the corporation, is not required to give further notice of an intention to commence an action, before a suit to charge such stockholder can be instituted. A requirement that demand shall be made on the stockholder before suit against him is not to be implied if not expressed in the statute. *Me. Supreme Ct.* 1860, *Ingalls v. Cole*, 47 *Me.* 530.

288. Form of demand on corporation before suit against member. Under a statute provision that no suit shall be commenced against the stockholder for a debt of the corporation until after a legal demand of payment thereof shall be made upon the company the demand upon the corporation for payment of a debt, to charge a stockholder, must be personal, upon a proper agent, or officer, and by a person authorized to receive the thing demanded, so that payment may be made at once. *N. H. Supreme Ct.* 1858, *Haynes v. Brown*, 36 *N. H.* 545.

289. It is not enough for the creditor to send to the officer, by a third person, a notice in writing to pay, unless payment is expressly refused without objection to the form of the demand. *Id.*

290. There is, however, no objection to joining the claims of several persons in one demand; and if copies of the notes, or claims demanded, are presented, it is not necessary to present the originals, unless objection is made on that account. *Id.*

291. The nature or origin of the debt or liability will therefore frequently determine upon what officer or agent the demand should be made. Thus a demand for the payment of one of the bonds of a railroad company may properly be made, not only upon the treasurer, but upon the board of directors, or any member of it, or upon the superintendent. It would be the duty of any one of these either to pay it or to give notice to those whose immediate duty it would be to pay it. *N. H. Supreme Ct.* 1859, *Harvey v. Chase*, 38 *N. H.* 272.

292. That where the receiver, appointed to wind up the affairs of the bank, has alleged, in pleading, that he did not deem it his duty to sue the stockholders on behalf of the creditors, the creditors may commence their suit against the stockholders without first requesting the receiver to sue them,—see *Atwood v. Rhode Island Agricultural Bank*, 1 *R. I.* 376.

293. Dissolution not necessary. To render a shareholder liable under the N. Y. act of 1811, it is not necessary there should have been legal proceedings to dissolve the company. When it has ceased to act, and is without funds, and indebted, it is to be deemed dissolved; and an action at law will lie to enforce the statutory liability. *N. Y. Supreme Ct.* 1840, *Bank of Poughkeepsie v. Ibbotson*, 24 *Wend.* 473; *N. Y. Ct. of Errors*, 1826, *Briggs v. Penniman*, 8 *Cow.* 387.

294. Debt is a proper action against a stockholder for a debt of the corporation, for which he is made liable by the charter. The statute creates a direct and immediate obligation [1 *Mass.* 248]. *N. Y. Supreme Ct.* 1836, *Simonson v. Spencer*, 15 *Wend.* 548; *U. S. Circ. Ct. (N. H.)* 1817, *Bullard v. Bell*, 1 *Mason*, 243.

295. Pleading. By the common law, the members of a corporation are not individually liable for the corporate debts; and where the liability is created by a special charter which is a private statute, it must be pleaded in an action or bill. *Conn. Supreme Ct.* 1819, *Middletown Bank v. Russ*, 3 *Conn.* 135.

296. In an action against stockholders of a corporation, to charge them with a statute liability for debts of the corporation, the complaint must show that the defendants were such stockholders at the time at which the debt was contracted. *N. Y. Supreme Ct.* 1861, *Young v. N. Y. & Liverpool U. S. Mail Steamship Co.* 15 *Abb. Pr.* 69.

297. Evidence. In a suit by a billholder against a stockholder of a bank, an exemplification of the record of the case of the same plaintiff against the assignee of the bank is admissible as evidence of the identity of the bills upon which suit is brought. *Ga. Supreme Ct.* 1855, *McDougald v. Lane*, 18 *Ga.* 444.

298. Where proceedings in equity are instituted against an insolvent corporation, and receivers appointed, &c., thereof, such proceedings are admissible in an action at law to recover unpaid installments against a delinquent subscriber, though not a party to the bill, for the purpose of showing by what authority the action is prosecuted. *Md. Ct. of Appeals*, 1847, *Hall v. United States Ins. Co.* 5 *Gill*, 484.

299. In an action against a stockholder to recover the amount of an execution against the corporation of which he is a member, it

is necessary to establish the existence and organization of the corporation: they must be shown by direct proof. A judgment obtained against the corporation is not conclusive of the corporate existence in an action to which they are a stranger. *Me. Supreme Ct.* 1856, *Hudson v. Carman*, 41 *Me.* 84.

300. In an action of assumpsit against a member of a corporation, brought by one of its creditors to recover money lent to it, evidence is not admissible to prove that the defendant informed other creditors, when they lent money to the corporation, that its members were individually liable for its debts, and showed them a by-law of the corporation imposing such liability. *Mass. Supreme Ct.* 1847, *Trustees of Free Schools in Andover v. Flint*, 13 *Metc.* 539.

301. In an action against several parties alleged to have been directors and officers of a chartered bank, to recover on bills issued by them which had become worthless, it is incumbent on the plaintiff to prove the charter, where, under the act of incorporation, a charter was necessary to create the bank a body corporate. *Pa. Supreme Ct.* 1862, *Gardner v. Post*, 43 *Pa. St.* 19.

302. Variance. In a suit against a stockholder of a railroad corporation who is liable for the corporate debts, on a judgment recovered by default against the corporation, if the record discloses a good cause of action, the defendant cannot object that in the original suit there was a variance, and the proof did not support the declaration. *Me. Supreme Ct.* 1854, *Came v. Brigham*, 39 *Me.* 35.

303. Witness. One stockholder is not competent as a witness to prove defendant to be another stockholder, in order to make him liable for a debt contracted by the corporation. *N. Y. Supreme Ct.* 1843, *Pierce v. Kearney*, 5 *Hill*, 82.

304. Amount of recovery. In an action brought against a stockholder who is bound for the ultimate redemption of the bills issued by a bank, "in proportion to the amount of shares, and the value thereof, that each individual or company may hold in said bank, in the same manner as in common actions of debt," when the record does not show that any other bills of said bank are due and unpaid, nor that there has been any other recovery against such stockholder upon bills of the bank, the plaintiff is entitled to recover his whole claim, if it does not exceed

the amount of stock the defendant owns; and such payment may be pleaded in bar of subsequent actions. *Ga. Supreme Ct.* 1854, *Lane v. Harris*, 16 *Ga.* 217.

305 Severing judgment. Under the Pennsylvania statute respecting the personal liability of members of manufacturing corporations, a recovery may be had against such of the parties sued as are proven to have been stockholders, though some are included against whom that fact is not proved. See *McHose v. Wheeler*, 45 *Pa. St.* 82; *S. P. Porter v. Kepler*, 14 *Ohio*, 127.

306. Joining members in action against company. To charge stockholders of a corporation under the Pennsylvania act of April 7, 1849 (*Pamph. L.* 568), relating to manufacturing companies, for debts due by the company, it is necessary to join them or a portion of them at least, in the action against the corporation. *Pa. Supreme Ct.* 1866, *Mansfield Iron Works v. Willcox*, 52 *Pa. St.* 377.

307. The Mass. statute of 1851, ch. 315, providing that judgments against corporations shall not bind a member unless summons was left with him, and that one with whom summons is left may be admitted to defend in any such action; and if it shall appear that he is not liable, judgment for him shall be entered on the issue joined,—does not authorize a stockholder to interpose a defence to the demand, if that be admitted by the corporation's default, but only a defence to his liability,—i. e. on the question of membership. *Mass. Supreme Ct.* 1852, *Holyoke Bank v. Goodman Paper Manuf. Co.* 9 *Cush.* 576; 1858, *Utley v. Union Tool Co.* 11 *Gray*, 189. See also, *Farnum v. Ballardvale Machine Shop*, 12 *Cush.* 507. But compare *Thayer v. Union Tool Co.* 4 *Gray*, 75.

308. Where several stockholders in a corporation are summoned to answer in a suit against the corporation, pursuant to that act, and severally deny their liability, they are not entitled to a separate trial by different juries. *Mass. Supreme Ct.* 1852, *Holyoke Bank v. Goodwin Paper Manuf. Co.* 9 *Cush.* 576.

309. Under the Massachusetts statutes,— which provide that in an action against a corporation, a stockholder may be summoned, and that he may defend as to the question of his membership,—it is necessary that the plaintiff, in order to establish the individual liability of a stockholder so summoned should prove the articles of association

of the corporation. *Mass. Supreme Ct.* 1858, *Utley v. Union Tool Co.* 11 *Gray*, 189.

310. If the stockholder so summoned does not appear, but suffers judgment by default, he cannot in a collateral action deny the existence of the corporation, or his liability to be arrested as a stockholder upon the execution against the corporation. *Mass. Supreme Ct.* 1859, *Richmond v. Willis*, 13 *Gray*, 182.

311. Liability as a stockholder for a judgment debt of a corporation is not established merely by proof, that, in the suit in which the judgment was recovered, the person sought to be charged as a stockholder was summoned and failed to appear. *Mass. Supreme Ct.* 1862, *Mason v. Cheshire Iron Works*, 4 *Allen*, 898.

312. A stockholder in a manufacturing corporation cannot defend himself from judgment against him in an action against the corporation, under St. 1851, ch. 315, by showing that the officers of the corporation have sufficient property to pay the judgment. The material question is, not whether the officers are possessed of sufficient property to pay the debt when the action is pending in court, but when the execution was served. *Mass. Supreme Ct.* 1858, *Brayton v. New England &c. Co.* 11 *Gray*, 498.

313. It is not necessary for the persons summoned as stockholders, in an action against a corporation, under a statute imposing personal liability upon its members, to file an answer containing a specific denial that the corporation has failed to comply with the statutes of the State concerning corporations; but it is incumbent upon a plaintiff who seeks to charge them with the corporate debts, to prove that the corporation has failed to comply with some one of the requisitions of the statutes, by the omission of which stockholders are rendered liable. *Mass. Supreme Ct.* 1862, *Taylor v. New England Coal &c. Co.* 4 *Allen*, 577.

E. Bill in equity.

314. Equity has cognizance of suits by creditors to enforce the individual liability of stockholders. Where the statute liability of the stockholders is several as well as joint, and for the whole amount of the debt, without reference to the amount of the stock owned, they may be sued before a decree is had against the corporation, and the corpo-

ration may be made a party to the suit against them. *N. Y. A. V. Chan. Ct.* 1845, *Masters v. Rossie Lead Mining Co.* 2 *Sandf. Ch.* 301.

§15. That a creditor's bill will lie against a stockholder to compel him to pay the amount of his subscription, not previously paid to the company, over to a creditor of the company,—see *Henry v. Vermillion & Ashland R. R. Co.* 17 *Ohio*, 187. And see *Miers v. Zanesville &c. Turnpike Co.* 11 *Ohio*, 273; and again, 18 *Ohio*, 197. See also *Atwood v. Rhode Island Agricultural Bank*, 1 *R. I.* 876.

§16. Trial by jury not a right. The New York act of 1849, (ch. 226), to enforce the responsibility of stockholders in banking corporations and associations, is not unconstitutional as depriving the stockholders of the right of trial by jury. The affairs of insolvent corporations, and the right to enforce contribution from the stockholders were, before the constitution, within the jurisdiction of courts of equity, and the trial by jury did not apply to them. *N. Y. Ct. of Appeals*, 1858, *Case of Empire City Bank*, 8 *Abb. Pr.* 192; 18 *N. Y.* 199.

§17. Bill for discovery. The charter of a manufacturing corporation made the stockholders jointly and severally liable for all debts contracted by the corporation, to the amount of the stock held by them respectively, and gave creditors a right to bring suit for their debts in any court having cognizance thereof, upon proof of demand of payment made on the proper officer of the company, and his refusal. *Held*, that under 2 *Rev. Stat.* 461, § 45, a creditor, upon refusal of payment on demand, might file his bill at once against the stockholders known to him, seeking a discovery of all who were stockholders at the time the debt was contracted, and for payment by them of his simple contract demand. *N. Y. Ct. of Appeals*, 1852, *Bogardus v. Rosendale Manuf. Co.* 7 *N. Y.* (3 *Seld.*) 147; * *Conn. Supreme Ct.* 1819, *Middletown Bank v. Russ*, 3 *Conn.* 135.

§18. Where the creditor of an insolvent corporation, whose execution against the corporate property has been returned unsatisfied, is ignorant of the names of the stockholders whose shares of the capital

stock had not been paid in full, he may pray for a discovery of their names; and after he has obtained such discovery, he may amend his bill and make them parties, for the purpose of charging them personally for the deficiency, to the extent of their liability; or he may wait until a final decree against the corporation shall be made, and then file a supplemental bill against the stockholders, for the purpose of charging them for any deficiency which may exist after applying the assets of the corporation to the satisfaction of the decree. *N. Y. Chancery*, 1848, *Morgan v. N. Y. & Albany R. R. Co.* 10 *Paige*, 290; 2 *N. Y. Leg. Obs.* 246; *A. V. Chan. Ct.* 1845, *Masters v. Rossie Lead Mining Co.* 2 *Sandf. Ch.* 301.

§19. Pleading. A bill in equity against officers must clearly show that the excess of debts over and above the amount of capital stock actually paid in, happened under the administration of the defendants.* *Mass. Supreme Ct.* 1862, *Merchants' Bank v. Stevenson*, 5 *Allen*, 398.

§20. Multifariousness. A bill against an incorporated company, charging that the corporation executed a fraudulent deed of assignment, made the corporation and the trustees parties, asking the subjection of the assets assigned to the satisfaction of the claim of the complainants; and it also made the individuals who were incorporators parties, and sought to subject them to personal liability, as members of an unincorporated association:—*Held*, that the bill was defective on the ground of multifariousness, and should be dismissed. *Tenn. Supreme Ct.* 1850, *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.* 11 *Humph.* 1.

§21. Parties. A creditor's bill to charge stockholders on their unpaid subscriptions should be filed by the creditor, in behalf of all the creditors;† and if each shareholder is liable only in due proportion with the others, it should be filed against the corporation and all the shareholders who are liable,‡ so that an account may be taken of

* For rules of pleading to charge shareholders with dividends received by them,—see *Bigelow v. Congregational Society*, 11 *VA.* 268; *Osgood v. Laytin*, 5 *Abb. Pr. N. S. I.*

† *S. P. Crease v. Babcock*, 10 *Me.* 525. The other creditors should not be made defendants unless a cause for it is alleged. *Young v. N. Y. & Liverpool Steamship Co.* 10 *Abb. Pr.* 229.

‡ Equity requires this in all cases where the remedy is solely by bill in chancery. *Hadley v. Russell*, 40 *N. H.*

* As to the force of this case as a precedent, since the adoption of the new practice,—see *Young v. N. Y. and Liverpool Steamship Co.* 10 *Abb. Pr.* 229.

the debts and assets and the deficiencies on shares. *N. Y. Ct. of Appeals*, 1850, *Mann v. Pentz*, 8 *N. Y. (8 Coms.)* 415.

§22. A bank divided a large part of its capital before the expiration of its charter, among its stockholders, without providing for the redemption of its notes. *Held*, that a bill in equity might be maintained by some of the holders of the notes against some of the stockholders, to subject them to liability for the payment of the corporate debts, the impossibility of bringing all before the court being a sufficient excuse for dispensing with the other parties in interest. *U. S. Circ. Ct. (Me.)* 1824, *Wood v. Dummer*, 3 *Mason*, 308.

§23. As to remedy in equity against estate of deceased stockholder where the liability does not survive at law,—see *New England &c. Bank v. Newport Steam Factory*, 6 *R. I.* 154.

§24. The corporation a necessary party to a suit to enforce individual liability. *Bogardus v. Rosendale Manuf. Co.* 7 *N. Y. (8 Seld.)* 147.

§25. Decree. When the liability is several, a decree may be rendered against some, when the cause is in readiness as to them, and the cause proceed as to the others. *Ky. Ct. of Appeals*, 1830, *Castleman v. Holmes*, 4 *J. J. Marsh.* 1.

§26. Whether solvent stockholders are liable to pay more on account of the insolvency of others, or because the corporation owned part of the stock,—see *Crease v. Babcock*, 10 *Metz.* 525; *Erickson v. Nesmith*, 46 *N. H.* 371.

F. Special proceedings.

§27. Jurisdiction. The statutory proceedings, taken under the *N. Y.* act of 1849, in case of banks, are to be presumed to have been within the jurisdiction of the court, unless the contrary appears. *N. Y. Ct. of Appeals*, 1858, *Case of Empire City Bank*, 8 *Abb. Pr.* 192; 18 *N. Y.* 199.

§28. What refusal to pay notes constitutes insolvency within that act. *Case of Mechanics' Bank*, 5 *Abb. Pr.* 374; *Livingston v. Bank of New York*, *Id.* 338.

§29. Mode of procedure. *Case of Empire City Bank*, *supra*; *Matter of Reciprocity Bank*, 22 *N. Y.* 9; *Matter of Hollister*

Bank, 27 *N. Y.* 393; *Diven v. Duncan*, 41 *Barb.* 520; *Pruyn v. Van Allen*, 39 *Id.* 355.

IV. LIABILITY OF MEMBERS OF ENGLISH JOINT STOCK COMPANIES AS CONTRIBUTORIES.*

§30. That a member may be liable to the creditors of the company, without being liable to have his name inserted in the list of contributors,—see *Exp. Fenwick*, 1 *De Gex & S.* 557; 18 *Law J. N. S.* ch. 112; 18 *Jur.* 204.

§31. That he may be liable as contributory without being directly liable to the creditor,—see *Exp. Cope*, 1 *Eng. L. & Eq.* 87; 29 *Law J. N. S.* 28.

§32. Membership, how acquired. Deviation from prescribed formalities in becoming a member often disregarded by the court. *Exp. Straffon*, 10 *Eng. L. & Eq.* 275; 11 *Jur.* 485; *London Grand Junction Railway Co. v. Graham*, 1 *Ad. & E. N. S.* 271; *Re Llanharry Hematite Iron Co.* 1 *Law Rep. Chan. App.* 85.

§33. Mere agreement for shares or payment of deposit not enough to render liable as contributory. *Thompson's Case*, 5 *Eng. L. & Eq.* 8; *Exp. Beardshaw*, 15 *Id.* 330; 22 *Law J. N. S. Ch.* 15; 16 *Jur.* 1108; 1 *Drawry*, 226; *Capper's Case*, 15 *Jur.* 145; 2 *Eng. L. & Eq.* 77. See also, *Exp. Hirschel*, 15 *Jur.* 942.

§34. Mere membership of provisional committee not enough. *Exp. Cottle*, 2 *H. L. Cas.* 647; 1 *Eng. L. & Eq.* 9; 14 *Jur.* 708. (Compare *Beasley's Case*, 2 *Macn. & G.* 176; 14 *Jur.* 704.) *Exp. Hole*, 3 *De Gex & S.* 241; 14 *Jur.* 910; *Exp. Carmichael*, 1 *Eng. L. & Eq.* 66; *Exp. Clarke*, *Id.* 69.

§35. Unless one has authorized expenses. *Carrick's Case*, 5 *Eng. L. & Eq.* 114; *Exp. Stocks*, 15 *Eng. L. & Eq.* 438; 22 *Law J. N. S. ch.* 218; *Exp. Maudslay*, 1 *Eng. L. & Eq.* 61. But compare *Exp. Terrell*, 8 *Eng. L. & Eq.* 64; 15 *Jur.* 1073; 21 *Law J. N. S. ch.* 222.

§36. Or has accepted shares. *Exp. Sichell*, 1 *Sim. N. S.* 187; 1 *Eng. L. & Eq.* 194; 15 *Jur.* 53; 20 *Law J. N. S. Ch.* 129; *Nicholay's Case*, 4 *Eng. L. & Eq.* 24; *Exp. Mark-*

109. But it is a rule of convenience, and absence of some from the jurisdiction may be averred as excuse. *Erickson v. Nesmith*, 46 *Id.* 371.

* This liability is an obligation to contribute, upon the winding up of such a company under the statute, to the funds necessary for the liquidation of its indebtedness. Since the cases are not of general and direct application under the American system, they are very briefly indicated in the text.

well, 13 *Eng. L. & Eq.* 456; *Hutton v. Upfill*, 3 *H. L. Cas.* 674; 1 *Eng. L. & Eq.* 13.

337. Liability sometimes limited to amount of deposit. *Bright v. Matson*, 14 *Eng. L. & Eq.* 1.

338. And determined by recovering the deposit back. *Exp. Walstab*, 1 *Eng. L. & Eq.* 170.

339. Mere application for shares not sufficient. *Conway's Case*, 8 *Eng. L. & Eq.* 250; *Onion's Case*, 7 *Id.* 64; *Llanharry Hematite Iron Co. (Tothill's Case)*, 1 *Law Rep. Ch. App.* 85; 85 *Law J. N. S. Ch.* 120.

340. Nor is a "reservation" by resolution of the committee, without allotment. *Sharp's Case*, 1 *De Gez. Maon. & G.* 535; 16 *Jur.* 579; 21 *L. J. N. S. Ch.* 767.

341. Allotment may be sufficient without notice. *Re New Theatre Co. (Bloxam's Case)*, 13 *Week. Rep.* 700; 33 *L. J. N. S. Ch.* 574.

342. But does not bind the applicant unless made in accordance with his offer. *Exp. Barber*, 15 *Jur.* 51; 1 *Eng. L. & Eq.* 190; 20 *L. J. N. S. Ch.* 146; *Exp. Capper*, 14 *Jur.* 1128; 19 *Law J. N. S. Ch.* 894; *Manwaring's Case*, 10 *Eng. L. & Eq.* 222. Compare *Ashpitel v. Sercombe*, 19 *Law J. N. S. Eoch.* 82; *Exp. Morrison*, 15 *Jur.* 346; 20 *Law J. N. S. Ch.* 296.

343. How far members are exonerated by proving that they were induced to become so by false representations. *Re Deposit & General Life Ins. Co. (Exp. Ayre)*, 4 *Jur. N. S.* 596; 27 *Law J. N. S. Ch.* 579; *Exp. Parbury*, 3 *De Gez. & S.* 43; 13 *Jur.* 725; *Brockwell's Case*, 4 *Drewry*, 205; 3 *Jur. N. S.* 879; 26 *Law J. N. S. Ch.* 855; *Exp. Matthew*, 3 *De Gez. & S.* 234; *Re Madrid Bank (Wilkinson's Case)*, 2 *Law Rep. Ch. App.* 536; 36 *Law J. N. S. Ch.* 489; *Reese River &c. Mining Co. (Exp. Smith)*, 2 *Law Rep. Ch. App.* 604; 36 *Law J. N. S. Ch.* 618; 16 *Law Times*, 549.

344. Effect of subsequent agreement to apply part payment on a large number of shares as payment in full on a smaller number. *Exhall Coal &c. Co. (Mile's Case)*, 10 *Jur. N. S.* 1013; 13 *Week. Rep.* 219.

345. Effect of deposit. *Cooper's Case*, 5 *Eng. L. & Eq.* 1; *Re Leeds Banking Co. (Barrett's Case)*, 13 *Week. Rep.* 541; *Carrick's Case*, 5 *Eng. L. & Eq.* 114; *Best's Case*, 13 *Week. Rep.* 632, 762.

346. Deed of settlement. Effect of clause stipulating for limited liability. *Worcester Corn Exchange Co.* 19 *Eng. L. & Eq.* 627.

347. Effect of alteration of the instrument after signature. *Felgate's Case*, 11 *Jur. N. S.* 52.

348. Liability not necessarily affected by omission to sign the subscribers' agreement. *Exp. Brittain*, 7 *Eng. L. & Eq.* 28; *Exp. Yeland*, 16 *Jur.* 509; 21 *Law J. N. S. Ch.* 852; *Exp. Nicholay*, 15 *Jur.* 420.

349. Nor by the fact that the deed of settlement had not been executed by the necessary number. *Exp. Bird*, 1 *Sim. N. S.* 47; 15 *Jur.* 80; 20 *Law J. N. S. Ch.* 80.

350. Effect of signing the deed for a part only of the shares allotted. *Re Great Northern &c. Coal Co. (Exp. Ourrie)*, 32 *Law J. N. S. Ch.* 421; *Exp. Dodgson*, 3 *De G. & S.* 85; 14 *Jur.* 886; *Hay v. Willoughby*, 15 *Eng. L. & Eq.* 464; 22 *Law J. N. S.* 249; 17 *Jur.* 80; *Exp. Staffon*, 3 *Eng. L. & Eq.* 101; 15 *Jur.* 321.

351. Liability of persons making colorable subscriptions. *Exp. Davidson*, 3 *De Gez. & S.* 21; 13 *Jur.* 722; 18 *Law J. N. S. Ch.* 254; *In re Waterloo Life &c. Co. (Saunders's Case)*, 10 *Jur. N. S.* 246.

352. Subscribing to take shares without liability, in payment of a debt. *Exp. Woodfall*, 3 *De Gez. & S.* 63; 14 *Jur.* 29.

353. Holder of stock as pledgee. *Exp. Price*, 19 *Law J. N. S. Ch.* 128; 14 *Jur.* 405; 3 *De Gez. & S.* 146.

354. Holder of preference stock liable, although its issue was unauthorized. *Exp. Hitchcock*, 3 *De Gez. & S.* 92; 13 *Jur.* 1023. Compare *Exp. Coleman*, 9 *Jur. N. S.* 813.

355. Effect of subscribing as agent or trustee. *Re Southampton &c. Boat Co. (Exp. Bird)*, 10 *Jur. N. S.* 138; *Exp. Holt*, 1 *Sim. N. S.* 389; 15 *Jur.* 369; 20 *Law J. N. S. Ch.* 413; *Mallorie's Case*, 2 *Law Rep. Ch. App.* 81; 36 *Law J. N. S. Ch.* 141; 15 *Law Times, N. S.* 458.

356. Liability of husband in respect of his wife's shares. *Exp. Angas*, 1 *De Gez. & S.* 560; 13 *Jur.* 76; *In re North of England Joint Stock Banking Co. (Sadler's Case)*, 3 *De Gez. & S.* 86; 18 *Law J. N. S. Ch.* 251; 13 *Jur.* 674; *Exp. Burlinson*, 3 *De Gez. & S.* 18; 13 *Jur.* 849; 18 *Law J. N. S. Ch.* 250; *Exp. Kluht*, 3 *De Gez. & S.* 210; 14 *Jur.* 898; 19 *Law J. N. S. Ch.* 385; *In re Vale of Neath &c. Brewery Co. (White's Case)*, 3 *De Gez. & S.* 157; 19 *Law J. N. S. Ch.* 497; 14 *Jur.* 454; *Dodgson v. Bell*, 3 *Eng. L. & Eq.* 542; *Exp. Doyle*, 14 *Jur.* 542.

357. Liability of a father in respect of

shares taken or transferred by him in the name of his son. *Fenwick's Case*, 1 *De Gez & S.* 557; 18 *Jur.* 204; 18 *Law J. N. S. Ch.* 113; *Exp. Litchfield*, 3 *De Gez & S.* 141; 19 *Law J. N. S. Ch.* 124; 14 *Jur.* 541; *Exp. Reavely*, 12 *Jur.* 1065; 1 *De G. & S.* 550; *Stikeman v. Dawson*, 4 *Eng. Railw. Cas.* 585; *In re Reid*, 24 *Beav.* 318; 3 *Jur. N. S.* 1015; *In re Maxwell*, 24 *Beav.* 321.

858. Liability of the son in such a case. *Exp. Maguire*, 3 *De Gez & S.* 31; 13 *Jur.* 673; 48 *Law J. N. S. Ch.* 256; *Exp. Pim*, 3 *De Gez & S.* 11; 13 *Jur.* 672; 18 *Law J. N. S. Ch.* 259; *Exp. Pim*, 1 *Macn. & G.* 291; 1 *Hall & T.* 388; 19 *Law J. N. S. Ch.* 233.

859. Proper practice where there are two persons of the same name, only one of whom is liable. *Exp. Webb*, 9 *Jur. N. S.* 856.

860. Estate of deceased shareholder, when liable. *Exp. Armstrong*, 1 *De Gez & S.* 565; 18 *Jur.* 75; *Exp. Robinson*, 15 *Jur.* 438; 20 *Law J. N. S. Ch.* 297; *Meux's Executors*, 15 *Jur.* 439; 20 *Law J. N. S. Ch.* 298; 4 *Eng. L. & Eq.* 40; *Re Northern Coal Mining Co.* 10 *Eng. L. & Eq.* 171; *Blakeley's Executors*, 3 *Macn. & G.* 726; 16 *Jur.* 299; 19 *Law J. N. S. Ch.* 566; *Crosfeld's Case*, 2 *De Gez, Macn. & G.* 128; 16 *Jur.* 731; *Exp. Thomas*, 1 *De Gez & S.* 579; 18 *Law J. N. S. Ch.* 249; 13 *Jur.* 274.

861. Devisees, when liable. *Exp. Hamer*, 16 *Jur.* 555; 21 *Law J. N. S. Ch.* 882.

862. Executors sometimes liable in personal capacity. *Re Leeds Banking Co. (Fearnside's Case)*, 1 *Law Rep. Ch. App.* 231; 12 *Jur. N. S.* 60; 13 *Law Times, N. S.* 694.

863. Liability of assignees in bankruptcy. *Exp. Stone*, 3 *De Gez & S.* 220; 14 *Jur.* 965; *Kuper's Assignees' Case*, 3 *De Gez & S.* 113; 19 *Law J. N. S. Ch.* 165; 14 *Jur.* 285; *Chapple's Case*, 17 *Eng. L. & Eq.* 516; 5 *De Gez & S.* 400.

864. Effect of transfer to exonerate transferor. *Exp. Sutton*, 14 *Jur.* 966.

865. Assent by the company to transfer of shares. *Chartres' Case*, 1 *De Gez & S.* 581; *Re Vale of Neath &c. Brewery Co. (Walter's Case)*, 3 *De Gez & S.* 149; affirmed, 19 *Law J. N. S. Ch.* 501; 14 *Jur.* 566; *Exp. Gordon*, 3 *De Gez & S.* 249; *Exp. Bernard*, 11 *Eng. L. & Eq.* 128; *Exp. Crosfeld*, 13 *Id.* 284; *Exp. Wood*, 17 *Id.* 236; *Re British Provident &c. Ass. Soc. (Lane's Case)*, 3 *New Rep.* 50; *Re Herefordshire Banking Co. (Bulmer's Case)*, 12 *Week. Rep.* 564.

866. Time when transferor's liability attaches. *Cape's Case*, 19 *Eng. L. & Eq.* 1.

867. Forfeiture, surrender, &c. One whose shares have been duly declared forfeited by the company, not liable as contributory. *Exp. Bailly*, 1 *Eng. L. & Eq.* 141; 15 *Jur.* 129; 20 *Law J. N. S. Ch.* 145; *Re North Hallenbeagle Mining Co. (Knight's Case)*, 2 *Law Rep. Ch. App.* 321; 36 *Law J. N. S. Ch.* 317; *Re Taristock Ironworks Co. (Lyster's Case)*, 4 *Law Rep. Eq. Cas.* 233; 36 *Law J. N. S. Ch.* 616; 16 *Law Times, N. S.* 824.

868. In what cases shareholders will be exonerated from liability by surrendering their stock and being discharged by the directors. *Exp. Bennett*, 27 *Eng. L. & Eq.* 572; *Exp. Besly* 4 *Id.* 149; 15 *Jur.* 523; *Exp. Burton*, 13 *Eng. L. & Eq.* 435; *Spackman's Case*, 13 *Week. Rep.* 479; *Lord Belhaven's Case*, 34 *Law J. N. S.* 503; *Stanhope's Case*, 1 *Law Rep. Ch. App.* 161; 35 *Law N. S.* 296; *Blake's Case*, 13 *Week. Rep.* 486; *Brotherwood's Case*, 31 *Beav.* 365.

869. Liability of retiring directors. *Exp. Stanhope*, 3 *De Gez & S.* 198; 19 *Law J. N. S. Ch.* 889; *Exp. Busk*, 14 *Jur.* 947; 19 *Law J. N. S. Ch.* 391; affirmed, 16 *Jur.* 343; 21 *Law J. N. S. Ch.* 688; *Exp. Cockburn*, 15 *Jur.* 28; 1 *Eng. L. & Eq.* 189.

870. Effect of a transfer to the company. *Re British Provident &c. Society*, 11 *Week. Rep.* 1044; *Exp. Bagge*, 4 *Eng. L. & Eq.* 72; 20 *Law J. N. S. Ch.* 229; 13 *Beav.* 162; *Shortridge v. Bosanquet*, 17 *Eng. L. & Eq.* 331; 22 *Law J. N. S.* 48; 16 *Jur.* 919; *Exp. Lewis*, 10 *Eng. L. & Eq.* 162.

871. Or to an officer who purchased for the benefit of the company. *Exp. Richmond's Executors*, 13 *Jur.* 727; *Holloway's Case*, 1 *De Gez & S.* 777; 13 *Jur.* 954; *Benham's Case*, 13 *Week. Rep.* 438.

872. Admission of liability, or even part payment, not conclusive. *Exp. Tanner*, 9 *Eng. L. & Eq.* 162; *Exp. Hall*, 3 *De Gez & S.* 214; 14 *Jur.* 909; 19 *Law J. N. S. Ch.* 336; *Exp. Holroyd*, 5 *Eng. L. & Eq.* 150.

873. Equitable right of contribution as between certain members, not ground for modifying the amounts for which they must contribute in the winding up proceedings. *Exp. Sutton*, 3 *De Gez & S.* 262; 14 *Jur.* 966; *Exp. Morgan, In re Vale of Neath &c. Brewery Co.* 1 *Macn. & G.* 235; 1 *Hall & Tw.* 320; 18 *Law J. N. S. Ch.* 265; 13 *Jur.* 665.

INJUNCTION.

1. Power to enjoin a corporation. In general a court invested with full chancery powers, has power to interfere by injunction to prevent a corporation from acting in excess of the powers conferred upon it, to the irreparable injury of the party complaining. *Pa. Supreme Ct.* 1855, *Sandford v. Catawissa &c. R. R. Co.* 24 *Pa. St.* 378; *Chancery* 1886, *Spencer v. London & Birmingham Railway Co.* 1 *Eng. Railw. Cas.* 159; 1888, *River Dun Nav. Co. v. North Midland Railway Co.* *Id.* 185; *Rolls Ct.* 1835, *Att. Gen. v. Mayor &c. of Liverpool*, 1 *Myl. & C.* 171. And see *Rigby v. Great Western Railway Co.* 4 *Eng. Railw. Cas.* 175; *Webb v. Manchester & Leeds Railway Co.* 1 *Eng. Railw. Cas.* 576; 4 *Myl. & C.* 116; *Holyoake v. Shrewsbury & Birmingham Railway Co.* 5 *Id.* 421.

2. A court invested with full chancery powers may restrain a corporation from doing an unconscionable thing outside of, as well as within, its ordinary business sphere. *Pa. Supreme Ct.* 1867, *Big Mountain Improvement Co's Appeal*, 54 *Pa. St.* 861.

3. The remedy by injunction extends to all acts that are contrary to law and prejudicial to the interests of the community and for which there is no adequate remedy at law. Hence, either of two conflicting bodies of men, claiming to hold one and the same office, under a corporation, at one and the same time, may apply to the courts for an injunction to restrain the other from the usurpation of powers to which it is not legally entitled. *Pa. Supreme Ct.* 1864, *Kerr v. Trego*, 47 *Pa. St.* 292.

4. When such injunction will be granted, generally. A corporation constructing works beyond what is necessary for the purposes of their incorporation, and beyond what is contemplated by their charter, will be restrained by injunction from continuing their erections beyond the limits allowed. *N. J. Ct. of Errors*, 1855, *Newark Plank Road Co. v. Elmer*, 1 *Stockt.* 754.

5. One corporation having a vested right may obtain an injunction to restrain another corporation from interfering with them, when the damage threatened is of an irreparable and permanent character, and particularly when the defendants are acting under color of their charter. *Fla. Supreme Ct.* 1862, *Florida &c. R. R. Co. v. Pensacola & Georgia R. R. Co.* 10 *Fla. (2 Galb.)* 145.

6. When, at suit of member. A corporation may be restrained, by injunction at the suit of an individual member from applying the corporate property to purposes not authorized by their incorporation.* *Md. Chancery*, 1829, *Binney's Case*, 2 *Bland.* 99.

7. The facts, that the expenditure has been authorized by a regular corporate meeting;—that the State is a stockholder;—or that the corporation (if found within the jurisdiction of the court), exists under a charter granted by, or holds property situated within, a foreign State,—do not prevent the application of this rule. *Id.*

8. Where a contract made with a corporation to do certain work, is fulfilled to the satisfaction of the board of directors managing the corporate concerns, and it appears that such work has been done on favorable terms, and is beneficial to the company, a court of equity will not, on the allegation of one of the corporators that there was a secret agreement between one of the directors and the contractor, looking to a division of the profits, enjoin the payment of the stipulated compensation. *N. C. Supreme Ct.* 1860, *Havens v. Hoyt*, 6 *Jones Eq.* 115.

9. — of stockholder. A stockholder in a bank is entitled to an injunction to restrain its officers from the continued commission of acts which are contrary to law, and may endanger the existence of the charter, although upon the affidavits exhibited on both sides, the truth of the charges is left in doubt. Under such circumstances the awarding of an injunction can do no injury, and only gives the stockholders a proper measure of protection. *Pa. Supreme Ct.* 1857, *Manderson v. Commercial Bank*, 28 *Pa. St.* 379.

10. The act incorporating a bank provided that a majority of the directors, the president being one, should form a board or quorum for the transaction of any business; "but ordinary discounts may be made by the

* That, in England, the court of chancery will not restrain a corporation from applying to Parliament for an enlargement of its corporate powers, at the instance of a shareholder dissatisfied with the proposed change,—see *Ware v. Grand Junction Water Works Co.* 2 *Russ. & M.* 470.

Chancery will, in proper cases, grant an injunction to restrain parties from applying to Parliament for a private act or an act respecting property. But it will not do this merely upon the ground that such act would interfere with existing rights, whether they exist by the tenure of property or by virtue of contract. *Heathcote v. North Staffordshire Railway Co.* 2 *Hall & T.* 389; 14 *Jur.* 859; 2 *Maon. & G.* 100; 6 *Eng. Railw. Cas.* 268.

president and four directors," and "the rate of discount at which loans shall be made shall not exceed one half of one per centum for thirty days." *Held*, that on proof to the court, of the discounting of paper by the cashier and president without four directors, and that notes had been discounted at rates greater than that allowed by charter, there was sufficient ground for a temporary injunction. *Id.*

11. On a bill by stockholders of a bank, charging the directors with fraud and corruption in the management of an election merely, an injunction restraining them from exercising their office, will not be granted *in limine*, before the coming in of the answers. *N. Y. Chancery*, 1822, *Ogden v. Kip*, 6 *Johns. Ch.* 160.

12. — or of officer. The power of a court of equity to grant an injunction, in a suit by a trustee of a corporation to restrain his co-trustees from mismanaging the property of the corporation,—considered. *Latimer v. Eddy*, 46 *Barb.* 61.

13. What damage must be shown. The plaintiff must show that he has sustained, or will sustain substantial damage from the violation of a legal right, if the act which he seeks to enjoin is continued or committed. *Chancery*, 1848, *Holyoake v. Shrewsbury & Birmingham Railway Co.* 5 *Eng. Railw. Cas.* 421.

14. It is not competent for one who suffers damage in common with others, only, to maintain a bill to enjoin a corporation from the continuance of a public nuisance, under color of legislative grant. *Conn. Supreme Ct.* 1842, *Bigelow v. Hartford Bridge Co.* 14 *Conn.* 565; 1845, *O'Brien v. Norwich & Worcester R. R. Co.* 17 *Id.* 372.

15. When an injunction will be denied. Equity will not interfere to relieve against the proceedings of the governing body of a corporation, unless it be shown that all the means of compulsion in the power of the corporation have been resorted to in vain, as by calling general meetings of the corporations, &c., or that no power remains with the general body by reason of their numbers having been reduced too low, so that the corporation is virtually suspended. *Chancery*, 1843, *Foss v. Harbottle*, 2 *Hare*, 461, 494.

16. That if upon an application for an injunction to restrain a railway company from

prosecuting certain works, it appears that the company intend to abandon the work sought to be restrained, the court will not grant the injunction,—see *Logan v. Courtown*, 5 *Eng. L. & Eq.* 171.

17. A motion for a temporary injunction to restrain the construction of a railroad was denied, as being a violation of the spirit of the rule, which forbids the issuing of an injunction to restrain the construction of a public work authorized by a law of the State, until after hearing upon the rule to show cause. *N. J. Chancery*, 1862, *Delaware & Raritan Canal Co. v. Raritan & R. R. Co.* 14 *N. J. Eq.* (1 *McCart.*) 445.

18. That carrying on banking operations contrary to law is not such a nuisance as may be restrained by an injunction,*—see *Att. Gen. v. Utica Ins. Co.* 2 *Johns. Ch.* 371; *Att. Gen. v. Bank of Niagara*, 1 *Hopk.* 354.

19. Injunction in behalf of a corporation. An injunction will be granted to prevent an act tending to disable a corporation from exercising their franchise, as well as to restrain a party from violating it by attempting to participate in its exclusive privileges. *U. S. Supreme Ct.* 1824, *Osborn v. Bank of the United States*, 9 *Wheat.* 738.

20. A regularly appointed committee of a voluntary religious society, who are in the actual possession of certain premises used as a church and burying ground, may file a bill to restrain the heirs of the donor from disturbing their possession, as no action at law, even if one could be brought by such a society, would afford an adequate remedy for an injury to property of this character. And although it might have been well for the plaintiffs to produce a formal vote authorizing them to act for the society, they may sue, according to the familiar practice of equity where the parties are numerous, in behalf of themselves and others having a like interest, for purposes common and beneficial to all. *U. S. Supreme Ct.* 1829, *Beatty v. Kurtz*, 2 *Pet.* 566.

21. Right lost by delay. A stockholder is not entitled to a remedy by injunction against a departure from the original objects of the incorporation, unless he has shown himself prompt and vigilant in the assertion

* When injunctions against banks should be granted, in a time of general suspension of specie payments,—see *Livingston v. Bank of New York*, 26 *Barb.* 304; 5 *Abb. Pr.* 323, 346, note.

of his rights; it will not do for him to wait until the mischief of which he complains, is accomplished. *Ohio Supreme Ct.* 1856, Chapman v. Mad River R. R. Co. 6 *Ohio St. (Oritchf.)* 119.

22. That where the application is to restrain the company from proceeding by an action at law to enforce their powers, it must be made in proper time after the commencement of the action,—see Thorpe v. Hughes. 3 *Mylne & C.* 742.

23. A complainant's right to an injunction to restrain a railway company from completing their works, may be lost by an acquiescence in the erection of the works, under knowledge of their extent. *Chancery*, 1838, Attorney General v. Manchester & Leeds Railway Co. 1 *Eng. Railw. Cas.* 486; 1840, Illingworth v. Manchester & Leeds Railway Co. 2 *Id.* 187.

24. Obligations of officers under injunction against company. An injunction, although addressed exclusively to a corporation, operates upon those members and officers of the corporation by whom the corporate will is manifested and corporate acts performed; and creates a duty for which they, as parties to the suit, are personally responsible. *N. Y. Ct. of Appeals*, 1853, People v. Sturtevant, 9 *N. Y. (5 Seld.)* 268.

25. In an action by individual corporators of the city of New York, against the mayor, aldermen, and commonalty, to enjoin them from granting the right to construct a railroad in the city, the summons and complaint, with affidavits and an injunction obtained, were served upon the mayor, and the summons and injunction were served upon members of the two boards of the common council. *Held*, that this was sufficient to found proceedings for contempt, for disobedience of the injunction by the members of the two boards. It was not necessary to serve the complaints and affidavits upon the individual members of the common council themselves. The effect of an injunction or decree restraining any acts of a corporate body, and addressed in the ordinary way to it, or its agents, &c., is to bind not only the intangible artificial being, but also all the individuals who act for the corporation in the transaction of its business, to whose knowledge the injunction or decree comes. Unless this be so, it would be necessary, in order to effectually bind a corporation by an injunc-

tion, to make every person a party to the suit, who could by any possibility be its agent in doing the prohibited act. *Id.*

26. Where an injunction against a corporation is served on its president, it is his duty to prevent the other officers of the corporation from doing any thing as such officers, contrary to the order of the court; and if he conceals from such officers the fact that an injunction has been served upon him, and allows them to go on and do acts in violation of it, it is a breach of the injunction on his part. *N. Y. Chancery*, 1843, Bank Commissioners v. City Bank of Buffalo, cited in 1 *Barb. Ch.* 636.

INSOLVENCY.

1. What constitutes. That the same definition of insolvency which applies to ordinary traders is applicable also to a corporation engaged in the manufacture and sale of pianos,—see Hazelton v. Allen, 8 *Allen*, 114.

2. A corporation, like an individual, is insolvent when it is not able to pay its debts. Insolvency means a general inability to answer, in the course of business the liabilities existing and capable of being enforced. [2 *You. & Jer.* 459; 2 *Bouv. Inst.* 157; 1 *Johns.* 370; 3 *Mann. & G.* 158; 4 *Bing.* 20; 1 *Metc.* 366; 1 *Sandf. Ch.* 207.] *N. Y. Ct. of Appeals*, 1854, Brouwer v. Harbeck, 9 *N. Y. (5 Seld.)* 589.

3. Insolvency, in the abstract, has the same signification, whether applied to corporations or associations, and means a general inability to pay one's debts; an inability to fulfil one's obligations, according to his undertaking; a general inability to answer, in the course of business, the liabilities existing and capable of being enforced,—not an absolute inability to pay one's debts at some future time, upon a settlement and winding up of all a trader's concerns; but, not being in a condition to pay one's debts in the ordinary course, as persons carrying on trade usually do. [5 *Seld.* 589; 2 *Bell's Com.* 162; 4 *Cush.* 184; 12 *O. R.* 335; 4 *Hill*, 654.] *N. Y. Supreme Ct. Sp. T.* 1858, Ferry v. Bank of Central New York, 15 *How. Pr.* 445.

4. The refusal by a bank to redeem its bills is *prima facie* a failure. See Townsends v. Bank of Racine, 7 *Wis.* 185.

5. That the mere non-payment of debts

does not constitute insolvency within the statute;—insolvency is not a convertible term for a mere refusal to pay, although the latter may be evidence of it,—see *People v. Kerr*, 37 *Barb.* 357. Compare *Hoyt v. Shelden*, 8 *Bow.* 267; *Re Larne & Co. Railway Co.* 14 *Jur.* 996; *Re Birmingham Benefit Society*, 3 *Sim.* 421.

6. An insurance company cannot be said to be insolvent, or to act in contemplation of insolvency, merely because the amount of risks against which it has insured greatly exceed its capital, especially if its assets are more than sufficient to meet all losses of which it has any notice or suspicion. It is essential to the success of such a company that its risk should exceed its capital. *N. Y. Superior Ct.* 1859, *Holbrook v. Basset*, 5 *Bow.* 147.

7. How proved. Upon a bill filed for the appointment of receivers of a corporation, if the question of insolvency be doubtful, and the conduct of the managers of the corporation appears to have been fair and honest, the company should have the benefit of the doubt; as a corporation should not be disturbed in the proper transaction of its business, unless its condition is hopeless. *N. J. Chancery*, 1848, *Brundred v. Paterson Machine Co.* 3 *Green Ch.* 294.

8. The opinions of witnesses as to the insolvency of a corporation, without stating the facts on which the opinions are founded, are not evidence sufficient to form a basis for the action of the court in such cases. *Id.*

9. In New York the mere failure of a bank to pay a debt due from it on demand, is not sufficient to authorize proceedings to be taken against it, under section 7 of N. Y. Laws of 1849, ch. 226,—which provides that a creditor of a corporation, the payment of whose debt has been refused, may at any time within ten days after such refusal, apply to the court for an order declaring such corporation insolvent. The fact of refusal to pay, continued after the ten days specified in the act, is not conclusive evidence of insolvency; it only shifts the burden of proof from the applicant to the bank. [17 *Barb.* 309.] *N. Y. Supreme Ct. Sp. T.* 1857, *Case of Mechanics' Bank of Williamsburgh*, 5 *Abb. Pr.* 374.

10. But wherever the existence of a good defence to the demand of the creditor of a bank is made to appear on proceedings un-

der the above section, the proceedings taken must be dismissed. Therefore, where the demand of a creditor of a bank was for payment of a sum of money held by the bank, but claimed from them also by third parties,—*Held*, that the bank showed a good defence to the claim, within the meaning of the statute, and that the title to the fund could not be tried in the proceedings against the bank. *Id.*

11. In a time of general suspension of specie payments by banks, the mere fact of suspension by a bank of circulation is not proof of insolvency. A bank may be regarded as solvent, under such circumstances, which has property enough to satisfy all its liabilities. *N. Y. Supreme Ct. Sp. T.* 1857, *Livingston v. Bank of New York*, 26 *Barb.* 304; 5 *Abb. Pr.* 338.

12. Bankrupt corporations. Provisions relative to. Act of Congress of Mar. 2, 1867, 14 *U. S. Stat. at L.* 617.

INSURANCE COMPANIES.

[Throughout this work titles of particular kinds or classes of corporations, present, as a general rule, only matters presumed to be peculiar to the particular class mentioned. Rules which the reader would desire to consult with reference to corporations of more than a single class, are placed, as far as possible, under the appropriate general heads. Thus, decisions relative to the *organization*, *property*, and *powers* of insurance companies, resting upon or illustrating principles equally applicable to other business corporations, are treated under ORGANIZATION; PROPERTY; POWERS;—and the powers of *officers* and *agents* of these companies, and the extent to which the companies are bound by their contracts and acts, except so far as necessarily involved with their peculiar corporate purpose, are treated under such general heads as AGENTS; BOARD; CONTRACTS; ESTOPPEL; OFFICERS; NOTICE; RATIFICATION.

As this work is confined to the law of *Corporations*, much of the law of insurance considered as a contract which may be made either by a corporation or an individual underwriter, is excluded, or only very briefly indicated. Such matters should be sought in works treating of insurance considered as a branch of the law of *Contracts*.* Our purpose is confined to a presentation of the law governing insurance *companies*, considered as one class of corporations.]

I. ORGANIZATION AND POWERS.

II. OFFICERS AND AGENTS.

III. POLICIES.

IV. PREMIUM NOTES.

* As respects the department of *Fire Insurance* and correlated topics, the cases, both English and American, have been extensively and conveniently collected in *A Digest of FIRE INSURANCE DECISIONS*; compiled by H. A. LITTLETON and J. S. BLANCHET, New York, *Baker, Voorhis & Co.* A sec-

I. ORGANIZATION AND POWERS.

1. Mutual and joint stock companies.

The nature of the organization of mutual insurance companies, and the distinction between these and joint stock companies,—explained. *Mygatt v. N. Y. Protection Ins. Co.* 21 *N. Y.* 52; 19 *How. Pr.* 91; *White v. Haight*, 16 *N. Y.* 810; *Hart v. Achilles*, 28 *Barb.* 576.

2. Division into departments. In New York a mutual insurance company, organized under the general insurance companies' act, of April 10, 1849, may divide its risks into classes, according to the degree of hazard, and assess the premium notes only for the payment of the losses happening in the class to which such notes belong. The division of risks into classes is only one of the modes or manners in which the company may, under the statute, choose to transact its business. *N. Y. Ct. of Appeals*, 1860, *White v. Ross*, 15 *Abb. Pr.* 66; 1863, *Sands v. Boutwell*, 26 *N. Y.* 233; *N. Y. Supreme Ct.* 1859, *White v. Coventry*, 29 *Barb.* 805; *Sheldon v. Roseboom*, *Id.* 809, n. *Conn. Supreme Ct.* 1859, *Hope &c. Ins. Co. v. Weed*, 28 *Conn.* 51.

3. But all the notes of a mutual insurance company constitute its capital stock, and although the notes of one department must be first assessed to pay the losses of that department, yet, if they are found not sufficient, and anything remains in the other department beyond paying the claims upon it in that branch, resort must be had to those remaining assets until the whole are exhausted. If the necessity exists, resort must be had to the entire fund of the company. *N. Y. Ct. of Appeals*, 1860, *White v. Ross*, 15 *Abb. Pr.* 66.

4. Hence, when there are two departments in a company,—one stock and one mutual,—it is no defence to a note given on insurance in the mutual department, that all the losses in that department have been paid, and that the unpaid losses accrued in the other department. *Id.* Followed and approved, 1862, *The Same v. The Same*, 28 *How. Pr.* 109.

5. The charter of a mutual insurance company, provided for receiving premium notes for insurance from the insured, payable at

such time or times, and in such term or terms, as the corporation should from time to time require; and that any person applying for insurance, so electing, might pay a cash premium in addition to a premium note, or a definite sum in money, to be fixed by the corporation, in full for insurance, and in lieu of a premium note. *Held*, that the makers of premium notes were liable to pay losses on cash policies; the fund produced by cash premiums being exhausted. *N. Y. Ct. of Appeals*, 1860, *White v. Havens*, 20 *How. Pr.* 177.

6. A mutual fire insurance company organized under the general laws of Wisconsin, in pursuance of its charter, divided the business into two departments, "the Farmer's" and "the Merchant's," and provided by by-law that the accounts of the two should be kept distinct, and that no premium note should be assessed, except for the payment of losses or expenses in the department to which it belonged. A citizen of another State insured in the "Merchant's Department," obtained a judgment in the United States district court against the company on his policy for a loss; he then filed a creditor's bill in the same court, and had a receiver appointed. The receiver assessed notes in the "Farmer's Department," and brought a suit in a State court to recover the amount assessed on a premium note in that department executed subsequently to said loss. *Held*, that the defendant was entitled to judgment. *Wis. Supreme Ct.* 1862, *Allen v. Winne*, 15 *Wis.* 113.

7. The charter of a mutual fire insurance company intrusted the power of issuing policies, and effecting insurances, to the directors, who were required to divide all risks into four separate classes, and assign each policy to its proper class; and a by-law was established defining the different kinds of property to be assigned to each class. With a full knowledge of the facts, the directors insured property in one class, which, according to the by-law, should have been assigned to another class. *Held*, in an action on the premium note, that the policy was not void, and that the note was valid. *N. H. Supreme Ct.* 1855, *Union Mut. Fire Ins. Co. v. Keyser*, 32 *N. H.* 813.

8. Mutual company—*Held* authorized to take cash premiums. *Union Ins. Co. v. Hoge*, 21 *How. (U. S.)* 85; 17 *How. Pr.* 127.

second edition, revised and enlarged by STEPHEN G. CLARK, of the New York bar, has brought the collection down to the present time (1868).

9. Limits of the powers of the company.

Where a charter declares that the corporation is formed solely for the business of insurance and shall not be engaged in trade or other business, and confers power to make insurances; to hold real estate for their use, to receive mortgages for security of the capital stock and of debts due, to purchase on sales made by virtue of judgments or decrees, and to take any real estate in payment of their debts; to purchase stock of the United States for the purpose of investing therein the capital of the company, and to receive transfers of such stock as security for the payment of shares subscribed, or for any debts due to them; to loan money on bottomry, *respondentia*, or mortgage of real estate and chattels real; and to have the liquidation and settlement of the business and concerns of the original stockholders and stock in a former corporation, and, after the extinguishment of all claims, to distribute the residue to such stockholders;—these powers do not carry the power to loan money by discounting a note; but, on the contrary, such provisions, in their nature, forbid such a loan. A corporation has no power but that conferred upon it. Its charter is an enabling act. And such a loan is, by such a charter, wholly void, and the corporation cannot recover on the note. *Conn. Supreme Ct.* 1825, *N. Y. Firemen Ins. Co. v. Ely*, 5 *Conn.* 560.

10. A company incorporated for the purpose of insurance, and forbidden to carry on any other trade or business, also forbidden to exercise banking powers, with a clause in the act incorporating them, enumerating the kind of securities upon which they may loan money, have no power to loan upon securities other than those specially enumerated. *N. Y. Supreme Ct.* 1824, *N. Y. Firemen Ins. Co. v. Ely*, 2 *Cow.* 678. To the same effect is, *The Same v. Sturges*, *Id.* 664; also, *Mo. Supreme Ct.* 1847, *Blair v. Perpetual Ins. Co.* 10 *Mo.* 559.

11. A power given in the charter of an insurance company to invest their funds in such a way as they deem best, does not authorize them to buy the notes of one who is insured by them, for the purpose of using the notes as offsets in case of a claim made by the insured under the policy. *Ohio Supreme Ct.* 1855, *Strauss v. Eagle Ins. Co.* 5 *Ohio St. (Critchf.)* 59.

12. Where the charter of an insurance

company limits its power to make contracts, and requires its capital to be secured on real property or invested in stocks, a loan made by discounting notes, and taking paper as collateral, is void; and neither the company, nor a subsequent holder with notice, can maintain an action on such paper. *N. Y. Superior Ct.* 1829, *Fulton Bank v. Benedict*, 1 *Hall*, 480, 554.

13. A corporation created for the purpose of engaging in the business of insurance, has no power to advance its money or obligations, to sustain another corporation engaged in a similar or dissimilar business. [24 *Conn.* 159; 3 *Seld.* 328; 7 *Eng. L. & Eq.* 505.] The authority given to insurance companies, to reinsure in other companies, does not justify such transactions. *N. Y. Supreme Ct.* 1857, *Berry v. Yates*, 24 *Barb.* 199.

14. A mutual insurance company, not insolvent, may, in the ordinary prosecution of its business, indorse its notes to creditors in lieu of cash. [2 *Sandf.* 180; 3 *Comst.* 390.] *N. Y. Superior Ct.* 1860, *Marine Bank v. Vail*, 6 *Bow.* 421.

15. **Membership.** An individual insured in a mutual insurance company becomes a member of the corporation by that act, and is bound to inform himself of its rules and regulations. [4 *Barr.* 185.] *Pa. Supreme Ct.* 1865, *Mitchell v. Lycoming Mut. Ins. Co.* 51 *Pa. St.* 402.

16. The charter of a mutual insurance company provided that all policies should be signed, and that the company should be liable according to the terms thereof; that every person who should become a member by effecting insurance, should, before he received his policy, deposit his note, &c., and that every member should pay for losses in proportion to the notes, and the company should have a lien on the building insured, to the amount of the note,—*Held*, that every assured must become a member and deposit his note before the policy was binding, and that under the first provision, whatever might be the general custom of insurers, the company was liable only from the signing, not from the agreeing to insure and to issue a policy. *N. J. Ct. of Errors*, 1858, *Belleville &c. Ins. Co. v. Van Winkle*, 1 *Beasl.* 333.

17. The directors of a mutual insurance company, or their officers, by their direction or approval, may so act as to entitle a person to become a member, who, by their fault has

been prevented from depositing his note, and so as to authorize a court of equity to compel his being received. *Id.*

18. A charter of a mutual insurance company provided that all persons who should insure with the company should thereby become members thereof during the period they should remain so insured and no longer, that they should pay for losses in proportion to their deposit notes, and that at the "expiration of the term of insurance," the notes, or so much as remained unpaid, should be given up to the makers (N. Y. Laws of 1886, 42, ch. 41, §§ 2, 6, 8.) *Held*, that the words "term of insurance" referred to the term for which the policy was issued. A member of such company whose insured property is destroyed by fire before his policy expires, and whose loss is paid by the company, continues a member of the company notwithstanding, and is liable to assessment upon his premium note for any losses incurred during the remainder of the term specified in his policy. *N. Y. Ct. of Appeals*, 1860, *Bangs v. Skidmore*, 21 *N. Y.* 186.

19. The obligation of one insured in a mutual company, to contribute, does not cease in consequence of a forfeiture of his insurance by his own neglect. A member cannot divest himself of his obligations to the society, except in such way as is provided by the rules of the society. *U. S. Supreme Ct.* 1810, *Korn v. Mutual Assurance Society of Virginia*, 6 *Cranch*, 192. See *infra*.

20. Consolidation of companies. Where, by an act of the legislature of Massachusetts, three independent mutual insurance companies were incorporated into one, under a new name, with a provision that the act "shall not affect the legal rights of any person," nor take effect until it shall be accepted by the members of said corporations respectively, at meetings called for that purpose,—*Held*, that a member of one of the old corporations, not expressly assenting to such act, was not, by the mere force thereof, constituted a member of the new organization. His rights as a member of one of the original corporations, were in no way impaired by the act creating the new corporation; and he or his assignee must seek any remedies they might be entitled to upon a policy issued by the corporation of which he was a member, against the original corporation of which he was a member. Until, by his assent to the consolidation,

he became a member of the new corporation, there was no privity of contract between him and the new corporation upon which he could maintain an action against them upon a policy issued by one of the original companies. He had not been sued by the new corporation for premiums or assessments, and he therefore could not hold that corporation liable upon such policy. *N. Y. Ct. of Appeals*, 1865, *Gardner v. Hamilton Mut. Ins. Co.* 33 *N. Y.* 421.

21. Dissolution. Whether it is ground for decreeing a dissolution, that an insurance company have relinquished making any further insurances, while they are continuing to receive premiums, and pay losses,—see *Ward v. Sea Ins. Co.* 7 *Paige*, 294; *Matter of Jackson Mar. Ins. Co.* 4 *Sandf. Ch.* 559; *Traders' Mut. Fire Ins. Co. v. Stone*, 9 *Allen*, 483.

II. OFFICERS AND AGENTS.

22. Powers of officers generally. The officers of a mutual insurance company against fire, have power to waive any defects in the preliminary proofs required by statute. *Ms. Supreme Ct.* 1864, *Lewis v. Monmouth Mutual Fire Ins. Co.* 52 *Ms.* 492.

23. Officers of a mutual insurance company have no power to waive express stipulations of their policies or by-laws, which relate to the substance of the contract, although they may disregard such as relate merely to the proof of loss. *Mass. Supreme Ct.* 1864, *Evans v. Trimountain Mutual Fire Ins. Co.* 9 *Allen*, 329.

See OFFICERS.

24. Thus, where the charter of an insurance company did not authorize the president and assistants to accept an abandonment, and required that no money should be paid without the assent of at least four of the directors,—*Held*, that the president and assistants could not make a valid acceptance of an abandonment. *N. Y. Supreme Ct.* 1807, *Beatty v. Marine Ins. Co.* 2 *Johns.* 109.

25. Powers of directors. Where a corporation has vested all of its corporate powers in its board of directors, the latter may do whatever the corporation has power to perform. Therefore, under authority conferred upon an insurance company to cancel such of its stock notes as they should deem worthless, a cancellation by the directors is effectual; and an assessment levied upon the

amount of the notes remaining is valid. *Me. Supreme Ct.* 1862, *Maine Mut. Marine Ins. Co. v. Neal*, 50 *Me.* 301.

26. Where the directors of a mutual fire insurance company are empowered by charter "to determine the sum to be insured upon any building, provided it do not exceed three fourths of the value thereof," but are, by the general powers vested in them, to determine the value of the building, the company, when sued for a loss under a policy, is estopped from objecting that the sum insured by the directors exceeded the prescribed limit of value; it appearing that there was no fraud or misrepresentation as to the value on the part of the insured. *R. I. Supreme Ct.* 1860, *Hoxsie v. Providence &c. Ins. Co.* 6 *R. I.* 517.

See BOARD; DIRECTORS; also *infra*, 78.

27. — of president. Where an act incorporating an insurance company, provided that the president, with one third of the directors, should be a quorum competent to transact business, and that he might sign policies, and that business might be done by committees;—*Held*, that the president had no other powers than those specified, and could not waive preliminary proofs. *N. Y. Supreme Ct.* 1827, *Dawes v. North River Ins. Co.* 7 *Cow.* 462.

28. The by-laws of a mutual insurance company provided that no policy should be delivered until after payment of the premium; and, by a vote of its directors, if premiums should not be paid within sixty days from the dates of the policies, the policies were to be considered as canceled. *Held*, that the president had no authority to waive these provisions, and that the company was not bound by assurances given by him to a mortgagee that a policy had been procured by the owner of mortgaged property, and made payable to the mortgagee in case of loss, when in fact such policy had not been delivered in consequence of a failure to pay the premium. *Mass. Supreme Ct.* 1861, *Baxter v. Chelsea Mut. Fire Ins. Co.* 1 *Allen*, 294.

29. The president of an insurance company *Held* to be the proper officer to transfer a note of the company, to indorse it, and to convert it into money. See *Caryl v. McElrath*, 8 *Sandf.* 176; *Baker v. Cotter*, 45 *Ma.* 286.

30. An indorsement of a note owned by an insurance company, in this form, "A. B. President," will be deemed the indorsement of the corporation of which A. B. was president;

it being proved that the corporation was accustomed to negotiate its paper by such an indorsement, and it not appearing that it ever made indorsements in any other form. *N. Y. Supreme Ct.* 1861, *Elwell v. Dodge*, 33 *Barb.* 836.

31. Where a stock subscription note, payable to the order of a mutual insurance company, indorsed by its president, and negotiated before its maturity (this being a common mode of negotiating its notes), is taken by a third person in good faith, in the usual course of business, such holder acquires a good title. *N. Y. Superior Ct.* 1860, *Merchants' Bank v. McColl*, 6 *Bow.* 478.

See BILLS AND NOTES.

32. The president of a mutual insurance company, authorized by its charter to receive notes for premiums in advance, and negotiate the same, agreed, on receiving such a note, that it should be given up at its maturity. *Held*, that his agreement was void, and that he had no right, after the note matured, although it had not been negotiated, to agree to give it up. *N. Y. Superior Ct.* 1847, *Brouwer v. Appleby*, 1 *Sandf. ct.* 158; *Hone v. Allen*, *Id.* 171, *note*.

33. The charter of a mutual insurance company authorized it to receive premium notes in advance, and negotiate them for the purpose of paying losses, or otherwise, in the course of its business; and the by-laws gave power to the president to sign policies, and transact the ordinary business of the company. He borrowed money to pay losses, and hypothecated premium notes therefor, to the amount of several thousand dollars, and afterwards had the notes discounted by the lender in payment of the loans. *Held*, that these acts of the president were within his authority, and that the negotiating of the notes was in the transaction of the ordinary business of the company, and did not require a previous resolution of the board of trustees.* *N. Y. Superior Ct.* 1852, *Brouwer v. Harbeck*, 1 *Duer*, 114.

See PRESIDENT.

34. — of vice-president. The vice-president of an insurance company does not, merely by virtue of his office, have authority to receive, from the insured, goods which are injured, and to agree with him that the same shall be the property of the company, or shall be sold

* But see reversal, 9 *N. Y.* (5 *Seld.*) 569.

under the direction of the company and at their risk, so as to render the company responsible for the solvency of auctioneers employed to sell the goods. Such authority is not necessarily involved in the power of officers to adjust losses. *N. Y. Superior Ct.* 1861, *Jellinghaus v. New York Ins. Co.* 8 *Bono*. 281.

35. — of secretary. The secretary of an insurance company is presumed to be the official agent to carry into effect the votes and directions of those who have the management of its affairs, unless the contrary appears. *Ma. Supreme Ct.* 1860, *Leary v. Blanchard*, 48 *Ma.* 269.

36. The secretary of a company whose business is conducted by the president, vice-president, and secretary, subject to the direction of a board of trustees, being empowered verbally by the president and vice-president, with the knowledge of the trustees, to indorse the premium notes of the company, is thereby authorized to transfer the title of a note indorsed by him. *Id.* Compare *Houghton v. McAuliffe*, 26 *How. Pr.* 270.

37. The letters of the secretary of a mutual insurance company are admissible in evidence in an action upon the policy so far as they admit a notice of the loss, or communicate the proceedings of the directors thereon. *Ma. Supreme Ct.* 1864, *Lewis v. Monmouth Mutual Fire Ins. Co.* 52 *Ma.* 492.

38. — of treasurer. Treasurer of a mutual fire insurance company, whose by-laws provide that each applicant for insurance shall pay to the treasurer such premium as the directors shall determine, before his policy shall be binding, cannot waive cash payment of premium. See *Buffum v. Fayette Mut. Fire Ins.* 3 *Allen*, 860.

39. Agents. Who may be. The same person cannot act as agent for two corporations in making a contract between them,—e. g. a contract by one corporation reinsuring another. A contract so made will not be enforced. *N. Y. Ct. of Appeals*, 1856, *N. Y. Central Ins. Co. v. National Protection Ins. Co.* 14 *N. Y.* (4 *Kern.*) 85; *N. Y. Supreme Ct.* 1853, *Utica Ins. Co. v. Toledo Ins. Co.* 17 *Barb.* 182.

40. A sub-agent of an insurance company cannot issue a policy, or make any agreement on the part of the company to issue a policy, to himself. *N. Y. Ct. of Appeals*, 1858, *Bentley v. Columbia Ins. Co.* 17 *N. Y.* 421.

41. — their authority. An agent of an in-

surance company, whose duty consists in taking surveys, receiving applications for insurance, examining the circumstances of a loss, approving assignments and receiving assessments, is not authorized to accept notice of over insurance or waive the consequences of it. *Pa. Supreme Ct.* 1865, *Mitchell v. Lycoming Mut. Ins. Co.* 51 *Pa. St.* 402.

42. An agent of an insurance company, authorized to procure applications for insurance, and furnished by the company with printed blanks therefor, containing interrogatories to be answered by the applicant, with regard to the condition of the property to be insured, has, as incidental to such power, authority to make all necessary explanations of the meaning and effect of the terms employed by the company in their interrogatories, and to agree with the applicant as to the terms which he shall employ to express the facts stated by him in answer to the interrogatories. *Conn. Supreme Ct.* 1857, *Malleable Iron Works v. Phoenix Ins. Co.* 25 *Conn.* 465.

43. Authority to an agent to receive premiums "on risks accepted," authorizes him to receive them on deposit, to become the property of the company, *eo instanti* that they accept. *N. J. Supreme Ct.* 1857, *Hallock v. Commercial Insurance Co.* 2 *Dutch.* 268.

44. That it is within the authority of an agent of an insurance company, who is intrusted with printed forms of policies, signed by the officers of the company, to be filled out, countersigned and issued by him, to add to the policy, before it is delivered or accepted or the premium paid, a memorandum that the building insured is in the course of construction; and such memorandum will be binding on the company,—see *Gloucester Manuf. Co. v. Howard Fire Ins. Co.* 5 *Gray*, 497. Compare *Sheldon v. Conn. & C. Ins. Co.* 25 *Conn.* 207.

45. If an insurance agent has authority only to receive and forward applications for insurance, parol evidence is inadmissible to show that he took down statements wrongly in making out applications. But if he had power to pass upon and did pass upon a risk without submitting it to his principal and failed to take down correctly the facts stated by the applicant, the company is estopped from objecting that it was misled by the representations of the assured. *Iowa Supreme*

Ct. 1864, *Ayres v. Hartford Fire Ins. Co.* 17 *Iowa*, 178.

46. Where an insurance policy had been issued in the name of a company, by a person acting as its agent, but whose authority so to act was not shown, and such policy was renewed by an authorized agent of the corporation,—*Held*, that the company had ratified the act of the person issuing the policy, and that his acts and declarations at the time the risk was taken were admissible in evidence against the company. *Wis. Supreme Ct.* 1862, *Beal v. Park Fire Ins. Co.* 16 *Wis.* 241.

47. Effect of private instructions. An insurance company appointed H. their general agent, and placed in his hands a number of policies executed in blank, to be issued by him, but restricted him to effecting insurances within a particular limit. *Held*, they were liable on a policy issued by him upon property at a distant place; the insured having no reason to suspect the restriction. *N. Y. Supreme Ct.* 1840, *Lightbody v. North American Ins. Co.* 28 *Wend.* 18.

48. That a statement in the instructions issued by the directors of a mutual insurance company to agents, that risks upon certain property are not insurable, does not preclude the company from making a valid contract of insurance upon such property, unless they are prohibited from so doing by the by-laws,—see *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 *Allen*, 217.

49. Notice to agent. Mere knowledge by an agent of an insurance company of acts which would avoid a policy issued by his principal, without objection thereto, does not bind the company. *Iowa Supreme Ct.* 1864, *Ayres v. Hartford Fire Ins. Co.* 17 *Iowa*, 178.

50. Where the charter of an insurance company does not require, in express terms, the notice of a subsequent insurance to be given in writing, a verbal notice to any officer, director, or proper agent of the company, is sufficient; but the mere fact of knowledge acquired by an agent from a conversation of the assured and others is not equivalent to a verbal notice. *N. J. Supreme Ct.* 1854, *Schenck v. Mercer County Mut. & c. Ins. Co.* 4 *Zabr.* 447.

51. Knowledge by an agent of a mutual insurance company of a fire by which a loss occurred, does not relieve the assured from the duty of giving notice and making proof

of loss, according to the by-laws. *Mass. Supreme Ct.* 1861, *Smith v. Haverhill Mut. Fire Ins. Co.* 1 *Allen*, 297.

52. When company's agent becomes agent of applicant. In general, an agent of an insurance company in filling up a blank application for insurance, will be deemed to act as the agent of the company rather than of the applicant. If the application contains a misstatement which is not induced by the instructions of the applicant, a policy issued upon it will not be rendered invalid. *N. Y. Ct. of Appeals*, 1867, *Rowley v. Empire Ins. Co.* 86 *N. Y.* 550. And see *Masters v. Madison County Mut. Ins. Co.* 11 *Barb. (N. Y.)* 624; *Malleable Iron Works v. Phoenix Ins. Co.* 25 *Conn.* 465.

53. In mutual insurance companies the insured does not stand in the relation of a co-corporator in his own act of insurance; but as to this he is a stranger; and an act of examination and description by an agent of the company previous to the insurance is not converted into his own act and made a representation by him. The insured is therefore not chargeable with an over-estimate of the property by an agent, unless he took some fraudulent part in it. *Pa. Supreme Ct.* 1857, *Cumberland Valley & c. Co. v. Schell*, 29 *Pa. St.* 31.

54. Where a local agent of a fire insurance company, authorized to receive and forward to the company, applications for insurance, and instructed by the company to consider himself in so doing the agent of the party applying rather than of the company, neglects to communicate to the company facts disclosed to him by an applicant for insurance, material to the risk, and the company in consequence issues a policy in ignorance of such facts, the neglect of such agent is not chargeable to such applicant, unless such agent is also acting as the agent of the applicant; and the instructions of the company above stated, not communicated to the applicant, do not make him such agent. *Conn. Supreme Ct.* 1856, *Beebe v. Hartford & c. Ins. Co.* 25 *Conn.* 51.

55. An agent for an insurance company, empowered merely to receive written applications for insurance, to transmit them to the company, and, if they decide to take the risk, to receive the policy executed by them and to issue it to the applicant upon receipt from him of the premium, is not the agent of the

company for the making of applications; and if employed by the applicant, or permitted to act for him in drawing up the application, is his agent, for whose mistakes of a fact committed in the statements or answers to interrogatories in the applications, he is responsible. *R. I. Supreme Ct. 1856, Wilson v. Conway Fire Ins. Co. 4 R. I. 141.*

56. If, however, the agent, being empowered to receive and transmit written applications for insurance to the company, and requested by the applicant to copy the answers which he shall make in another application for insurance upon the same property taken away by him to fill up, instead of waiting until he receives from the applicant such answers to copy, sends to his company an old application for insurance upon the same property, corrected to suit the change of circumstances by himself (thus sending an application which he was not authorized by the applicant to send), the company is estopped from setting up the mistakes of fact in the application thus misent by their agent, in defence to a suit on the policy for a loss under it. *Id.*

57. An insurance company cannot be affected with notice by verbal communications made by an applicant for insurance to an agent authorized only to receive written applications for insurance and to transmit them to the company for acceptance or rejection; and in a suit upon the policy for a loss, evidence of verbal communications of facts made to the agent varying from the statements in the written application, is inadmissible to avoid the effect of misstatements or mistakes in the written application. *Id.*

See NOTICE.

58. Where an application for insurance contained an express agreement on the part of the applicant that "the company shall not be bound by any act done or statement made to or by any agent or others not contained in the application," and the policy was issued upon condition that "every insurance agent forwarding application or receiving premiums is the agent of the applicant and not of the company." *Held*, that evidence designed to show, that the defendant was induced to take out a policy upon the fraudulent misrepresentations of one who acted as general agent of the company, was inadmissible in an action brought against a member to recover a deposit. *Mass. Supreme Ct. 1864,*

Shawmut Mutual Fire Ins. Co. v. Stevens, 9 Allen, 382.

59. A person representing himself as the agent of the plaintiffs, an insurance company, obtained from the defendant, and forwarded to the plaintiffs, an application for insurance, and the plaintiffs, knowing what he had done, afterwards appointed him their agent to obtain applications, taking bonds for the faithful discharge of his duties, dated several months previous. *Held*, that these acts of the company amounted to a ratification of the defendant's agency. *Vt. Supreme Ct. 1856, Farmers' Mut. Fire Ins. Co. v. Marshall, 29 Vt. 23.*

60. An applicant for insurance, in his application to a mutual fire insurance company, in answer to a question from the company whether the premises were incumbered, by what, and to what amount, stated that they were mortgaged to L. for \$2,000. The applicant had in fact, no legal title to the premises, but only a bond from L. to convey the same to him, on his giving a mortgage for \$2,000 advanced to him by L. to build with, and for the additional sum of \$1,800, the price of the land, and the company issued a policy to the applicant "on his dwelling-house," made in express terms subject to the lien established by law on the interest of the assured in the buildings covered by the policy, and the land under the same; and "payable in case of loss to L., mortgagee." *Held*, that the misrepresentation in the application avoided the policy; although the application was drawn up by an agent and director of the insurance company. *Mass. Supreme Ct. 1851, Lowell v. Middlesex Mut. Fire Ins. Co. 8 Cush. 127. But see Masters v. Madison County Mut. Ins. Co. 11 Barb. (N. Y.) 624.*

61. A by-law of a mutual insurance company, which makes the surveyor of the company the agent of the assured, relieves the company from responsibility for the errors of the surveyor, or for want of compliance with the requisitions of the by-laws. *Pa. Supreme Ct. 1844, Susquehanna Ins. Co. v. Perrine, 7 Watts & S. 348. Compare Abbott v. Shawmut Mut. Fire Ins. Co. 3 Allen, 213; Kennedy v. Lawrence County Mut. Ins. Co. 10 Barb. (N. Y.) 235.*

For rules of Agency, applying to insurance companies in common with other corporations,—see AGENTS; also CONTRACTS; OFFICERS.

liams v. N. E. Mutual Fire Ins. Co. 31 Me. 219.

78. A fire insurance company, although restricted by charter to risks upon property to the amount of three fourths of its value only, may nevertheless be bound by a deliberate valuation of property, and an insurance of three fourths of the amount of such valuation, and in the absence of fraud, collusion, or misrepresentation, they cannot show, in an action against them to recover a loss, that the property was insured for more than three fourths of its true value. *Mass. Supreme Ct.* 1842, *Fuller v. Boston Mut. Fire Ins. Co.* 4 Metc. 206. See *supra*, 26.

79. — upon term. The fact that a charter of an insurance company expires, by its own limitation, within the time during which a policy issued by it is to continue, does not make the policy void. It is valid for the unexpired term of the charter. *N. Y. Supreme Ct.* 1859, *Huntley v. Beecher*, 30 Barb. 580; *S. P.* 1860, *Huntley v. Merrill*, 32 Barb. 626.

80. Priority of policies. In the distribution of the proceeds of an assessment made by an insurance company to pay losses by fire, all the liabilities of the company, incurred in the same manner, should be paid *pro rata*, without reference to priority in the time of loss. *N. H. Supreme Ct.* 1861, *Richards v. New Hampshire Ins. Co.* 43 N. H. 268.

81. Where insured property is destroyed by fire to so great an amount that all the deposit notes, and one per cent. on all the property insured, is not more than sufficient to pay the losers, and afterward, before the deposit notes are collected, another fire destroys other property insured in the same company, the losers by the latter fire are not entitled to any part of the fund arising from the notes, and one per cent. assessed. *Pa. Supreme Ct.* 1845, *Coston v. Alleghany Mut. Ins. Co.* 1 Pa. St. 322.

82. In the absence of the appropriation of any specific fund to the payment, a person insured, who sustained a loss prior to a calamity which caused the corporation's insolvency, is not entitled to a preference of payment from its assets, over those whose claims arose by the calamity.* *N. Y. Chancery*, 1837, *Lowerre v. American Fire Ins. Co.* 6 Paige, 482. Compare *Le Roy v. Globe Ins. Co.* 2 Edw. 657.

* One who loans to an insurance company a sum to enable them to pay off a loss which they have incurred, is not, when the company subsequently becomes insolvent, entitled to re-

83. Adjustment of claims. It is in the power of an insurance company, or its receiver, to allow equitable claims for losses, although no actions to recover the same could be maintained, by reason of the neglect of the claimants to sue within the time prescribed by the charter or by-laws of the company, or that limited by the statute. And when such claims are allowed, the company, or its receiver, is bound to pay them, provided there are funds for that purpose; and when there are no funds, it is the duty of the company, or its receiver, to collect enough for that purpose from the note makers. And the latter cannot defeat actions brought against them, upon their notes, for the recovery of such funds, on the ground that the company, or its receiver, might have avoided allowing or paying the losses upon mere technical grounds. If the note makers have any remedy for the allowance of such claims, it must be against the directors or receiver personally. *N. Y. Supreme Ct.* 1865, *Sands v. Hill*, 42 Barb. 651.

84. In an action against a mutual insurance company, on a policy of insurance, the report of the committee, organized under the provisions of the act of incorporation to examine and inquire into the loss, and ascertain the sum due the insured, is not conclusive of the amount of the loss. *Pa. Supreme Ct.* 1858, *Sinking Springs &c. Ins. Co. v. Rupp*, 29 Pa. St. 526.

85. Cancelling policy. How effected. Where the charter of an insurance company provides that all policies of assurance and other instruments, made and signed by the president, or other officer, in conformity with the regulations of the company, shall be binding upon the same, and the constitution of the company requires in addition that a policy should be countersigned by the secretary, an unsigned note delivered by the secretary, assenting to a proposition to cancel a policy, does not constitute an agreement obligatory on the company. A contract varying a policy is as much an instrument as the policy itself,

payment out of the surplus fund of the company as against other parties insured. *De Peyster v. American Fire Ins. Co.* 6 Paige, 486.

Nor are the stockholders entitled to such fund as against the creditors. *Scott v. Eagle Fire Co.* 7 Paige, 196.

That insolvency and the appointment of a receiver, subsequent to suit brought on the contract of insurance, is not available as a defence, further than that it limits the right of the plaintiff to a *pro rata* payment out of the fund,—see *Bodle v. Chenango Mut. Ins. Co.* 2 N. Y. (2 Comst.) 53.

and can only be executed in the manner prescribed by law. *U. S. Supreme Ct.* 1804, *Head v. Providence Ins. Co.* 2 *Cranch*, 127.

86. — on what terms. Under a provision in the charter of an insurance company that, upon alienating the insured property, the insured should be entitled to surrender the policy and have his deposit note canceled, on paying his proportion of losses then incurred, — the defendant surrendered a policy and the company canceled and surrendered the deposit note, without payment of anything toward losses, though at that time there were contested claims against the company for losses, some of which were subsequently established. The receiver appointed in chancery made an assessment thereof upon notes of the same class as that of the defendant. There was no proof of fraud, or of any mistake of fact in regard to the claims existing against the company when the note was surrendered, — *Held*, that the surrender was valid, and that the receiver could not recover on the note. The amount to be paid on a surrender in such case is a proper subject of adjustment between the insured and the company at the time, and the adjustment made is binding on both parties, where there is no fraud or mistake. *N. Y. Ct. of Appeals*, 1850, *Hyde v. Lynde*, 4 *N. Y.* (4 *Comst.*) 887.

87. — its consequences. The surrender of a mutual insurance company's policy by the insured, and its cancellation by the insurance company, dissolves the relation of the insured as a member of the company, and the company has no further claim upon him, except for the unpaid assessments previously made. *N. Y. Supreme Ct.* 1862, *Campbell v. Adams*, 38 *Barb.* 132. See *infra*, 120–134.

88. Where the parties canceled the policy by consent, while the risk was running, — *Held*, that the insured was not liable for any part of the premium. *N. Y. Superior Ct.* 1848, *Merchants' Mutual Ins. Co. v. Underwood*, 1 *Sandf.* 474.

89. Forfeiture of policies for non-payment. A provision that a mutual policy shall be void if assessments on the premium note remain unpaid for thirty days, is valid.* *N.*

* A mutual policy issued under a by-law which provides that the policy shall become void, "if the assured shall neglect, for the term of thirty days, to pay his premium note, or any assessment thereon, when requested to do so, by mail or otherwise," is rendered void by the neglect of the assured to pay the amount of an assessment upon his premium note, for thirty days after a written request for payment,

Y. Supreme Ct. 1842, *Beadle v. Chenango County Mutual Ins. Co.* 3 *Hill*, 161.

90. Where by-laws require notice of the assessment to be published, failure to pay assessments is unavailable as defence to the policy, unless publication of the notice is shown. *N. Y. Ct. of Appeals*, 1848, *Bodle v. Chenango County Mutual Ins. Co.* 2 *N. Y.* (3 *Comst.*) 58.

91. A refusal to pay an illegal assessment for thirty days after demand will not render void a policy of insurance issued by a mutual company, or defeat a subsequent assessment upon the same, although the by-laws authorize the directors to terminate the same in case of a refusal to pay assessments, and the directors when making the assessment voted that any policy, the holder of which should refuse to pay any assessment for thirty days after a demand on him, should be void. *Mass. Supreme Ct.* 1864, *Matter of People's Mutual Equitable Fire Ins. Co.* 9 *Allen*, 319.

92. Waiver of condition of prepayment. Whether a general agent of an insurance company can waive a provision in a policy that it shall not be valid until the premium is paid, — see *Boehen v. Williamsburgh City Ins. Co.* 35 *N. Y.* 131; *Mulrey v. Shawmut Mut. Fire Ins. Co.* 4 *Allen*, 116; *Wing v. Harvey*, 27 *Eng. L. & Eq.* 140; *Sheldon v. Conn. &c. Ins. Co.* 25 *Conn.* 207.

93. The by-laws of an insurance company provided, that no insurance should be considered as made, or binding, until the premium was actually paid. Their agent wrote to a party wishing insurance, "Should you desire to effect the insurance, send me your check, payable to my order, for the amount of the premium, and the business is concluded." *Held*, that the putting a letter directed to the agent in the post office, with the check inclosed, was a payment within the provision of the by-laws. *U. S. Supreme Ct.* 1850, *Talloe v. Merchants' Fire Ins. Co.* 9 *How.* 390.

94. It is no evidence of waiver of a by-law of a mutual fire insurance company, re-

prepaid, duly directed, and deposited by the company in the post office, in due course of mail, would reach the place of his residence, as set forth in the policy, whether he received such request or not. *Lothrop v. Greenfield &c. Ins. Co.* 2 *Allen*, 83.

But the company cannot set up as a defence, the forfeiture of the policy by non-payment of assessments on the insured's premium note, under a general allegation of the answer, that the company has a legal defence to the claim. *Bodle v. Chenango County Mutual Ins. Co.* 2 *N. Y.* (3 *Comst.*) 58.

quiring the assured, before the delivery of any policy, to pay such premium and give such deposit note as the president and directors shall from time to time determine, that the policy was made out and recorded in the company's books, pursuant to an agreement between the person to be insured and the president of the company; that the directors had previously voted "that the premiums on all policies shall be payable within thirty days from the date of said policies, and if not paid within sixty days the policies shall be considered canceled;" that both before and after sixty days from the date of this policy, the president and secretary requested this person to pay the premium, without suggesting any invalidity of the policy; and that, after a loss of the property insured, an assessment was laid to cover it. *Mass. Supreme Ct.* 1859, *Brewer v. Chelsea Mutual Fire Ins. Co.* 14 *Gray*, 203.

95. — of proofs of loss. An omission to give notice and make proof of loss, in compliance with the requirements of the by-laws of a mutual insurance company, is not waived by a statement of the president of the company, made seventeen months after the loss, that the company would be disposed to do what was right, that they knew at the time of the fire that it was their loss, and were surprised that they were not notified; nor by a subsequent direction from the directors of the company to one of the assignees in insolvency of the assured, in reply to a verbal claim of loss made by him, to have a statement of loss sent to them, and they would take the subject into consideration; nor by a subsequent vote of the directors to require the assured to make a statement under oath in regard to the loss. *Mass. Supreme Ct.* 1861, *Smith v. Haverhill Mut. Fire Ins. Co.* 1 *Allen*, 297.

96. Where one of the by-laws of a mutual insurance company required that the insured, within thirty days after loss by fire, should give notice to the company, specifying the amount of loss, the manner of it, and other particulars as a condition to his right to recover,—*Held*, that a declaration to the insured by a traveling agent of the company, "that the matter would be all right with the company," was not a waiver of the necessity of such notice. *N. C. Supreme Ct.* 1860, *Boyle v. North Carolina Mut. Ins. Co.* 7 *Jones' Law*, 373.

97. — of forfeiture by assignment. The

acts of the company in making and collecting assessments upon the premium note, after notice of an assignment without consent, are not a waiver of the forfeiture, unless it is shown that the losses for which the assessments were made, occurred after the forfeiture. *N. Y. Supreme Ct.* 1842, *Smith v. Saratoga County Mut. Fire Ins. Co.* 8 *Hill*, 508. And see *Boynton v. Clinton & Essex Mut. Ins. Co.* 16 *Barb.* 254.

98. The by-laws of an insurance company provided that the risk should be suspended, if the assured neglected for a certain time to pay assessments after personal demand. *Held*, that by making a subsequent assessment and collecting it, the company did not waive their exemption from liability, caused by a previous non-payment. *Ms. Supreme Ct.* 1857, *Nash v. Union Mut. Ins. Co.* 48 *Me.* 343.

99. Transfer of policy, by bequest. A shareholder in an unincorporated insurance company, by whose rules every holder of shares was required to effect an insurance with the company, by his will gave to A and B "all and every of his shares and interest in the company, and all the advantages to be derived therefrom." The words "shares and interest," were also, in other parts of the will, used with reference to companies of different kinds. *Held*, that the policy of assurance effected by the testator with the company, did not pass under the bequest. *Chancery*, 1853, *Harington v. Moffat*, 17 *Eng. L. & Eq.* 22; 4 *De Gaz. M. & G.* 1.

100. Consent to transfer of policy. Where the by-laws of an insurance company require the approval and ratification of the directors to the transfer of a policy, it is sufficient if such approval, &c., may be fairly presumed from the acts of their authorized agent, or from their own acquiescence. A formal vote is not necessary. *N. J. Supreme Ct.* 1853, *Duray v. Hudson & Co. Ins. Co.* 4 *Zabr.* 171.

101. And the consent of a mutual insurance company to an assignment of a policy, being given by the secretary as agent of the company, and by him indorsed on the policy, binds the company and the directors. *Id.*

102. A provision in the charter of an insurance company, requiring that all policies shall be signed by the president, does not render it necessary that the assent of the company to an assignment of a policy should be signed by him. The signature of the sec-

retary to such an assignment is *prima facie* evidence of an agreement by the company; and the company, by receiving a consideration in the assignee's guarantee of the premium note, accept the act of the secretary, and are bound by it. *Mass. Supreme Ct.* 1829, *N. E. Marine Ins. Co. v. De Wolf*, 8 *Pick.* 56.

103. Rights of assignee. The charter of a mutual fire insurance company contained the usual grant of power to make by-laws necessary and convenient for the management of the business of the company. Under this power, the company adopted a by-law which provided that a mortgagee, having the policy assigned to him, might have the same ratified and confirmed for his benefit, by consent of the directors, and giving security to their satisfaction for the remaining term of the policy, and that, in such case, the mortgagee should be entitled to all the privileges and incur all the liabilities of the institution equally with the other members.

Held, 1. That the by-law was within the power conferred by the charter, and was valid.

2. That where an assignment had been made to a mortgagee, under the by-law, an action upon the policy, in case of loss, should be brought in the name of the assignee. *N. H. Superior Ct.* *Rollins v. Columbian Fire Ins. Co.* 5 *Fost.* 200.

104. The charter of a mutual insurance company provided that the assignee of a policy should give security "to the satisfaction of the directors." *Held*, that the original deposit note given by the assignor might be considered the security contemplated, if the acts of the directors were such as to show their "satisfaction." *N. J. Supreme Ct.* 1853, *Duray v. Hudson & Co. Ins. Co.* 4 *Zabr.* 171.

105. If the assignees in insolvency of persons insured by a mutual insurance company, have guaranteed the payment of the premium note, and taken an agreement from the company that the policy shall be continued in force to them for an extended period of time, they may recover the full amount of a loss which subsequently occurs, without deducting the amounts due from the insolvent debtors to the company upon other premium notes; although the policy contains an agreement that, in case of loss, all sums due to the company from the insured shall be deducted before payment. *Mass. Supreme Ct.* 1863, *Tripp v. Pacific Mut. Ins. Co.* 7 *Allen*, 230.

106. A mutual fire insurance company issued a policy to W., who, having mortgaged the premises to S., assigned the policy to him, with the consent of the directors. Afterward, S. having sold his interest in the premises to H. and E., assigned the policy to them, with the approval of the directors, H. and E. giving their written promise to the company, at the time, to pay all assessments that should thereafter be made against the policy. Subsequently, assessments were made against the policy for losses happening before the assignment to H. and E., and also for losses after the assignment to them. After all the assessments were made, those that were made for losses prior to the assignment to H. and E., were paid by the surety of W., who had signed his premium note with him, and the note was given up to the surety. On an action brought against H. and E. for the assessments for losses after the assignment to them,—*Held*, that they were liable for the payment of them, and that the surrender of the original note of W. did not relieve H. and E. from their promise. *N. H. Superior Ct.* 1855, *New Hampshire Mut. Fire Ins. Co. v. Hunt*, 10 *Fost.* 219.

107. A mutual fire insurance policy was assigned to a purchaser of the insured premises, who gave his own premium note in lieu of the one originally given, which was given up to the maker, there being at the time an assessment unpaid upon it; notice of this assessment was given to the makers of each note, and afterwards the premises were burned. It was provided in the policy that "any member" who should refuse payment of an assessment for thirty days after notice, should forfeit his policy, provided his premium note, after paying losses, should be given up to him on demand. *Held*, that, within the meaning of this provision, the assignee of the policy was not a member of the company, and that he could recover for his loss, notwithstanding the unpaid assessment. *N. J. Supreme Ct.* 1859, *Brannin v. Mercer County & Co. Ins. Co.* 4 *Dutch.* 92.

For rules regulating Corporate contracts applicable to insurance policies in common with other agreements, see CONTRACTS and the titles there mentioned.

IV. PREMIUM NOTES.

108. What is a premium note. A note made and delivered to persons organizing a

mutual insurance company, for the purpose of being presented to the commissioners appointed by the comptroller to examine the capital and securities of such company, is a premium note; and as such is covered by an injunction restraining the receiver of the company from collecting and receiving any moneys on the premium notes of said company. *N. Y. Ct. of Appeals*, 1865, *Sands v. Campbell*, 81 *N. Y.* 345.

109. A note given to an insurance company in advance of premiums earned, upon the understanding that the note shall be renewed from time to time for amounts not earned,—*Held*, not a "subscription note" within the meaning of the New York general insurance act. *N. Y. Superior Ct.* 1858, *Elwell v. Crocker*, 4 *Bow.* 22; 1860, *Lawrence v. McCready*, 6 *Bow.* 329.

110. Stock notes and premium notes. There is a wide distinction between the liabilities of those who give notes to form the capital stock of a mutual insurance company and of those who give notes for premiums, after the stock is made up and the company brought into existence.* While the former class are liable on their notes, irrespective of losses, the latter are liable only for the *pro rata* share of such losses, in common with all other available premium notes held by the company. *N. Y. Supreme Ct.* 1862, *Dana v. Munro*, 38 *Barb.* 528.

111. The agent of an insurance company about to be organized, applied to the defendant to insure buildings in the company, when it should be in a situation to do business; saying that it was not yet organized, but soon would be. After the company was authorized to receive applications, the request to insure was renewed, and acceded to by the defendant, who made an application, and gave a note for the premium, without any intimation being given that any obligation was intended other than that incurred by every person insuring in a mutual insurance company. *Held*, that the note could not be treated as a stock note, and collected without an assessment. *Id.*

112. Whose note may be taken. Where the only provision in the charter authorizing

the company to take notes, empowers them to take the notes of members—i. e. persons insured—for premiums, in proportion to the amount insured, they cannot take the note of a person other than one insured. They cannot recover against a stranger who gives his note for the accommodation of an insured, and without consideration. *N. Y. Ct. of Appeals*, 1855, *Mutual Benefit Life Ins. Co. v. Davis*, 12 *N. Y.* (2 *Kern.*) 569.

113. Form. In an action by a mutual insurance company against a member, to recover an amount agreed to be paid as a deposit, a promise to pay "to the company or its treasurer," "in such sums as may be called for by a vote of the directors of said company, or by the treasurer of said company," may be given in evidence under a declaration alleging a promise to pay to the company, and that the sum sued for has been duly demanded and called for. *Mass. Supreme Ct.* 1864, *Shawmut Mutual Fire Ins. Co. v. Stevens*, 9 *Allen*, 332.

114. Where the charter of an insurance company authorizes the company to take premium notes in advance, and negotiate such notes, if the company take a non-negotiable note,—e. g. a note payable to the order of the maker, but not indorsed by him,—it is nevertheless valid in the hands of the company. *N. Y. Superior Ct.* 1848, *Brouwer v. Hill*, 1 *Sandf.* 629.

115. A premium note, payable "in such portions, and at such time or times as the directors may, agreeably to the charter and by-laws of the company, require,"—*Held* sufficient in form under a statute requiring premium notes to be made payable "at the end of, or within, twelve months from date." *N. Y. Supreme Ct. Sp. T.* 1853, *Hill v. Reed*, 16 *Barb.* 280.

116. A note given to a mutual insurance company organized under the New York general act (Laws of 1849, ch. 308), as one of the notes required to make up its capital, by which the maker promises to pay the specified sum to the company "in such portions and at such time or times as the directors may require" is in legal effect* payable immediate-

* Upon this distinction, see also, *Howland v. Edmonds*, 24 *N. Y.* 301; 23 *How. Pr.* 153; *Bell v. Sibley*, 33 *Barb.* (N. Y.) 610; *Bell v. Yates*, *Id.* 627; *Sands v. St. John*, 36 *Id.* 623; 23 *How. Pr.* 140; *Hyatt v. Edmond*, 37 *Barb.* 601; *Toll v. Whitney*, 18 *How. Pr.* 161.

* The statute of limitations applies to capital stock notes given to a mutual insurance company. They cannot be excepted from the operation of the statute upon the theory of a legislative intent that they should form a continuing or permanent security. *Bell v. Yates*, 33 *Barb.* (N. Y.) 627; *Sands v. St. John*, 36 *Id.* 623; 23 *How. Pr.* 140.

ly; for the statute contemplates an absolute liability. No demand is necessary to found an action upon it; and the statute of limitations therefore begins to run against it at the time it is given, and is a good defence at the expiration of six years from that time. It makes no difference in this respect that the statute required such notes to be payable "at the end of, or within, twelve months from date." *Ct. of Appeals*, 1862, *Howland v. Edmonds*, 24 *N. Y.* 307; 23 *How. Pr.* 152.

117. Transfers. A mutual insurance company, authorized by their charter to negotiate their premium notes, for the purpose of paying claims or otherwise, may transfer a note in payment of a loss. *N. Y. Ct. of Appeals*, 1850, *Howland v. Myer*, 8 *N. Y.* (3 *Comm.*) 290.

118. A note given to a mutual insurance company by a party insured, for premiums to be earned, may be negotiated by the company; and a *bona fide* holder for value will be entitled to recover the full amount, however small the amount of risks undertaken for the makers. *N. Y. Superior Ct.* 1857, *Central Bank of Brooklyn v. Lang*, 1 *Bow.* 202.

119. The charter of the Atlas Mutual Insurance Company, in regard to notes received for premiums in advance, authorized the company to negotiate them for the purpose of paying claims, or otherwise, in the course of its business.

Held, 1. That a note given for premiums on an open policy of insurance to the makers, and afterward substituted for notes which had been negotiated by the company to the plaintiffs, for the purpose of paying claims, or otherwise, in the course of its business, must be regarded as a note of the character specified in the charter; and that the transfer thereof to the plaintiffs by the company was lawful, and the title of the plaintiffs indisputable.

2. That if notes originally negotiated were lawfully transferred to the plaintiffs, the surrender of those notes, and the substitution of others in their place, for the convenience and accommodation of the parties, was not unlawful, it being but an exchange of securities, all of which were of a character which made it proper, under the charter, for the company to negotiate them for the purposes of ordinary business. *N. Y. Ct. of Appeals*, 1864, *Wood v. Wellington*, 30 *N. Y.* 218.

120. Effect of insolvency of company on premium note. It is no defence to an action brought by an insurance company, on a premium note, that the company became insolvent before the expiration of the policy. *Pa. Supreme Ct.* 1858, *Sterling v. Mercantile Mut. Ins. Co.* 32 *Pa. St.* 75. And see *Lester v. Webb*, 5 *Allen*, 569.

121. A note having been given to an insurance company for premiums, payable twelve months from date, and liable for losses occurring during that period, was assigned by the company as collateral for a loan to them; the drawer of the note paid to the pledgee the sum for which it had been pledged, which was less than its face, and obtained the note; the company, becoming insolvent, made an assignment to assignees, who brought trover for the note, claiming for the payment of losses which had occurred during the time for which it had been given. *Held*, that they could recover only the balance due on the note, deducting the amount for which it had been pledged. *Pa. Supreme Ct.* 1862, *Fell v. McHenry*, 42 *Pa. St.* 41.

122. The non-acceptance by the company, of an amendment of the charter, being set up in defence,—*Held*, that the company had recognized the amendment, by acting under it from the commencement; that, as the defendant had by repeated acts accepted the benefits reaped from giving his notes under the amendment, he could not question its acceptance; and that, as the balance due on the note was required for the payment of the losses for which it had been pledged, the plaintiffs were entitled to recover. *Id.*

123. The insolvency of the insurers does not entitle the insured to require the cancellation of his premium note, on surrendering the policy and paying *pro rata* for the time the policy has run. *N. Y. Superior Ct.* 1848, *Hone v. Boyd*, 1 *Sandf.* 481.

124. Effect of cancellation of policy. The canceling of a policy of insurance by the insurers and the insured,—*Held*, not to affect the rights of a *bona fide* indorsee for value of the premium note. *Mass. Supreme Ct.* 1855, *Williams v. Cheney*, 3 *Gray*, 215.

125. Members of mutual fire insurance companies are liable to pay all legal assessments upon their premium notes made during the whole period for which they are insured, unless the policy, charter, by-laws, or note, provide otherwise. *N. H. Superior Ct.*

1852, *New Hampshire Mut. Fire Ins. Co. v. Rand*, 4 *Fost.* 428.

126. A member of a mutual fire insurance company is not discharged from his liability on his deposit note for losses already accrued, by the cancellation of his policy by a general corresponding agent of the company, accompanied by a promise to surrender the note, without proving the authority of such agent to surrender the note. *Mass. Supreme Ct.* 1855, *Marblehead Mut. Fire Ins. Co. v. Underwood*, 3 *Gray*, 210.

127. A vote of the directors of a mutual insurance company, canceling all outstanding policies, with a provision that the cancellation shall take effect on a certain day, does not put it out of their power to lay necessary assessments after that time upon the deposit notes. *Mass. Supreme Ct.* 1864, *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 *Allen*, 27.

128. The premium note is part and parcel of the contract of insurance, and, with the policy, constitutes the whole of the transaction. One part cannot be canceled and the other remain in full force, without the consent of both parties. *N. Y. Supreme Ct.* 1862, *Campbell v. Adams*, 38 *Barb.* 132.

129. Where the charter provided that the policy should become void upon an alienation of the property, and that upon surrendering it to be canceled, the insured should be entitled to receive his deposit notes upon payment of all losses, &c., accrued before the surrender,—*Held*, that the company had a right to assess the premium note for losses which occurred after the alienation, and before such surrender. *N. Y. Supreme Ct.* 1844, *Neely v. Onondaga County Mutual Ins. Co.* 7 *Hill*, 49.

130. — of forfeiture. A member of a mutual insurance company is liable to contribute to all losses which happened while the policy was in force, and assessment therefor may be made after the policy has been forfeited by an assignment without consent. *N. Y. Supreme Ct.* 1842, *Smith v. Saratoga County Mutual Fire Ins. Co.* 3 *Hill*, 508.

131. An insurance company, by declaring a policy forfeited for non-payment of assessments, do not deprive themselves of the right to recover the assessments then due upon the insured's premium note. *Iowa Supreme Ct.* 1860, *Iowa State Ins. Co. v. Prosser*, 11 *Iowa*, 115. But see *Keenan v. Missouri &c. Ins. Co.* 12 *Id.* 126.

132. Losses cannot be set off. A member of a mutual insurance company cannot, upon its insolvency, set off against his indebtedness for premiums due upon policies, a loss sustained by him, adjusted and payable by the company. The premiums taken by a mutual company constitute a common fund, in which all the insured have a common interest. Each of them, as insured, is bound to take a *pro rata* dividend from such fund, and can secure no preference over other creditors by reason of his being also a debtor. *N. Y. Ct. of Appeals*, 1860, *Lawrence v. Nelson*, 21 *N. Y.* 158; *N. Y. Superior Ct. Sp. T.* 1867, *Pardo v. Osgood*, 2 *Abb. Pr. N. S.* 365. See also, *Lawrence v. Nelson*, 4 *Bow.* 240.

133. Where the maker was insured, but, at the end of the year, paid the premiums, and renewed the note for the full amount for another year, during which the company failed;—*Held*, he was not entitled to any deduction for the premiums so paid.* *N. Y. Superior Ct.* 1847, *Hone v. Ballin*, 1 *Sandf.* 181.

134. But as to premiums earned after the renewal, he was *Held* entitled to a deduction on the note, on his paying them. *Id.*; *S. P. Merchants' Mutual Ins. Co. v. Leeda*, 1 *Sandf.* 183.

135. Power of directors to assess premium notes. The deposit notes of a mutual insurance company are part of its capital, and the directors are bound to call in a sufficient amount on them to pay the insured who are losers by fire. *Pa. Supreme Ct.* 1845, *Rhinehart v. Alleghany &c. Ins. Co.* 1 *Pa. St.* 359.

136. The theory and fundamental principle of mutual insurance companies is, as the designation imports, that all the members are at once insurers and assured. The charter is made subject to the general law; and this requires the choice of directors, and makes it their duty to lay assessments when occasion requires. Such power of assessment is their main resource; they have small funds besides. The directors are the common agents of all the members, acting under powers, in the performance of duties created by law, which the vote of the company could

* Where the charter of a company requires premium notes to be assessed in proportion to their "original amount," no deduction can be made from a note given for insurance during a longer term than the company itself could, under its charter, continue in existence. *Huntley v. Beecher*, 30 *Barb.* (*N. Y.*) 590.

not take away or annul. To lay assessments, therefore, when occasion requires, is one of their regular and ordinary powers in the superintendence and management of the concerns of the company. These being of regular recurrence, the by-laws fix a day for a regular monthly meeting, not directing what shall be specially done at these meetings. The just conclusion is, that they are thus to meet to perform these usual and recurring duties as they may arise. These duties are marked out by the charter and by-laws, and therefore no special notice is necessary to the directors; they are presumed to know them and come prepared to act on them. *Mass. Supreme Ct. 1853, Bay State Mut. Fire Ins. Co. v. Sawyer, 12 Cush. 64.*

137. An assessment on a premium note given to a mutual fire insurance company, duly laid at a regular monthly meeting of the president and directors, which was held pursuant to the by-laws of the company and the statutes of the State, is valid, without affirmative proof that notice was given to the directors that an assessment would be laid at such meeting, although one by-law of the company provides that "in case an assessment be needed for any purpose, the directors shall have power to order such assessment at any meeting called for that purpose." *Id.*

138. In the absence of any express provision in the by-laws of a mutual insurance company relative to the calling of its meetings, except that "the secretary shall notify all meetings of the directors," a notice given by the secretary, by direction of the president only, without that of the directors, is sufficient. And if the by-laws do not require the object of such meetings to be stated in the notices, an assessment upon deposit notes may be laid at such meeting, although the president does not attend, and the object of the meeting was not mentioned in the notices. *Mass. Supreme Ct. 1864, Fayette Mut. Fire Ins. Co. v. Fuller, 8 Allen, 27.*

See MEETINGS.

139. To enable an insurance company to sustain an action on assessments made, it is not necessary for them to show that they have sustained losses. The statute vests in the directors the right of making assessments whenever they shall deem it necessary, for the honorable and prompt payment of losses, or of the expenses of the company, and the right of deciding when such assessments are

necessary. *N. Y. Com. Pl. 1857, St. Lawrence Mut. Ins. Co. v. Paige, 1 Hill. 430.*

140. A vote of the directors of a mutual insurance company, whereby the report of a committee recommending an assessment upon the deposit notes is adopted, is sufficient to authorize the laying of such assessment. *Mass. Supreme Ct. 1865, Citizens' Mut. Fire Ins. Co. v. Sortwell, 10 Allen, 110.*

141. Although the by-laws of a mutual insurance company do not provide that the deposit notes shall be deemed to be absolute funds of the company, but speak of assessments thereon, assessments may be laid and collected in the usual manner. *Id.*

142. And under by-laws so framed the directors may lay an assessment before the collection of the notes has been ordered.* *Mass. Supreme Ct. 1864, Fayette Mut. Fire Ins. Co. v. Fuller, 8 Allen, 27.*

143. The directors of a mutual insurance company (or the receiver acting in their place) have however no arbitrary discretion in making an assessment upon the premium notes, but they are controlled by the statute, and bring themselves within its provisions before they can enforce the collection of the premium notes. *N. Y. Supreme Ct. 1857, Thomas v. Whallon, 31 Barb. 172.*

144. That the assessment of a premium note given to a mutual insurance company is a ministerial and not a judicial act, and is therefore not final,—see *Herkimer Co. Mut. Ins. Co. v. Fuller, 14 Barb. (N. Y.) 373; 7 How. Pr. 210; Hurlbut v. Carter, 21 Barb. (N. Y.) 221; Sands v. Sweet, 44 Id. 108; Jackson v. Van Slyke, Id. 116, note.*

145. Their liability for neglect. Under a mutual fire insurance charter which provides that the directors, upon being notified of a loss, shall assess upon the signers of the deposit notes liable thereto, a sum sufficient to meet the same, the necessity of such an assessment is not superseded by the validity of claims is denied and litigated, but is merely suspended; and the directors cannot surrender the deposit notes of policies which expired subsequent to the loss, without providing for the contingent validity of the litigated

* Under the by-laws of a mutual insurance company providing for assessments for the payment of losses "after the earned premiums shall have been used up," earned premiums that are uncollectable and worthless may be regarded as "used up." *Maine Mut. Marine Ins. Co. v. Neal, 50 Me. 301.*

claims. And if a judgment is eventually recovered upon them, an omission by the directors to make assessment for the payment of them, will (if such assessment was necessary to the payment) render the directors personally liable for such an amount, towards the payment of the judgment, as an assessment seasonably made and enforced with due diligence, would have procured. *U. S. Circ. Ct. (N. H.) 1857, Jordan v. Union Ins. Co. 11 Law Rep. N. S. 83.*

146. Their power to impose payment in full. A power reserved by by-law to the directors of a mutual insurance company, in case of non-payment of a call on a premium note given by a member to the corporation, to require payment of the whole amount of the note, to be held for the payment of assessments due and thereafter made, the balance, if any, to be returned to the member after the expiration of his policy, does not amount to a power to impose a forfeiture, and requires no express authorization by charter. Under such a by-law, nothing is forfeited, the party is merely compelled to pay his note sooner than otherwise might have been required, but is not compellable to pay more than the amount. *Mich. Supreme Ct. 1845, Cahill v. Kalamazoo Mutual Ins. Co. 2 Doug. 124, 188.*

147. A provision in the charter of a foreign mutual fire insurance company, that if any member shall neglect to pay any assessment upon his deposit note, an action may be brought for the whole amount of the note, and the money thus collected shall remain in the treasury of the company, and the balance thereof, after contributing to the payment of losses and expenses, be repaid to the member, at the expiration of his policy, is not a penal statute.* And a member neglecting to pay an assessment is liable for the full amount of his note, in an action brought in Massachusetts, setting forth the note, the laying of the assessment, notice thereof to the defendant, his failure to pay the same, and his consequent liability to pay the whole note. *Mass. Supreme Ct. 1856, Jones v. Sisson, 6 Gray, 288.*

148. That it is competent for a mutual fire insurance company, to provide by its

by-laws, that all premium notes not paid in installments as ordered by the directors, after notice shall become due and collectable in their entire amounts,*—see *German, & Co. Ins. Co. v. Franck, 23 Ind. 364.*

As to the Powers of a receiver of an insolvent company, in respect to assessments, and otherwise, see *RECEIVERS.*

149. Time allowed. The delay of a mutual fire insurance company, for a time not unreasonable, to make an assessment, does not invalidate the assessment, notwithstanding a statutory provision that "if any member shall have a just claim on the corporation, founded on a policy issued by them, exceeding the amount of their existing funds, exclusive of the deposit notes given by the members, the directors shall forthwith" lay an assessment. *Mass. Supreme Ct. 1855, Marblehead Mut. Fire Ins. Co. v. Underwood, 8 Gray, 210.*

150. For what demands an assessment may be laid. An assessment by a mutual insurance company is valid, that is based upon a computation of the losses, from month to month, and includes in the losses chargeable upon each policy all those of the entire month in which it expires, excluding those of the month in which it began. *Mass. Supreme Ct. 1853, People's Mut. Ins. Co. v. Allen, 10 Gray, 297.*

151. An assessment by a mutual insurance company is not invalid, because it is made to cover losses occasioned by bad investments; nor because it is laid in place of a previous illegal assessment, which the directors have not enforced; nor because, in consequence thereof, it has been delayed for some months. *Id.*

152. The record of losses kept by a mutual insurance company, is sufficient *prima facie* evidence that such losses have occurred, in an action to recover an assessment laid upon the members. *Id.*

153. An assessment, laid by a mutual fire insurance company whose by-laws authorize their directors to borrow money to meet losses, and to include the sums thus borrowed, the interest thereon, and all necessary incidental expenses in the next assessment, is not rendered invalid by including reasonable sums for interest on money borrowed, and

* Interest is not collectable on a default in payment of an assessment on a premium note given by a member of a mutual insurance company; for the recovery for the whole amount is in the nature of a penalty. *Bangs v. McIntosh, 28 Barb. (N. Y.) 591.*

* Or they may enact that, if an assessment on a premium note is not paid, the policy for which the note is given shall be void until the assessment is paid. *Fogel v. Lycoming Ins. Co. 8 Grant's Cas. 71.*

probable losses from the failure of some of the assessed to pay their assessments, and ten per cent. for collecting assessments. *Mass. Supreme Ct.* 1856, *Jones v. Sisson*, 6 *Gray*, 298.

154. A mutual insurance company, whose by-laws provide for the surrender of policies for cancellation at any time, and for the payment of the return premium to the insured, in accordance with a certain table, may include among the items of liability, in making an assessment upon the deposit notes, the return premiums due to the policy holders. *Mass. Supreme Ct.* 1864, *Fayette Mut. Fire Ins. Co. v. Fuller*, 8 *Allen*, 27.

155. Sums voluntarily paid to a mutual insurance company by its members, upon an assessment which is subsequently adjudged to be illegal, with interest thereon, may be treated by the company as just claims against it, within the meaning of the statute, and may be included as such in making a new assessment. *Mass. Supreme Ct.* 1864, *Matter of People's Mutual Equitable Fire Ins. Co.* 9 *Allen*, 319.

156. Where in making such assessment, it was found that, two years previous, a large debt was due from the company, and that many of the members who paid the sums assessed upon them by the illegal assessment became exempt from a new assessment by the limitation of time, so that, if the debt should be assessed upon policies which were in existence at the time when the items of which it was composed accrued, and which still continued liable to assessment, there would not be premium notes to a sufficient amount to pay them all;—*Held*, that the whole amount of such debt might be taken as a unit, and assessed upon all the policies which were then outstanding in proportion to the time of their existence and the amount of their premiums. *Id.*

157. A sum equal to one-third of the whole amount of the just claims against a mutual insurance company was added for overlay, in making an assessment upon the members,—*Held*, that the assessment was valid, although such claims were chiefly for sums voluntarily paid upon an assessment subsequently adjudged to be illegal. *Id.*

158. The receiver of an insolvent insurance company may include in his assessment a reasonable sum for the expenses of making and collecting the assessments. If the re-

ceiver had no power to add to the exact sum necessary for discharging the liabilities of the company an amount sufficient for expenses, the expenses would necessarily be deducted from the amount due to the policy holders, casting the burden upon them instead of upon the insurers, which would be contrary to the spirit and intent of the statute, and to the principle of insurance, viz., indemnity. In the absence of any proof to the contrary, ten per cent. upon the amount of losses was, in this case, assumed to be a reasonable charge for such expenses. *N. Y. Ct. of Appeals*, 1863, *Sands v. Boutwell*, 26 *N. Y.* 233. See to nearly same effect, *Hyatt v. Esmond*, 37 *Barb. (N. Y.)* 601.

159. Mode of assessment. An assessment upon premium notes of a mutual insurance company, by a receiver of the company, need not specify, in form, the name of the party bound to contribute, nor the amount of the note. A general assessment is good, by which a receiver declares that each premium note is assessed to the full amount thereof. There is no indefiniteness or uncertainty about it, and the maker of each note is distinctly informed of the sum he is required to pay thereon. *N. Y. Ct. of Appeals*, 1863, *Sands v. Sanders*, 26 *N. Y.* 239; 28 *N. Y.* 416; 25 *How. Pr.* 82.

160. Defendant gave a premium note to an insurance company as a part of their capital, payable in such portions and at such times as the directors might, agreeably to their charter and by-laws, require. The directors subsequently adopted a resolution, under which all the assets of the company, including the note in question, were transferred to the plaintiff in trust that he should collect them, and apply the proceeds to the payment of the company's debts. *Held*, that this resolution was to be regarded as a requirement that the note should be paid, and as a substantial compliance with the condition upon which it was made payable. *N. Y. Supreme Ct. Sp. T.* 1853, *Hill v. Reed*, 16 *Barb.* 280.

161. A mutual insurance company, authorized by its act of incorporation to direct what per centum upon the property insured should be paid into the treasury, by the assured before receiving his policy; and to enforce the payment of annual assessments by a certain penalty, received, of a party insured, a deposit note, which was made, in pur-

suance of the by-laws of the company, in payment of the per centum and of assessments thereafter to be made. *Held*, that the payments ordered from time to time to be made upon the note, were not the annual assessments provided for in the act; and that his omission to make the payments ordered, did not subject him to the penalty therein provided. *N. H. Superior Ct.* 1849, *Rix v. Mutual Insurance Co.* 20 *N. H.* 198.

162. An action may be maintained by a mutual insurance company against a member to recover a deposit which is agreed to constitute a part of the absolute funds of the company, and to be payable on demand; although the declaration does not allege that the directors called for the full amount of such deposits, or that they notified the defendant thereof before the suit was commenced. *Mass. Supreme Ct.* 1864, *Shawmut Mutual Fire Ins. Co. v. Stevens*, 9 *Allen*, 332.

163. Only an amount actually assessed can be recovered. An assessment "of . . . per cent." is a nullity. *N. Y. Com. Pl.* 1857, *St. Lawrence Mutual Ins. Co. v. Paige*, 1 *Hill*, 480.

164. — as respects different classes of notes. In general, a receiver of an insolvent mutual insurance company is to make separate assessments for the payment of the several losses for which the company is liable, upon all the premium notes in force at the time each successive loss happened. Each note is to be assessed in proportion to its amount, without reference to the fact that some were made at higher rates of insurance than others, or to the fact that by the application of cash premiums, some losses had been paid, and thus the makers of earlier notes had been exonerated. *N. Y. Supreme Ct. Sp. T.* 1855, *Shaughnessy v. Rensselaer Ins. Co.* 21 *Barb.* 605.

165. But when it appears to a receiver, from the liabilities of the company, and the times the liabilities accrued, and from an examination of all the classes and notes of the company, that there is no note that is not chargeable to its entire amount for liabilities which justly attached during the existence of the policy accompanying such note, a general assessment upon all the notes, without regard to classes, and to their full amount, is unobjectionable. All the notes of the company constitute its capital, whether they be in one department or another, and if the ne-

cessity exists, resort must be had to the entire fund. An assessment made to-day of one class to pay all the losses of that class, and an assessment on the residue of that class, at a future day, to pay the losses of another class, the assets of which are exhausted, would be idle and attended with unnecessary expense and delay, when the same could all be effected by one assessment. *N. Y. Ct. of Appeals*, 1863, *Sands v. Sanders*, 26 *N. Y.* 239; 28 *N. Y.* 416; 25 *How. Pr.* 82.

166. It is no objection to such an assessment that the premium notes in all classes, and of all dates, were assessed. *So held*, where the stock notes and premium notes appertaining to each department of the business of the company, were insufficient to meet the losses and expenses which were chargeable to that department. *Ib.*

167. Effect of excess in amount. An assessment by a mutual insurance company upon its members, of a greater amount than is necessary to enable it to meet existing just claims against it, together with a reasonable allowance for expenses and failures to make collections, is invalid; and an allowance for these purposes, of any sum more than the whole amount of the deficiency in its funds, is unreasonable, if no special circumstances are shown to justify the excess. *Mass. Supreme Ct.* 1863, *People's &c. Ins. Co. v. Babbitt*, 7 *Allen*, 285.

168. An assessment upon the members of a mutual insurance company of more than double the amount of the deficiency in its funds is unreasonable and void, if no special circumstances are shown requiring so large an amount. *Mass. Supreme Ct.* 1864, *Traders' Mutual Fire Ins. Co. v. Stone*, 9 *Allen*, 483.

169. — of inequality. In adjusting assessments upon deposit notes, and liabilities arising under policies issued by a mutual insurance company at different times and to continue for different periods, it is not demanded that the assessments should be exactly proportional and equal; a reasonable approximation to such a result is sufficient. *Mass. Supreme Ct.* 1864, *Fayette Mutual Fire Ins. Co. v. Fuller*, 8 *Allen*, 27; 1865, *Citizens' Mutual Fire Ins. Co. v. Sortwell*, 10 *Allen*, 110.

170. A mutual insurance company is not required to proceed, after every loss happening to it, to compute the assessments on its deposit notes requisite to meet such loss, but may adopt a rule of proceeding that will

approximate as near as is practicable and reasonable to the above method. *Mass. Supreme Ct. 1851, New England Mut. Fire Ins. Co. v. Belknap, 9 Cush. 140.*

171. — of errors in mode of assessment. To render a member of a mutual fire insurance company liable upon his premium note, in an action of assumpsit for an assessment, it must appear that the assessment was duly laid, and is one to which the defendant is legally liable. *N. H. Supreme Ct. 1864, Great Falls Mutual Fire Ins. Co. v. Harvey, 45 N. H. 292.*

172. An assessment made by a mutual fire insurance company in good faith, upon correct principles, and substantially correct, is binding, notwithstanding small errors, upon a member who is not affected to a perceptible amount by the errors. Thus, an assessment laid by such company is not rendered invalid, as against a member who has suffered no damage, by the fact that the proportion between the cash premiums and the deposit notes taken by the company varied at different times. *Mass. Supreme Ct. 1855, Marblehead Mut. Fire Ins. Co. v. Underwood, 3 Gray, 210.*

173. A premium note, drawn payable in such portions and "at such times as the directors may agreeably to the by-laws require," given to a mutual insurance company whose by-laws provide that the deposit note shall be double the premium, and "that on all policies for less than a year the deposit note may be for such a sum as the president may determine," and who have issued such policies with a deposit note of one dollar, and a premium paid of a larger sum, is not invalidated by a slight disproportion, occasioned by laying an assessment on the deposit notes only, instead of upon the amount of the premiums and deposit notes. *Mass. Supreme Ct. 1858, People's Mut. Ins. Co. v. Allen, 10 Gray, 297.*

174. Payment of an assessment upon the deposit notes of a mutual insurance company cannot be resisted on the ground of the omission to assess certain notes liable to assessment; if it appears that the notes so omitted were a small number, which the officers had adjusted and canceled before making the assessment, and of so small an amount as not materially to increase the assessment upon the remainder. *Mass. Supreme*

Ct. 1864, Fayette Mut. Fire Ins. Co. v. Fuller, 8 Allen, 27.

175. In an action to recover an assessment upon his note, a member of a mutual insurance company cannot allege in defence a non-compliance on the part of the directors with the by-laws, in not crediting the makers of the notes with the net profits of a certain year, it appearing that both for the year preceding and the year subsequent, the losses greatly exceeded the profits; and that if such profits had been duly credited, his assessment, in suit, would have been increased. *Me. Supreme Ct. 1862, Maine Mut. Marine Ins. Co. v. Neal, 50 Me. 301.*

176. Under the by-laws of a mutual insurance company, requiring each person insured to deposit his written agreement to be liable for an amount equal to the premium, in addition thereto, to be assessed and collected by the directors as they deem expedient, the same to be denominated the absolute funds of the company, and also that each member shall be held to pay a further sum, in case of losses consuming the absolute fund, assessments upon the notes held as absolute funds must be so made as to require payment of an equal proportion of each note held by the company at the time the assessment is made; and these absolute funds are to be exhausted, before a further assessment can be made under the statute liability for losses. Assessments not made upon these principles are void. *Mass. Supreme Ct. 1862, Appleton, &c. Ins. Co. v. Jesser, 5 Allen, 446.*

177. Where an assessment was laid on all the members of a mutual fire insurance company, to pay liabilities for losses and expenses, and it appeared that a portion of such losses accrued before some of the present members were connected with the company, — *Held*, that the assessment was void as to the latter, but valid as to the others. *Mass. Supreme Ct. 1856, Long Pond &c. Ins. Co. v. Houghton, 6 Gray, 77.*

178. Notice of assessment. Where a by-law of a mutual insurance company requires notice of an assessment, designating the class of property assessed, to be published, — *Held*, that a notice which does not specify the amount payable on each note, is sufficient. *N. H. Supreme Ct. 1858, Atlantic Fire Ins. Co. v. Sanders, 36 N. H. 252.*

179. It is no objection to the assessment or notice that they do not state the name of

each person nor the amount of his liability. If the rate of assessment on each class of notes is stated in such a way that each stockholder can calculate his liability, it is sufficient.* Each stockholder is to be presumed to know how many shares he owns. Where, however, the notes were described in different classes, as "small notes" and "large notes," without showing what those terms meant, and no explanation appeared in the charter,—*Held*, that the notice was insufficient, and the maker of a note was not in default for not paying. *N. Y. Ct. of Appeals*, 1859, *Bangs v. Duckinfield*, 18 *N. Y.* 592.

180. Publication of notice. A provision of statute requiring notice of an assessment upon premium notes to be published for three weeks, by the secretary of the company, will be deemed merely directory. The publication of such a notice is not a condition precedent to a recovery of an assessment by a receiver of the company. Actual notice of the assessment is the main thing. And a demand of the amount thereof, made by the receiver, before the commencement of a suit therefor, is sufficient. *N. Y. Supreme Ct.* 1862, *Cooper v. Shaver*, 41 *Barb.* 151.

181. Where the by-laws require the notice of assessment to be published in one newspaper of the county of M., "and in such other newspapers as the directors may deem necessary,"—it seems, that a publication in one newspaper in M. county is sufficient, unless a direction for further publication by the directors be shown. *Sands v. Boutwell*, 26 *N. Y.* 233.

182. Premium notes given to foreign companies. That, in Pennsylvania, a premium note made and delivered to an agent of a foreign insurance company, is valid, and may be enforced against the maker,—see *Thornton v. Western & Co. Ins. Co.* 31 *Pa. St.* 529.

183. The failure of an agency of a foreign

* The by-laws of a mutual insurance company require that notice of assessments, or classes of property to be assessed, to be given by the treasurer, and published in one or more newspapers, &c. *Held*, that the following notice: "The members of the third class of the Y. County Mut. Fire Ins. Co. are hereby notified, that the directors of said company have ordered an assessment on the members of said class, payable on or before the 15th of February, 1857, with interest thereafter," dated and signed by the treasurer, was sufficient. *York County, &c. Ins. Co. v. Knight*, 49 *Me.* 75.

† As to the restraints imposed upon foreign insurance companies by the laws of Pennsylvania,—see *Huntley v. Merrill*, 23 *Barb.* (N. Y.) 636.

insurance company to file the statement required by an act to license and regulate such agencies, does not avoid the promises made to the company to pay the premiums. *Mo. Supreme Ct.* 1853, *Clark v. Middleton*, 19 *Mo.* 58.

184. The payees of a deposit note, given in consideration of a policy of insurance issued in Massachusetts, by a foreign mutual fire insurance company, cannot maintain an action to recover an assessment thereon, without proving a performance by the company of the acts required by the statutes of the State, in order to enable them to issue the policy within its boundaries.* *Mass. Supreme Ct.* 1855, *Jones v. Smith*, 8 *Gray*, 500.

185. A promissory note given by a resident of Massachusetts for a premium on a policy of insurance made to him in that State by a foreign insurance company who have not complied with the requirements of the laws of the State applicable to such companies, is void in the hands of the company; although he is a mere agent for a citizen of another State, who is the owner of the property insured, and the policy is expressed to be "for whom it may concern." *Mass. Supreme Ct.* 1857, *Williams v. Cheney*, 8 *Gray*, 206. Compare *Same v. Same*, 3 *Gray*, 215; *Washington Mut. Ins. Co. v. Hastings*, 2 *Allen*, 398.

186. An indorsee for value of a premium note given in Massachusetts, to a foreign insurance company, who have not complied with those laws, cannot recover thereon, if he knew, or had reasonable cause to know, when he took the note, that the company had not

* In an action upon a promissory note given for the premium upon a policy of insurance, issued to a citizen of Massachusetts by a foreign insurance company, which had not complied with the requisitions of the statutes of the State, concerning such companies, proof that the president of the company was at the office of the agent in Boston soliciting business; that the defendants were invited by the agent to go there to meet him; that, upon a subsequent application for insurance by them, the agent suggested the company in which it should be effected; that he had in his office a sign bearing upon it the name of the company; that he informed applicants what the rates of insurance would be; that applications were forwarded and policies received in return through him; that premium notes were sent to him in blank, and were executed in his office when policies were delivered; and that he was paid for all his services by the company;—was *Held* sufficient to authorise the jury to find a violation of the statute, in making the insurance by an agent in the State, and that the note given for the premium was therefore invalid; although the agent testified that he did not consider himself as the agent of the company, and that he was not their agent. *Mass. Supreme Ct.* 1860, *Roche v. Ladd*, 1 *Allen*, 426.

complied with such laws; and the fact that he was a director, treasurer, and one of the executive committee of the company, is sufficient evidence that he had reasonable cause of such knowledge. *Id.*

187. Under the Massachusetts statute of 1854, chap. 453, § 81,—requiring foreign insurance companies to appoint a general agent, but providing (by § 86) that contracts of insurance made without complying with the act, shall be valid, but the agent liable to a penalty,—a note given on a contract made without complying with the act is valid, because it is the consideration of a valid contract. And the provision that no company shall receive any premium or assessment on a contract so made after notice by the commonwealth to appoint a general agent, does not apply to prevent an action on a premium note, unless such notice is averred. *Mass. Supreme Ct. 1868, Lester v. Webb, 5 Allen, 569.*

188. A foreign mutual insurance company, having issued a policy to a citizen of Massachusetts, and laid an assessment thereon, without first appointing a general agent in that State as provided by its statute, may, upon the subsequent appointment of such agent maintain an action to recover the assessment. *Mass. Supreme Ct. 1865, National Mutual Fire Ins. Co. v. Pursell, 10 Allen, 281.*

INTEREST.

1. Interpretation of charter power to take interest. A charter allowing a bank to discount bills of exchange, "upon banking principles and usages," does not authorize such bank to take more than the established legal rate of interest, in advance on its loans and discounts. *Ohio Supreme Ct. 1842, Creed v. Commercial Bank of Cincinnati, 11 Ohio, 489.*

2. An authority in the charter of a corporation to borrow money on such terms as may be agreed upon between the parties,—*Held*, an authority to pay interest exceeding the statutory rate. *Ind. Supreme Ct. 1860, Morrison v. Eaton & Hamilton R. R. Co. 14 Ind. 110.*

3. A provision in the charter of a pawn-broking company, authorizing them to charge for certain loans of less than fifteen days, half a month's interest, and for those of more

than fifteen days a month's interest, authorizes them to compute twenty days, for which a loan is in the first instance made, as a month; but if payment is delayed after that time, without any express agreement, they can only charge at the lawful rate.* *N. Y. Supreme Ct. 1832, Macomber v. Dunham, 8 Wend. 550.*

4. A banking company were authorized by charter to take seven per cent. interest on notes payable within four months, and eight per cent. on those for longer time,—*Held*, that they were not entitled, by including days of grace on a note payable four months after date, to the latter rate of interest, but seven per cent. interest. *Mass. Ct. of Errors, 1842, Forniquet v. West Feliciana R. R. Co. 6 How. 116.*

5. — of corporate contracts for interest. Where a corporation issued bonds payable at a distant date, with interest coupons payable semi-annually, and agreed that upon three successive defaults in payment of interest, the principal should become due,—*Held*, that a provision in the mortgage by which the bonds were secured, that the trustees therein named should sell the mortgaged property upon the written request of the holders of not less than a specified amount in said bonds, was no defence to a suit on the bonds after a breach of their condition. *Pa. Supreme Ct. 1867, Philadelphia & C. R. R. Co. v. Johnson, 54 Pa. St. 127.*

6. Interest coupons issued by a corporation and made payable at a particular place import that the company will have a deposit at the time and place specified, to answer the demands of payment; and without showing that such a fund was provided, it is no defence to allege a want of demand.† *Pa. Supreme Ct. 1867, Philadelphia & C. R. R. Co. v. Johnson, 54 Pa. St. 127.*

7. The interest upon loans of a corporation payable at a particular place and at a fixed time, ceases at that time, whether the bond or evidence of indebtedness be pre-

* A clause in the charter of a bank, limiting interest on discounts,—*Held*, not to apply after the breach of the contract. *United States Bank v. Chapin, 9 Wend. 471.*

† Whether coupons attached to bonds issued by a municipal corporation, not purporting to be complete obligations, but referring to the bonds to which they are attached, may be regarded as forming an independent chose in action upon which a suit can be maintained separate from the cause of action upon the bond,—see *Clarke v. City of Janesville, 4 Am. Law Reg. 591; 10 Wis. 134.*

sented for payment or not; and it is not necessary, to secure exemption from a charge for interest accruing upon the loan, that the amount of the loan with accumulated interest at the time of the payment, be kept separate from the other funds of the company, if it can be shown that funds sufficient for payment were at all times on hand.* *Pa. Supreme Ct. 1864, Emlen v. Lehigh Coal & Co. 47 Pa. St. 76.*

8. A banker's certificate of deposit payable on presentation sixty days after date, with interest, carries interest till presented and paid. *Mo. Supreme Ct. Payne v. Clark, 28 Mo. 259.*

9. In a suit on a demand due from a bank, the plaintiff is entitled to recover interest thereon from the time of action brought, although the bank is afterward restrained, by injunction, from proceeding in its business, and its property is put into the hands of receivers. *Mass. Supreme Ct. 1844, Watson v. Phoenix Bank, 8 Metc. 217.*

10. Where the bills of a bank are payable on demand, at a particular place, the holder is entitled to interest thereon, from the time of such demand of payment of the bank or its trustees, and refusal to pay, and not from the time of the general suspension of specie payments by the bank, or from the date of such bills. *Ark. Supreme Ct. Ringo v. Real Estate Bank, 8 Eng. 568.*

11. What law governs. A provision in a charter that the charter shall not authorize the corporation to make any contract which, by the existing laws, amounts to usury, merely puts the corporation on the footing of natural persons, so that a contract made and to be performed in another State is to be governed by the law of the latter State, and may be valid without reference to the existing laws of the

State which granted the charter. The corporation may stipulate in another State for any rate of interest not forbidden by the laws of the State.* *Miss. Ct. of Errors, 1854, Knox v. Bank of United States, 26 Miss. 655; N. Y. Ct. of Appeals, 1855, Bard v. Poole, 12 N. Y. (2 Kern.) 495.*

12. A railroad corporation in Wisconsin executed its bond for the payment of a certain sum of money, with interest at ten per cent., payable in New York and containing an assignment of a note, and a mortgage given to secure it, executed in the same State. The bond, with the note and mortgage attached thereto, were delivered to the company's agent to be negotiated for its use; and he negotiated the bond for a loan of the same value in Connecticut and deposited the money in New York to the credit of the company. *Held*, that there was good reason to regard the contract of loan as governed by the usury laws of Wisconsin, in which case it would be valid under Wis. Laws of 1851, ch. 64, which statute expressly authorizes the company to borrow money at any rate that can be agreed upon, regardless of the usury laws of the State or of any other State where the loan may be effected. But if the law of the place of performance was to govern, the contract would be valid by the law of New York (*infra* 22) which prohibits a corporation from interposing the defence of usury in an action. *Wis. Supreme Ct. 1863, Lyon v. Ewings, 17 Wis. 61.*

13. Violating charter avoids contract. A charter which forbids the taking of interest beyond a certain rate, renders void a reservation or contract to pay such excessive rate. It is unlawful to contract to do that which is unlawful to do. Though this would not, in a penal action, be deemed a violation. *U. S. Supreme Ct. 1829, Bank of U. S. v. Owens, 2 Pet. 527.*

Where the charter of a bank provided that the corporation should not take more than at the rate of six per cent. *per annum* on its loans or discount,—*Held*, that a contract for a loan made by the bank for a greater rate of in-

* Where a corporation has no funds, and has shown no readiness to pay, at the place at which the coupons on their bonds are to be presented for payment, an averment of presentation and demand is not a condition precedent to a recovery of the interest; but payment, tender, and readiness to pay, are affirmative pleas which cast the burden of proof on the corporation. *Pa. Supreme Ct. 1867, North Pennsylvania R. R. Co. v. Adams, 54 Pa. St. 94.*

Where a municipal corporation, in receiving a tax from a railroad company prescribed by their charter to be paid upon a certain excess of its dividends, treat the authorized capital, and not the capital actually paid in, as the basis of calculation, and the company fall into the same error, interest upon the amount underpaid is not recoverable of the company until demand. *Pa. Supreme Ct. 1866, Passenger Railway Co. v. City of Philadelphia, 51 Pa. St. 465.*

* The Wisconsin usury law of 1859 (ch. 160, Gen. L. 1859), is applicable to determine the effect of the usurious contract of a bank where the bank, while that law was in force, loaned money at a higher rate of interest than was allowed by the banking law of April 19, 1852, although it is provided by section 9 of the former act that "this act shall not in any manner affect the operation of the banking law of 1852." *Wis. Supreme Ct. 1864, Brower v. Haight, 18 Wis. 102.*

terest, was totally void, although the general law of the State attached, as a penalty to usurious contracts, a forfeiture of only the excess of interest over the legal rate of six per cent. *Ohio Supreme Ct.* 1838, *Bank of Chillicothe v. Swayne*, 8 *Ohio (Hamm.)* 257. And see *Creed v. Commercial Bank of Cincinnati*, 11 *Ohio*, 489; *Same v. Reed*, *Id.* 498; *Spalding v. The Bank of Muskingum*, 12 *Ohio*, 544; *Miami Exporting Company v. Clark*, 18 *Ohio*, 1.

14. If a bank on discounting a bill of exchange, corruptly reserves greater interest than it is authorized by its charter to receive, the bill will be void; and so also will be a new bill given in renewal of the balance due on such previous illegal one. *Mich. Supreme Ct.* 1846, *Orr v. Lacey*, 2 *Doug.* 280.

15. To the contrary. If a bank takes a greater rate of interest on a discount than is allowed by the charter, the contract is not thereby made wholly void as between the parties, unless declared so by the charter; for an individual cannot object that the corporation has violated its charter; this is only for the State to do. Nor is it void for want of power, since the bank has power to discount; it is only void as to the excess. [Reviewing many authorities.] *Miss. Ct. of Errors*, 1848, *Commercial Bank of Manchester v. Nolan*, 7 *How.* 508; *S. P.* 1844, *Planters' Bank v. Sharp*, 4 *Smed. & M.* 74; 1847, *Grand Gulf Bank v. Archer*, 8 *Id.* 151; *Mass. Supreme Ct.* 1858, *Quinsigamond Bank v. Hobbs*, 11 *Gray*, 250.

16. Hence, where a bank, in its discounts, reserves a greater interest than is allowed by its charter, the contract falls under the general law against usury. Thus in Mississippi, the bank may recover the principal of the note without interest. *Miss. Ct. of Errors*, 1848, *Commercial Bank of Manchester v. Nolan*, 7 *How.* 508; 1844, *Planters' Bank v. Sharp*, 4 *Smed. & M.* 75; 1847, *Grand Gulf Bank v. Archer*, 8 *Smed. & M.* 151.

Compare CONTRACTS.

17. That general statutes of usury are applicable to corporations,—see *Bank of Alexandria v. Mandeville*, 1 *Oranch C. Ct.* 552.

See also INCORPORATION.

18. In the absence of any provision in the charter of a municipal corporation, as to the interest it may pay on borrowed money, the contracts of the corporation will be governed, in this respect, by the general law of the

State. *Ind. Supreme Ct.* 1860, *Evansville &c. R. R. Co. v. City of Evansville*, 15 *Ind.* 395.

19. Taking note in market, not usurious. Although the charter prohibits a bank from taking more than six per cent. in advance upon its loans and discounts, and the bank receive, in payment of a *bona fide* debt, the promissory note of a third party at a higher rate of discount than six per cent., yet as the note is a marketable commodity, usury cannot be predicated of the transfer. *N. Y. Supreme Ct.* 1843, *American Life Ins. & Trust Co. v. Dobbin*, *Hill & D.* 252; *Ohio Supreme Ct.* 1856, *Dunkle v. Renick*, 6 *Ohio St.* 527.

20. Benefit society loans not usurious. In an action on a note given to the treasurer of a mutual benefit society, it appeared that the purpose of the society was to accumulate a fund to be loaned to members at legal interest. The loans were put up at auction among the members. The note in suit was given for a loan made to defendant, a member, and included legal interest on the advance, and a bonus bid by him for the privilege of taking it. *Held*, that the contract was not usurious, for the reason that it was not a loan, but an advance of partnership funds. The rules of the society were, in effect, a mere agreement by partners that their joint contribution should be advanced for the use of one or the other, as occasion should require, and this was not borrowing. *C. P.* 1889, *Silver v. Barnes*, 6 *Bingh. N. C.* 180. To the same effect is *Chancery*, 1851, *Burbridge v. Cotton*, 15 *Jur.* 1070; 8 *Eng. L. & Eq.* 57.

21. In general, loans made by benefit societies, friendly societies, loan fund societies, and other societies formed to accumulate funds and lend them to members, are not affected by the fact that the interest reserved exceeds that allowed by the general usury laws of the State, provided they are within the powers conferred by the charter of the particular society. *N. H. Supreme Ct.* 1861, *Shannon v. Dunn*, 48 *N. H.* 194; *Mass. Supreme Ct.* 1859, *Merrill v. McIntire*, 18 *Gray*, 157; *Baxter v. McIntire*, *Id.* 168; *Pa. Supreme Ct.* 1860, *Schober v. Accommodation &c. Association*, 85 *Pa. St.* 223; *Ga. Supreme Ct.* 1857, *Bibb County Loan Association v. Richards*, 21 *Ga.* 592.

22. Defence of usury. No corporation, including all associations and joint stock companies—having any of powers and privileges of corporations not possessed by individuals or partnerships, shall hereafter interpose the defence of

usury in any action.* *N. Y. Laws of 1850, 384, ch. 172.*

23. Under the statute above mentioned, neither a corporation nor a receiver of one can maintain an action (under the New York statute allowing payments of excessive interest to be recovered back), to recover back usurious premiums which the corporation have paid. *N. Y. Ct. of Appeals, 1861, Buterworth v. O'Brien, 23 N. Y. 375.*

24. That act is equivalent to an enactment that no contracts or transactions with a corporation shall be void or impaired, by reason of any excess of legal interest being taken or agreed to be taken upon them, for such corporation. *N. Y. Superior Ct. 1861, Belmont Branch Bank v. Hoge, 7 Bosw. 543.*

25. The act of 1850, prohibiting corporations from interposing the defence of usury, does not preclude their sureties from doing so. *N. Y. Supreme Ct. 1860, Hungerford's Bank v. Dodge, 30 Barb. 626; S. C. sub. nom. Hungerford's Bank v. Potsdam & Watertown R. R. Co. 10 Abb. Pr. 24; 19 How. Pr. 89.*

26. Nor does it apply to the accommodation indorsers of a promissory note made by a corporation. *Pa. Supreme Ct. 1855, Bock v. Lauman, 24 Pa. St. 485; U. S. Dist. Ct. (Wis.) 1859, Market Bank of Troy v. Smith, 7 Am. Law Reg. 667.*

JOINT STOCK COMPANIES.

[By the term "joint stock company," or "joint stock association," is generally understood a body upon whom some of the privileges or powers of corporations have been conferred by statute, but which is not in a full sense a corporation. There is, however, some difficulty in harmonizing the English nomenclature with that in use in this country. In both countries there has been a great extension of the principle of allowing men to combine for a large enterprise, without assuming the full liability of partners; and in both countries a danger has been seen in giving to members of such combinations the entire immunity from liability possessed by members of corporations formed under the old common law forms of incorporation. In England the policy has been to confine incorporation to its original meaning, and grant it only in rare cases; while laws have been passed which allow partnerships, under such names as "jointstock companies," "public companies," &c., to assimilate themselves to corporations, and enjoy, to a considerable extent, corporate powers and exemption from personal liability, but which do not affect to recognise such bodies as "corporations" in the full sense of that term. In this country, upon the other hand, it has been thought convenient to create corporations, under that name, for almost any

purpose for which simple partnership forms were inadequate, and to secure creditors by imposing an individual liability upon members or officers of the corporation. Hence much of the law of English "joint stock companies" and "public companies" applies directly to what in this country are termed "corporations." For the convenience of American readers, decisions upon English "companies" are generally, throughout this work, treated as relating to corporations, and classified in the same manner as corresponding American decisions upon corporations; instead of being collected under the present head.]

1. **Their nature.** The effect of the statutes of New York relative to joint stock associations (see *N. Y. Laws of 1849, ch. 258; 1851, ch. 455; 1853, ch. 153*); when read together is to give such associations all the qualities or attributes of corporations except the right to have and use a common seal. By an examination of the statutes, it will be found, that joint stock companies possess the following qualities or attributes of corporations:

1. They can, like corporations, sue and be sued in a single or collective name, to wit: the name of their president or treasurer.

2. Their property or capital is represented in shares and certificates of stock differing in no respect from shares and stock certificates in corporations.

3. The death of a member, his insolvency, or the sale or transfer of his interest, is not a dissolution of the company.

4. They have perpetual succession, or what is sometimes called the immortality of corporations. They can take and hold real and personal estate in a collective capacity and in perpetual succession. These are all attributes of a corporation, and if we look into the books for elementary definitions, we shall find that corporations have no other attributes except the technical one of a common seal, to distinguish them from common-law partnerships. *N. Y. Supreme Ct. Sp. T. 1867, Waterbury v. Merchants' Union Express Co. 3 Abb. Pr. N. S. 163.*

2. **Power to sue.** A statute (*a. g. N. Y. Laws of 1849, ch. 258, and 1851, ch. 455**)—

* In an action brought under these statutes by an officer of a joint stock company, the allegation in the complaint that the company is a joint stock company or association, consisting of more than seven shareholders or associates, is a material and issuable allegation. *N. Y. Com. Pl. Sp. T. 1860, Tiffany v. Williams, 10 Abb. Pr. 904.*

The complaint need not show, however, that the association was formed for business purposes; and if it avers that the association consists of seven associates and upwards, it need not state their names. *N. Y. Supreme Ct. 1856, Tibbets v. Blood, 31 Barb. 630.*

* That the above statute is retrospective,—see *Curtis v. Leavitt, 15 N. Y. 9; Southern Life Ins. & Trust Co. v. Packer, 17 N. Y. 51; Central Bank v. Empire Stone Dressing Co. 36 Barb. 23.*

authorizing joint stock and other companies and associations of seven or more persons to sue or be sued in the name of their president or treasurer—do not operate to confer upon those officers a right to sue, except in cases where the shareholders or associates could before have prosecuted. The separate owners of demands, or of separate rights of action, cannot voluntarily associate and elect a president, and, under these acts, recover in the name of such president, in one suit, the separate demands. *N. Y. Supreme Ct. 1856, Corning v. Greene, 28 Barb. 33.*

3. Such statutes do not apply to fire companies, which hold their engines, &c., merely as agents of a municipal corporation. *N. Y. Com. Pl. Sp. T. 1856, Masterson v. Botta, 4 Abb. Pr. 180.* And see *Austin v. Searing, 16 N. Y. 112, 125.*

4. Nor to incorporations. *N. Y. Superior Ct. 1855, N. Y. Marbled Iron Works v. Smith, 4 Duer, 362.*

5. Proceedings for the dissolution of joint stock associations, in cases of insolvency, are to be conducted mainly according to the methods employed in the case of insolvent corporations, and not according to those derived from the law of simple partnership. *N. Y. Supreme Ct. Sp. T. 1867, Waterbury v. Merchants' Union Express Co. 3 Abb. Pr. N. S. 163.*

6. What facts will constitute a case of insolvency, such as will warrant the court, on the application of a stockholder in a joint stock association, in appointing a receiver and decreeing a winding up of the association,—see *Id.*

7. Distribution of assets. The stock of a joint stock mining association, formed in the city of New York, for the purpose of gold mining in California, was divided into money shares and labor shares. The holders of the labor shares contributed nothing towards the capital stock, and performed no labor beneficial to the company, but had their expenses to California paid out of the funds paid in by the holders of the money shares. Upon a dissolution of the association, by a decree in chancery, because of the impracticability of effecting the object intended:—*Held*, that the assets thereof should be distributed among the holders of the money shares alone. *Cal. Supreme Ct. 1850, Von Schmidt v. Huntington, 1 Cal. 55.*

For the organization, powers, &c., of Voluntary associations, see ASSOCIATIONS.

LEASES.

1. Corporate power to lease. Where, by their constitution, a corporation are restrained from granting leases for more than twenty-one years, they cannot covenant for a renewal of the term, any more than they could have originally granted a lease exceeding twenty-one. *Chancery, 1700, Lydiatt v. Foach, 2 Vern. 410; 1720, Taylor v. Dullidge Hospital, 1 P. Wms. 655; 1807, Watson v. Master &c. of Hemsworth Hospital, 14 Ves. 324.*

2. Form. That no particular language is required in leases by corporations more than in any others,—see *Poole v. Bentley, 12 East, 168; Morgan v. Powell, 7 Mann. & G. 989.*

3. A lease running in the names of certain persons, as the master and governors of a hospital, witnessing that the said master and governors have demised, with the covenants on the part of the lessee, to them and their successors, concluding with, "In witness whereof, the said master and governors have hereunto affixed their common seal," &c., but not signed by them, or either of them,—*Held* to be the lease of the corporation, and not of the individuals named in it as master and governors. *Q. B. 1842, Cooch v. Goodman, 3 Q. B. 580.*

4. Lease not an assignment. The Philadelphia and Erie railroad company leased to the Catawissa railroad company a portion of their road, with the proviso that if, "in case of an assignment for the benefit of creditors by the Catawissa company, a judicial sale or transfer of the road" should at any time take place, the lease should without any act of the lessors be void. The Catawissa railroad subsequently leased to another company, the whole of their railroad, &c., with the appurtenances of every nature,—*Held*, that the subsequent lease was not an assignment for the benefit of creditors, nor a judicial sale or transfer, and that the lease of the Philadelphia and Erie railroad company passed with it.* *Pa. Supreme Ct. 1866,*

* For the construction of an agreement, in a lease of a railroad, to return the road at the end of the term, in as good condition and repair as it was in at the beginning, natural wear only excepted,—see *Sturges v. Knapp, 31 Va. 1.* Such a lease provided that at the end of term of

Philadelphia & Erie R. R. Co. v. Catawissa R. R. Co. 58 Pa. St. 20.

5. Necessity of a seal. Every lease by a corporation, whether of corporeal or incorporeal hereditaments, must pass under the corporation seal; otherwise it is void *ab initio*. *K. B.* 1804, *Rex v. Inhabitants of Chipping Norton*, 5 *East*. 289; 1814, *Rex v. Inhabitants of North Duffield*, 3 *Maucl. & S.* 247.

6. Ratification of lease without seal. Although a lease was originally voidable for want of the corporate seal, yet an acceptance of rent by the corporation under it, is a confirmation of it. So the payment of rent is evidence from which a demise from year to year may be presumed. Although to enforce an executory contract against a corporation, it may be necessary to show that it was by deed, yet, on the other hand, where they have acted as upon an executed contract, it is to be presumed against them that everything necessary to make it a binding contract on both parties was done, they having had all the advantage they would have had if the contract had been regularly made. This is not inconsistent with the rule that in general a corporation can only contract by deed: it is merely raising a presumption against them from their acts that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise. *Q. B.* 1848, *Pennington v. Tanier*, 18 *Law J. N. S. Q. B.* 49; 18 *Jur.* 119; 12 *Q. B.* 1011.

7. Where a tenant to a borough went into possession under a lease which was void for not being executed under the corporate seal,—*Held*, that though the lease was void, the tenant was to be deemed tenant from year to year under the corporation; and his payment of rent from time to time to its officers, was sufficient proof of tenancy under the corporation, to enable it to distrain for the rent in arrear. *C. P.* 1806, *Wood v. Tate*, 5 *Bos. & P.* 247.

For the necessity of a Seal, and the mode of affixing it, to corporate contracts generally, see *CONTRACTS*, 151; 257–312; *SEAL*.

three years each, the lessor, if dissatisfied with the rent paid, might apply "to the chancellor of the State for the time being" for the appointment of the appraisers to fix the rent. *Held*, that the parties intended, by the term chancellor, the court of chancery, and that the supreme court, having succeeded to the powers of the court of chancery upon the abolishment of the latter, was the proper tribunal at which to apply for the appointment of appraisers. *N. Y. Supreme Ct.* 1861, *New York Central R. R. Co. v. Saratoga & Schenectady R. R. Co.* 39 *Barb.* 299; 3 *C. 26 How. Pr.* 463.

8. — of lease negotiated by agent. A corporation entered upon and enjoyed premises, pursuant to a lease purporting to be made by their agent, and paid rent thereon. *Held*, that they were bound by such lease, and that the authority of the agent to contract for them could be proved as well by a subsequent ratification by the company, as by direct evidence of his appointment, and that he was himself a competent witness to prove his authority.* *N. Y. Supreme Ct.* 1847, *Long Island R. R. Co. v. Marquand*, 6 *N. Y. Leg. Obs.* 180.

9. As to the power of corporations to Dispose of property, generally,—see *POWERS*; *PROPERTY*.

As to the law governing Assignments, Bills and notes, Bonds, Deeds, Grants, and Mortgages, by or to corporations, see those titles.

LEGISLATION.

1. Extent of the legislative power. In the absence of any special provisions of the constitution of a State restricting the legislature, the legislature may prescribe the functions and duties of corporations, control their action, and impose restraints upon them to the same extent as upon natural persons; that is, in all matters coming within the general range of legislative authority; subject to the limitation that they cannot impair the obligation of the contract implied in the charter, and cannot take the essential franchise without compensation.† *Vt. Supreme Ct.* 1855, *Thorpe v. Rutland & Burlington R. R. Co.* 27 *Vt.* 140; *S. P.* 1854, *Nelson v. Vermont & Canada R. R. Co.* 26 *Vt.* 717; *Ind. Supreme Ct.* 1856, *Madison & Indianapolis R. R. Co. v. Whiteneck*, 8 *Ind.* 217; *Mo. Supreme Ct.* 1858, *Gorman v. Pacific R. R.* 26 *Mo.* 441.

2. Any privileges which may exempt a corporation from the burdens common to individuals do not flow necessarily from the

* That though a resolution of a corporation cannot ratify a contract of hiring which is void by the statute of frauds, it may be evidence on the question of actual occupancy,—see *Howard Ins. Co. v. Hope Mut. Ins. Co.* 23 *Conn.* 394.

† The legislature can revoke or resume the authority given by law to town officers and road companies to make agreements respecting the use of highways, or may modify or rescind such a contract, with the assent of the company. *N. Y. Supreme Ct.* 1857, *People v. Fishkill & Beckman Plank Road Co.* 27 *Barb.* 445.

charter, but must be expressed in it, or they do not exist [4 Pet. 514]. As to general liability to legislative control, corporations and natural persons are to be placed upon precisely the same ground. It must be conceded that all which goes to the constitution of the corporation and its beneficial operation, is granted by the legislature, and cannot be revoked, either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States constitution. Any act essentially paralyzing the franchise, or destroying the profits therefrom arising, would, no doubt, be void. But, beyond that, the entire power of legislative control resides in the legislature, unless such power is expressly limited in the grant to the corporation, as by exempting their property from taxation in consideration of a share of the profits, or a bonus, or the public duties assumed, as has in some cases been held valid. Thus a general statute requiring railroads to maintain cattle guards at their crossings, is constitutional and binding even upon pre-existing corporations subject to no such obligations by their charters, if there is no express exemption in their charters upon the subject. Such an implied exemption cannot fairly be said to form a condition of the act of incorporation, unless everything is implied by grant which is not expressly inhibited, whereas the true rule of construction in regard to the powers of corporations is, that they are to take nothing by intendment but what is necessary to the enjoyment of that which is expressly granted.*

* The legislature of Mississippi, in 1833, chartered the Grand Gulf railroad and banking company, with power "to purchase and possess personal estate of any kind whatever," and "to sell and dispose of the same at pleasure." In 1840, the legislature enacted, that it should not be lawful for any bank in the State to transfer by indorsement, any note, &c., and in an action on such note, the fact of transfer might be pleaded in abatement.—*Held*, that the act of 1840 was constitutional, and applied to the Grand Gulf banking company, inasmuch as the power of transfer was neither expressly granted nor required by implication. *Miss. Ct. of Errors*, 1858, *Murdock v. Brown*, 6 *Am. Law Reg.* 690.

A bank for savings, the charter of which contains no express grant of power as to the mode of investing its funds, is subject to general statutes passed after its charter was granted, applicable to all savings banks, and regulating the mode of investment, for the protection of depositors. Incidental or implied powers can only be made to embrace such as are essentially necessary to enable the corporation to accomplish the purposes of its existence. And where a power is exercised not by virtue of a grant thereof, but

Vt. Supreme Ct. 1855, *Thorpe v. Rutland, Burlington &c. R. R. Co.* 27 *Vt.* 140.

8. A statute making corporations liable to day laborers employed by contractors under contracts made subsequent to the statute, is not unconstitutional as impairing the obligation of contracts. The right to exercise the power in the case of natural persons would not be questioned. Corporations are subject to precisely the same legislative control as natural persons, except where they are exempt by express provisions of their charters. *Vt. Supreme Ct.* 1858, *Branin v. Connecticut &c. R. R. Co.* 81 *Vt.* 214.

4. Where the charter of a railroad company expressly exempted it from legislative control,—*Held*, that the legislature might nevertheless subject the company, by a general law applicable to all railroad companies, to the duty of paying laborers upon its works, whose wages should be in arrear and not paid by the contractors. *Mo. Supreme Ct.* 1856, *Peters v. St. Louis Iron Mountain R. R. Co.* 28 *Mo.* 107.

5. A proviso to the charter of a railroad company gave to landowners the right to cross the railroad with teams or otherwise, in such a manner as should be calculated not to injure the same, *Held*, that this provision gave to the landowners no right to cross the track which could not be controlled and regulated by subsequent legislation in the shape of general statutes, enacted to secure safety to the public travelling on railroads. *Vt. Supreme Ct.* 1859, *Connecticut & Passumpsic Rivers R. R. Co. v. Holton*, 32 *Vt.* 43.

6. Operation of the general laws. Except so far as their charters provide to the contrary, corporations are subject to the general laws of the State. *Mo. Supreme Ct.* 1859, *State v. Noyes*, 47 *Mo.* 189; *Ill. Supreme Ct.* 1852, *Galena & Chicago R. R. Co. v. Loomis*, 13 *Ill.* 548; *Miss. Ct. of Errors*, 1843, *Commercial Bank of Manchester v. Nolan*, 7 *How.* 508; 1847, *Grand Gulf Bank v. Archer*, 8 *Smed. & M.* 151.

7. — how far applicable to previous corporations. A corporation holds its franchise subject to the general power of the legislature to modify the general law of the State. Thus an alteration in the statute of wills,

under the general laws of the State, the legislature may by other general laws restrict its exercise. Opinion of the judges, *Mass. Supreme Ct.* 1853, 9 *Cush.* 604.

forbidding devises to corporations, is not unconstitutional, even in its application to a previously existing corporation having theretofore the power to take by devise. *N. Y. Superior Ct.* 1849, *Ayres v. Methodist Episc. Church*, 8 *Sandf.* 351; 8 *N. Y. Leg. Obs.* 17.

8. A general statute requiring turnpike companies to erect signboards with the tolls designated thereon, and, in default thereof, forbidding them to receive tolls, cannot apply to a company previously chartered, and that have already put up signboards pursuant to the requirements of the charter. The grant in the charter is to govern. *Mass. Supreme Ct.* 1825, *Nichols v. Bertram*, 3 *Pick.* 349; 8 *P. Conn. Supreme Ct.* 1835, *Derby Turnpike Co. v. Parks*, 10 *Conn.* 522.

9. A general statute of Massachusetts (1840, ch. 85), making the proprietors of railroads responsible for injuries by fire communicated from their locomotive engines;—*Held*, to apply to railroads established before as well as since its passage; and to extend as well to estates, a part of which has been conveyed by the owner, as to those of which a part had been taken by authority of law, for the purposes of a railroad. *Mass. Supreme Ct.* 1849, *Lyman v. Boston & Worcester R. R. Corp.* 4 *Cush.* 288; 8 *P. Ma. Supreme Ct.* 1855, *Norris v. Androscoffin R. R. Co.* 89 *Ma.* 273.

10. A general law which requires that a bell or whistle shall be attached to each locomotive engine upon a railroad, which shall be rung or whistled before crossing any other road, is applicable to and binding on railroad corporations created before the passage of such law; and an omission to give the required signal constitutes a *prima facie* case of negligence. The legislature have power, by such a law in the nature of a police regulation to control the exercise of corporate franchises as the public interests require. *Ill. Supreme Ct.* 1852, *Galena & Chicago R. R. Co. v. Loomis*, 12 *Ill.* 548.

11. A statute making a suspension of specie payments by any bank a ground of forfeiture of its charter is not operative as to pre-existing banks, as it annexes a cause of forfeiture not contained in the act incorporating them, and without the consent of the members of the corporation. *Ala. Supreme Ct.* 1829, *State v. Tombeckbee Bank*, 2 *Stew.* 80.

12. A general act, in reference to all banks

"subsequently established,"—*Held*, to apply to a bank charter granted on the same day. *U. S. Cir. Ct. (Mich.)* 1843, *Weed v. Snow*, 3 *McLean*, 265.

13. The public laws of a State forbidding corporations to do certain acts, are notice to all who deal with such corporations, as well to persons without the State as to those within it. *U. S. Cir. Ct. (Mich.)* 1845, *Root v. Wallace*, 4 *McLean*, 8.

14. Inviolability of contracts. The rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation. *Mass. Supreme Ct.* 1806, *Wales v. Stetson*, 2 *Mass.* 146; *U. S. Supreme Ct.* 1815, *Terrett v. Taylor*, 9 *Cranch*, 43.

15. Private charters are protected by the clause of the constitution of the United States prohibiting the passage of laws impairing the obligation of contracts. *Mo. Supreme Ct.* 1858, *Gorman v. Pacific Railroad*, 26 *Mo.* 441.

A law compelling a company to fence its road is such a regulation. *Ib.*

As to the inviolability of Charters, see CHARTERS.

16. A grant of a franchise,—*e. g.* the right to run a ferry,—which has been accepted and acted upon, partakes of the nature of a contract, so far as to be protected by that clause of the federal constitution which inhibits the States from passing laws "impairing the obligation of contracts." [4 *Wheat.* 444.] And the rule applies where the grant is to a municipal corporation, as well as to grants to private corporations. *N. Y. Chancery*, 1828, *McLaren v. Pennington*, 1 *Paige*, 102; *Supreme Ct. Sp. T.* 1850, *Benson v. Mayor &c. of New York*, 10 *Barb.* 223. Compare *Aikin v. Western R. R. Corporation*, 20 *N. Y.* 870.

As to the inviolability of franchises, see FRANCHISES.

17. The relation between a corporation and a stockholder is one of contract; and any legislative enactment which, without his assent, authorizes a material change in the powers or purposes of the corporation, not in aid of the original object, if acted upon by the corporation, is not binding upon him. *Ind. Supreme Ct.* 1857, *McCray v. Junction R. R. Co.* 9 *Ind.* 359.

18. A statute exempting a corporation

from taxation, without imposing any duty upon it, or requiring anything from it, is not in the nature of a contract; and may be repealed at the pleasure of the legislature. *Pa. Supreme Ct.* 1854, *Hospital v. Philadelphia County*, 24 *Pa. St.* 329.

19. That a State law which declares, "that a bank shall pay a tax of six per cent. upon its dividends, after deducting accustomed expenses and losses, in lieu of all taxation whatever," is a contract the obligation of which the legislature cannot impair,—see *Woolsey v. Dodge*, 6 *McLean*, 142.

20. That embodying a provision of law in articles of association, does not render such provision of law a part of the contract of the shareholders, so as to be un repealable,—see *Sherman v. Smith*, 1 *Black*, 587.

21. How far it is competent to the legislature to pass laws affecting the individual liability of shareholders. See *Walker v. Crain*, 17 *Barb.* (N. Y.) 119; *Conant v. Van Schaick*, 24 *Id.* 87; *Rochester v. Barnes*, 26 *Id.* 657; *Hathorn v. Calef*, 53 *Mo.* 471.

22. Defects in organization. The legislature have power to cure any technical defects in the organization of a corporation formed under a general statute for incorporation, by a law declaring that the corporation shall be deemed a valid corporation, and to have been duly organized. Such a statute does not, by enabling the corporation to sue, interfere with vested rights—it merely gives, as against the debtors of the corporation, a remedy for an equity, which, without it, could not have been enforced. [16 *Serg. & R.* 101; 16 *Id.* 85; 7 *Watts*, 300; 16 *Mass.* 258; 1 *Hill*, 325; 20 *Wend.* 365.] *N. Y. Supreme Ct.* 1853, *Syracuse City Bank v. Davis*, 16 *Barb.* 188.

23. New remedies. That the legislature may change the law governing the remedies allowed in favor of or against a corporation. See *Bap. Northeast &c. R. R. Co.* 37 *Ala. N. S. I.* 679; *New Albany & Salem R. R. Co. v. McNamara*, 11 *Ind.* 543; *Sands v. Tillinghast*, 24 *How. Pr.* 485; *Bank of Columbia v. Okely*, 4 *Wheat.* 235.

24. The principle that the legislature cannot infringe the vested privileges of a corporation, cannot be construed to limit the general powers of legislation, where such legislation merely regulates the existing rights and duties of corporations, or provides new modes of enforcing acknowledged obligations.

Thus a statute making negligent injuries to persons, by railroad companies, indictable and imposing a fine for the benefit of the injured party, is valid.* *N. H. Supreme Ct.* 1855, *Boston &c. R. R. v. State*, 32 *N. H.* 215; 8 *P. N. J. Ct. of Errors*, 1850, *Camden & Amboy R. R. Co. v. Briggs*, 2 *Zabr.* 623; *Mass. Supreme Ct.* 1812, *Brown v. Penobscot Bank*, 8 *Mass.* 445.

25. Subsequent to the incorporation of a turnpike company, the legislature passed an act providing for the appointment of turnpike inspectors. *Held*, that the act was not unconstitutional as an invasion of the corporate rights of the company previously granted; it being the object of the legislature to provide a more effective mode to compel a compliance of the corporation with their charter requirements. *Vt. Supreme Ct.* 1841, *State v. Bosworth*, 18 *Vt.* 402.

26. A statute creating a commission to visit banks, examine their officers, who are compelled to testify under a penalty, and directing that if a bank be found in a condition dangerous to the public, an injunction shall be issued and a receiver appointed (*Mass. Stat.* 1838, ch. 14), is not unconstitutional in its application to a pre-existing bank, on the ground that a suspension of the proceedings of the bank by injunction diminishes the period for which the bank by charter is empowered to act. In case either of violation of charter or of insolvency, it is a legitimate exercise of legislative power, to provide for a proper and effectual mode of ascertaining the facts, by a judicial investigation, upon which the supposed delinquency depends; and for securing the assets in order to provide for the creditors and stockholders. And an injunction is a proper mode of doing this. *Mass. Supreme Ct.* 1839, *Commonwealth v. Farmers & Mechanics' Bank*, 21 *Pick.* 542.

27. The Georgia statute of February 20, 1854, providing that railroad corporations shall be suable in the counties in which injuries may have been committed, is not in violation of the constitution of the State, nor of that of the United States. *Ga. Supreme*

* Where the charter of a corporation authorizes the construction of works which may be an obstruction to navigation, without a reservation of a power to repeal or alter the charter, a subsequent statute giving an action against the corporation for injuries caused by such authorized obstruction is void as impairing the obligation of the contract arising out of the charter. *Del. Ct. of Err.* 1846, *Bailey v. Philadelphia &c. R. R. Co.* 4 *Harring.* 369.

Ct. 1855, *Davis v. Central R. R. & Banking Co.* 17 *Ga.* 323.

28. Exercise of reserved power to alter. A provision in a general act of incorporation reserving to the legislature the power to alter or repeal it at any time, does not operate merely as a reservation of a right to change the act prospectively, so that associations organized in the meantime would remain unaffected. On the other hand, it enables the legislature to deal with associations organized under the act as if they were established by a statute containing in itself such reservation. [11 *N. Y.* 1 *Kern.* 102.] *N. Y. Ct. of Appeals*, 1860, *Matter of Lee & Co.'s Bank*, 21 *N. Y.* 9, 161; *Poughkeepsie &c. Plank Road Co. v. Griffin*, 24 *Id.* 150.

29. It may be admitted that, under the ordinary reserved power to alter and repeal the charter, the legislature would have no right to change the fundamental character of the corporation, and convert it into a different legal being, without absolving those who did not choose to be bound. But if additional powers are conferred which are of the same character, and have been regularly acquired from the legitimate source of power, and if they have been fairly exercised, the defendant, although the change may have operated to his pecuniary disadvantage, is still bound by his undertaking. *N. Y. Ct. of Appeals*, 1856, *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 *N. Y.* (4 *Kern.*) 336.

30. Where, in an act of incorporation, the legislature, instead of reserving a general power to alter or repeal the act at its pleasure, reserves only the right to alter, &c., "in case the company shall misuse or abuse the privileges granted," their power to revoke the charter is conditional upon such misuse or abuse occurring. And an act revoking the charter, when no such misuse or abuse is established, is unconstitutional. *U. S. Circ. Ct. (Pa.)* 1865, *Mayor &c. of Baltimore v. Connellsville R. R. Co.* 4 *Am. Law Reg. N. S.* 750.

31. Passage of laws. Though very proper, it is not necessary to the validity of an act of the legislature respecting public corporations, such as towns, cities, and school societies, that the corporations interested should formally be made parties and have an opportunity to be heard, before any action of the legislature. *Conn. Supreme Ct.* 1855, *Granby v. Thurston* 28 *Conn.* 416.

32. Their effect. Although a chapter of the revised statutes of a State repeals all acts and parts of acts, the subjects of which are revised and re-enacted in that revision, or which are repugnant to its provisions, this must be construed as referring to general statutes, and not as repealing all provisions of charters previously enacted, which are in conflict with the general statutes contained in said revision. *Wis. Supreme Ct.* 1833, *Walworth County v. Village of Whitewater*, 17 *Wis.* 193; 1864, *City of Janesville v. Markoe*, 18 *Wis.* 350.

33. Acceptance. Where a statute relating to a corporation provides that an acceptance of it must be filed, or else it is to be void, and it is not accepted, the corporation can derive no advantage from the passage of the act; and at most, the statute, during the time for accepting it, could only be deemed a recognition of the lawful existence of the corporation as it was previously; but it becomes wholly void by its non-acceptance. *N. Y. A. V. Chan. Ct.* 1846, *Green v. Seymour*, 3 *Sandf. Ch.* 285.

34. Legislation under special constitutions. A law which confers certain privileges on certain existing corporations, does not violate art. 1, § 25, of the constitution of Pennsylvania,—which provides that no law shall create, renew, or extend the charter of more than one corporation,—so long as not more than one new charter is created, or defunct one revived, or existing charter continued beyond the time when it would otherwise expire. *Pa. Supreme Ct.* 1856, *Cleveland &c. R. R. Co. v. Erie*, 27 *Pa. St.* 380.

35. Increasing the powers and privileges of, or assigning new duties to, several municipal corporations by one act, is not an "extension" of their charters within the meaning of that provision. To create a charter is to make one which never existed before. To renew one is to give vitality to one which has been forfeited or has expired. To extend one is to give an existing charter more time than originally limited. A mere increase of powers is not within the meaning of such provision. *Pa. Supreme Ct.* 1853, *Moers v. City of Reading*, 21 *Pa.* 188.

36. A provision in a State constitution inserted for the purpose of preventing the undue multiplication of banks, "that there

shall be no other banks or moneyed institutions in this State, but those already provided by law, except a State bank and its branches, which may be established and regulated by the general assembly of the State, as they may think proper," is not to be construed to prevent the legislature from renewing before its expiration the charter of a bank established by law previous to the constitution. The continuance of an old charter, is not the creation of a new corporation. And the power to continue the charter of an old bank, carries with it as incident thereto, the power to enlarge its capital and powers. *III. Supreme Ct. 1844, People v. Marshall, 1 Gilman, 672.*

37. An act remedying a technical defect in the organization of a corporation,—*a. g.* insufficiency in the proof or acknowledgment of a certificate of organization of a banking association formed under the general statute,—is not an act to create a corporation. *N. Y. Supreme Ct. 1853, Syracuse City Bank v. Davis, 16 Barb. 188.*

38. Under the provision of the N. Y. constitution, that no corporation shall be created by special act except "in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws;" the legislature has authority to create a railroad corporation by special act, if, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws; banking corporations, only, are excepted. And the legislature having enacted a corporation by a special act, the judicial power cannot review the discretion or judgment of the legislature, and declare the act unconstitutional. *N. Y. Supreme Ct. 1853, Mosier v. Hilton, 15 Barb. 657.*

39. The constitution of the State of New York, gives the legislature the entire discretion of creating other corporations than banks, by special charter, and courts cannot review the exercise of this power. *N. Y. Supreme Ct. 1855, United States Trust Co. of N. Y. v. Brady, 20 Barb. 119.*

40. A special act for the incorporation of a company, in a city, is not unconstitutional by reason of the existence of a general law for the organization of such companies in any city. Whether a special act is necessary or not, rests wholly in the legislative discretion. *N. Y. Ct. of Appeals, 1860, People v. Bowen, 21 N. Y. 517.*

41. Under the constitution of Indiana the legislature may by a general law, if for the public good, provide for corporations to erect levees and drains when necessary, and to take land therefor, and to assess those benefited thereby; leaving the questions of necessity and benefit to be determined by the court in each particular case. *Ind. Supreme Ct. 1860, Anderson v. Kerns Draining Co. 14 Ind. 199.*

42. The provision in the Michigan constitution (§ 2, art. 12),—that "the legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house,"—does not restrict the legislature from creating more than one corporation by one act. It is competent to create several by one special act, or to pass a general law authorizing the voluntary formation of an indefinite number. *U. S. Cir. Ct. (Mich.) 1840, Falconer v. Campbell, 2 McLean, 195.*

43. The word "house" in that section means, the members present doing business, there being a quorum; and not a majority of all the members elected; and an act of incorporation passed by two-thirds of the members present, there being a quorum, is constitutional.* *Mich. Supreme Ct. 1851, Southworth v. Jackson & Palmyra R. R. Co. 2 Mich. 287.*

44. Under art. 7, § 9, of the N. Y. constitution of 1821, the legislature cannot pass a bill which shall have the effect of altering a body corporate, by a simple majority of each house. Although the legislature reserve in express terms the power to alter the charter of the corporation, it does not follow that this may be done by a mere majority vote. The legislature do not acquire any new power by this reservation, but simply retain that which they then had. The power to alter, as well as to create corporations, can only be exercised by the concurrence of two-thirds of the members. Hence the act of 1837, diminishing the circulation and issues of the safety fund banks, is in so far void.

* So much of the act of Michigan, "to organize and regulate banking associations" (Sess. L. 1837, p. 76), as purports to confer corporate rights upon the associations organized under its provisions, is in violation of the second section of the twelfth article of the constitution of the State, which declares that "the legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house," and is, therefore, void. *Green v. Graves, 1 Dougl. 851; Farmers & Mechanics' Bank v. Troy City Bank, 1 Dougl. 457.*

N. Y. Supreme Ct. 1845, Commercial Bank of Buffalo v. Sparrow, 2 *Den.* 97.

45. The legislature of Alabama has authority to grant a charter to a company for the purpose of erecting a tollbridge, notwithstanding the power given to county courts to grant licenses for that purpose, and the exercise of that power by the license of a ferry in the same neighborhood as the proposed bridge. *Ala. Supreme Ct.* 1835, Dyer v. Tuscaloosa Bridge Co. 11 *Ala.* (2 *Port.*) 296.

46. Under art. 11, § 8, of the constitution of Tennessee, which empowers the legislature to "vest such powers in the courts of justice with regard to private and local affairs as may be deemed expedient," the legislature is not empowered to invest such courts with power to grant charters of incorporation. This power belongs exclusively to the legislative department, whether exercised by virtue of an express constitutional grant, or as an ordinary function, and an act attempting to transfer such power is void. *Tenn. Supreme Ct.* 1856, State v. Armstrong, 8 *Sneed*, 684.

See CONSTITUTIONS.

LIBEL.

Right of action of company. Incorporated companies established for the purpose of transacting business,—a. g. banks,—may maintain actions of libel, the same as individuals, for words affecting their business or property; and without alleging special damage. *N. J. Supreme Ct.* 1852, Trenton Ins. Co. v. Perrine, 8 *Zabr.* 402; *N. Y. Supreme Ct. Sp. T.* 1862, Shoe & Leather Bank v. Thompson, 28 *Hov. Pr.* 253; *Each.* 1859, Metropolitan &c. Co. v. Hawkins,* 4 *Hurlst. & N.* 87.

As to actions Against corporations for libels issued under their authority, see WRONGS.

MAJORITY.

MEETINGS; OFFICERS; POWERS.

* In this case the action was held maintainable against a shareholder in the aggrieved company.

MANDAMUS.

[This title embraces decisions upon the employment of mandamus as a remedy, in so far as they turn upon considerations peculiar to its use in cases affecting corporations. Whatever relates to the nature of the right to be enforced by mandamus is under the title of that right; thus, the question whether a member or an officer may be restored by mandamus, is treated under MEMBERS and OFFICERS; whether transfers of stock may be compelled by mandamus, under STOCK. And the general doctrine, respecting mandamus, the application for it, the return, the hearing and decision, and procedure to compel obedience, applicable to cases against corporations only in common with others, is not considered as within the scope of this work, but should be sought in works treating of the law of *Remedies*.]

1. **Who may apply.** A private citizen has no right to apply for a mandamus to compel a public board to perform an omitted duty, in a case where he is not directly injured by its non-performance; but *it seems* cases may arise in which the court would listen to such application, especially if the attorney-general or prosecuting attorney were absent or refused to act without good cause. *Mich. Supreme Ct.* 1856, People v. Regents of the University, 4 *Mich.* 98.

2. **When the writ lies.** *Mandamus* lies where the relator has a clear legal right to the performance of some official or corporate act, by a public officer or corporation, and there is no other adequate or specific remedy. *Ohio Supreme Ct.* 1852, Cincinnati &c. R. R. Co. v. Commissioners of Clinton County, 1 *Ohio St.* 77.

3. **Not when there is another remedy.** Where the charter of a corporation, or the general statute, in force, and applicable to the subject, imposes a specific duty, either in terms, or by fair and reasonable construction and implication, and there is no other specific, or adequate remedy, the writ of mandamus will be awarded. But if the charter or the general law of the land, affords any other specific and adequate remedy, it must be pursued. See Rex v. Nottingham Old Waterworks, 6 *Ad. & E.* 355.

4. Where a corporate election is doubtful or questionable and fit to be tried by an information in the nature of a *quo warranto*, a mandamus will not be granted to proceed with an election; but if the election is merely colorable, and therefore void, so that in point of law the office is vacant, the writ will lie. *K. B.* 1764, Rex v. Bankes, 8 *Burr.* 1452; 1 *Wm. Black.* 445; 1767, Rex v. Mayor &c. of Cambridge, 4 *Burr.* 2008.

5. The titles of corporate electors cannot be impeached through the medium of the

person elected by them, at least where there are other means by which the titles of the electors can be tried. If, however, there do not exist any other means by which the right to elect at all can be ascertained, then the court will allow that to be done by impeaching the election of the party returned. *K. B. 1790, Rex v. Mein, 3 Durnf. & E. 596.*

6. The court will not grant a *mandamus* to a bank to compel a transfer of stock, where there is a remedy by action if they refuse. But in order to exclude the writ, the remedy must be *adequate*, or must afford *specific* or what in the case is equivalent to specific relief.* *K. B. 1780, Rex v. Bank of England, Doug. 524.*

7. An English dock company were required by their charter to make and maintain a channel of a certain description. *Held*, that a *mandamus* would lie to compel the company to repair the channel, although it might be that an indictment would lie against them for the omission. *Q. B. 1841, Regina v. Bristol Dock Co. 2 Q. B. 64; 2 Eng. Railw. Cas. 599; 6 Jur. 216; 1 Gale & D. 286. Compare Same v. Same, 1 Eng. Railw. Cas. 548; Rex v. Jeyes, 8 Ad. & E. 416.*

8. Not granted till after refusal. A *mandamus* will not be issued to an incorporated company to perform a duty, unless it is clear that there has been a direct refusal to do that which it is the object of the writ to enforce, either in terms, or by circumstances which distinctly show an intention not to do the act required. *K. B. 1835, Rex v. Brecknock & Abergavenny Canal Co. 3 Ad. & E. 217; 1 Har. & W. 279; 4 Nev. & M. 871; Rex v. Wilts & Berks Canal Nav. 3 Ad. & E. 477; Q. B. 1839, Regina v. Thames & Isis Nav. 8 Ad. & E. 901, n.; 1843, Regina v. Bristol & Exeter Railway Co. 4 Q. B. 162.*

9. In order to induce the court to issue a *mandamus* to a canal company, to make compensation to a claimant, a clear refusal on the part of the company must be shown; mere delay in attending to the claim is not

sufficient. *Q. B. 1840, Regina v. Wilts & Berks Canal Co. 8 Dougl. Pr. Cas. 623; 4 Jur. 848.*

10. It is not negative. That inasmuch as a *mandamus* lies merely to command that to be done which ought by law to be done, and not to order the undoing of that which ought not to be done, it will not lie to order a railway company to take the seal off from the register of shareholders on the suggestion that it was affixed without authority and contrary to the provisions of a statute,—see *Exp. Nash, 15 Q. B. 92.*

11. It does not control discretionary power. Where the law authorizes an individual, officer, or corporation, to act in their discretion, a *mandamus* will not lie to compel them to act, nor will it be issued until a plain dereliction of duty has been established.* *Ohio Supreme Ct. 1852, Exp. Black, 1 Ohio St 30; 1853, Turnpike Road v. Sandusky County, Id. 149.*

12. *Mandamus* to a board of regents entrusted with the control and government of an educational institution, to compel the appointment of the relator to a professorship of medicine therein,—refused. *Mich. Supreme Ct. 1856, People v. Regents of the University, 4 Mich. 98.*

13. To whom it should be addressed. That a *mandamus* must be directed to a corporation by its proper name,—see *Rex v. Taylor, 3 Salk. 231.*

14. That a *mandamus* ought to be directed to the corporate name, though the thing required to be done is to be done by a council,—see *Rex v. Mayor &c. of Oxford, 6 Ad. & E. 849; 1 Nev. & P. 474; Rex v. Mayor &c. of Gloucester, 3 Bulst. 190; Rex v. Mayor &c. of Abingdon, 2 Salk. 700; 1 Ld. Raym. 559; Rex v. Mayor &c. of Hereford, Id. 701; Rex v. Mayor &c. of Norwich, 1 Str. 55; Regina v. Ledgard, 1 Ad. & E. N. S. 616; Regina v. Mayor &c. of Stamford, 6 Id. 433; Mayor &c. of Sandwich v. Regina, 10 Id. 571.*

15. That a *mandamus* to enforce a right to

* Where an act of the legislature gives a railroad company a right to the use of a sum of money, on a compliance with certain terms, and imposes as a duty on the governor the issuance of his warrant on the custodian of a specified fund for the payment of such sum, a *mandamus* will lie against the governor to enforce the issuance of such warrant, where said terms have been complied with, since an action at law if maintainable would not afford the company complete redress, in case of failure to obtain the money. *Ala. Supreme Ct. 1860, Tennessee & Coosa R. R. Co. v. Moore, 36 Ala. 371.*

* Where a dock company was empowered by act of parliament to make a floating harbor; and the directors of the company were authorised and required "to make such alterations and amendments in the sewers as might or should be necessary in consequence of the floating of said harbor;—*Held*, that a *mandamus* lay to the directors, commanding them to "make such alterations," &c., in the words of the act, and that it was neither requisite nor proper to call upon the company to make any specific alterations, the mode of remedying the evil being left to their discretion by parliament. *K. B. 1827, Rex v. Bristol Dock Company, 6 Barn. & C. 181; 9 Dougl. & R. 309.*

inspect the corporate records, may be addressed to the officer who has charge of the records,—see *People v. Throop*, 12 *Wend.* 183.

16. That if a mandamus which is directed to a select body, include in its direction any others than those whose duty it is to obey the command, it will be superseded for misdirection—see *Rex v. Mayor &c. of Abingdon*, 2 *Salk.* 699; 1 *Ld. Raym.* 559; *Rex v. Mayor &c. of Norwich*, 1 *Str.* 55; *Pees v. Mayor &c. of Leeds*, *Id.* 640.

17. Sufficiency of return, generally. A return to a mandamus is sufficient, if it contain a full and certain answer to all the allegations expressly made, and discloses a fair legal reason why the mandamus should not be obeyed.* *K. B.* 1795, *Rex v. Archbishop of York*, 6 *Durnf. & E.* 490; *Mass. Supreme Ct.* 1830, *Inhabitants of Springfield v. County Commissioners of Hampden*, 10 *Pick.* 58.

18. — to mandamus to restore officer. Upon a mandamus to restore a corporate officer who has been removed, to his functions, the return should specify the grounds of the amotion, unless the officer were removable at the pleasure of the corporation.† *Rex v. Guardians of Thame*, 1 *Strange*, 115.

As to What grounds are sufficient, see AMOTION.

19. Where the return to an alternative mandamus to restore an officer, relies upon an amotion, it must set out all the necessary facts, precisely. It is not enough to set out conclusions only. The facts necessary to show both that the relator was removed in a legal manner, and that it was for adequate cause, must be set out. *K. B.* 1759, *Rex v. Mayor &c. of Liverpool*, 2 *Burr.* 723, 731.

20. Such a return should aver that all the members of the board authorized to amove, were summoned to attend the meeting.‡ *Id.*

* A return by county commissioners to an alternative mandamus, directing them to take supervision of a bridge, as a part of a highway laid out by the court of sessions,—*Held*, good, though the return set forth that the bridge had been dedicated to the public, without averring in what manner; the proceedings of the town, which were made part of the return, showing for what purpose the bridge was built, and the building of a bridge on a highway, being *ipso facto* a dedication of it to the public. *Inhabitants of Springfield v. County Commissioners of Hampden*, 10 *Pick.* 58.

† Or unless the case was within the jurisdiction of a visitor. In such case, that fact need only be duly shown in the return, and the cause of amotion need not be specified. *Regina v. Dean of Chester*, 15 *Q. B.* 513; *Appleford's Case*, 1 *Mod.* 82; *Phillips v. Bury*, 2 *Durnf. & E.* 346.

‡ When a statute authorized a corporation to remove an officer, and made the bailiffs, who were the heads of the corporation, a part of the quorum, a return to a mandamus,

Followed, *Rex v. Mayor &c. of Doncaster*, *Id.* 788.

21. A return to such a mandamus is insufficient, if it does not state that the party has been summoned to answer the charge before removal. *K. B.* 1799, *Rex v. Gaskin*, 8 *Durnf. & E.* 209.

22. Whether the same strictness of certainty is necessary in a return to a mandamus, as in an indictment,—see *Rex v. Lyme Regis*, 1 *Doug.* 178.

23. — to restore member. The return to a mandamus issued to restore a corporator who has been expelled, must set forth distinctly and with sufficient certainty, and not in an argumentative, inferential, or evasive manner, all the facts essential to show the expulsion to have been valid, both as respects the cause of disfranchisement and the mode of proceeding. *Pa. Supreme Ct.* 1866, *Society &c. v. Meyer*, 52 *Pa. St.* 125; 1850, *Commonwealth v. German Society*, 15 *Pa. St.* 251.

24. That a return to a mandamus, stating in general terms that the member was expelled for a violation of duty, without specifying the charges on which he was convicted, would be bad; the return should show precisely the cause and the proceedings, that the court may judge of the legality of the one, and the regularity of the other,—see *Commonwealth v. Pennsylvania Beneficial Institution*, 2 *Serg. & R.* 141; *Commonwealth v. Guardians of the Poor*, 6 *Serg. & R.* 469.

25. Where the rules of a religious society inflicted the penalty of expulsion on any member who should commence a suit at law against another member, "except the case were of such a nature as to require and justify a process at law," a return to a mandamus to restore a member to his standing, which set forth the rule, and also that the expelled member had commenced a suit against another (but did not aver that the case was not of such a nature as to require and justify a process at law was—*Held*, insufficient. *Pa. Supreme Ct.* 1815, *Green v. African Methodist Episcopal Society*, 1 *Serg. & R.* 254.

26. Where, on a return to such a mandamus, it appeared that the relator was, accord-

that such officer was duly amoved by the bailiffs and burgesses, the bailiffs being then present;—*Held*, to imply that the requisitions of the statute had been complied with, in the removal, although it did not appear that the bailiffs had expressly consented to it. *Q. B.* 1700, *Regina v. Bailiffs &c. of Ipswich*, 2 *Ld. Raym.* 1223; 2 *Salk.* 494.

ing to the terms of the constitution and by-laws of the association, tried and convicted of the charges laid against him, but not, as a by-law expressly directed, that he was found guilty on sufficient evidence,—*Held*, that the return was not good without showing that the association took proofs which they deemed to be sufficient evidence. *Pa. Supreme Ct.* 1866, *Society &c. v. Meyer*, 52 *Pa. St.* 125.

27. Where a charter of a corporation provided, that on the conviction of a member of certain charges, on "the deposition of two or more credible witnesses," he should be expelled, the return to a *mandamus* to restore such member must state that at least two witnesses were heard in support of the charge, and that the same was either proved or confessed. *Pa. Supreme Ct.* 1850, *Commonwealth v. German Society*, 15 *Pa. St.* 251.

28. To a *mandamus* to restore a member of a corporation, it is an insufficient return that the prosecutor had consented to be turned out; it should be more certain and allege that the prosecutor resigned, and that the corporation accepted the resignation. *Q. B.* 1709, *Regina v. Lane*, 2 *Ld. Raym.* 1804; 11 *Mod.* 270; *Fortes*. 275.

As to What grounds for expelling a member are sufficient, see *EXPULSION*.

MANUFACTURING COMPANIES.

1. How created. Under the New York general laws, for the creation of manufacturing companies, any three or more persons desirous to form such a company, may make, sign, and acknowledge before some officer competent to take the acknowledgement of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of state, a certificate in writing, in which shall be stated:

1. The corporate name of the said company, and the objects for which the company shall be formed.

2. The amount of the capital stock of the said company, and the term of its existence, not to exceed fifty years.

3. The number of shares of which the said stock shall consist.

4. The number of trustees, and their names, who shall manage the concerns of said company for the first year.

5. And the names of the town and county in which the operations of the said company are to be carried on. *N. Y. Laws of 1848*, ch. 40, § 1; *N. Y. Laws of 1866*, ch. 838.

2. When the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same, and their successors,

shall be a body politic and corporate, in fact and in name, by the name stated in such certificate and by that name have succession, and shall be capable of suing and being sued in any court of law or equity in this State, and they and their successors may have a common seal, and may make and alter the same at pleasure; and they shall, by their corporate name, be capable in law of purchasing, holding, and conveying any real and personal estate whatever which may be necessary to enable the said company to carry on their operations named in such certificate, but shall not mortgage the same or give any lien thereon.* *N. Y. Laws of 1848*, ch. 40, § 2; amended to allow mortgages, upon written assent of owners of two-thirds of stock. *Laws of 1864*, 1155, ch. 517, § 2.

3. The corporate purpose. The manufacturing of lumber, flour, and meal, is with-

* The New York act of 1848 as originally passed, authorized only the incorporation of companies for the purpose of "carrying on any kind of manufacturing, mining, mechanical, or chemical business." By later enactments its provisions have been extended to authorize companies to be formed for the following purposes:

For constructing and using machines for raising vessels or other heavy bodies. *N. Y. Laws of 1861*, 16, ch. 14.

For collecting, preserving, and selling ice. *Id.* 1855, 516, ch. 801.

For printing and publishing books, pamphlets, and newspapers. *Id.* 1867 549, ch. 262.

For bottling and selling mineral water drawn from any natural mineral spring. *Id.* 1869, 87, ch. 63.

For constructing and using grain elevators in the port of New York. *Id.* 1864, 788, ch. 387, § 3.

For constructing and employing vessels, &c., in towing and salvage. *Id.* 1864, 788, ch. 388.

For buying and selling and transporting coal and peat; such corporations not to be confined in their operations to the county in which their certificate shall be filed. *Id.* 1865, 514, ch. 307, §§ 1, 2.

For propagating, cultivating, and developing the different varieties of the grape, and manufacturing wines and brandies therefrom; and cultivating sugar cane, cotton, rice, tobacco, indigo, and other products of the earth, preparing and transporting and disposing of the same. *Id.* 1865, ch. 284.

For accumulating and supplying water for mining purposes; with power to acquire, take, hold, lease, and convey lands and water power suitable for those purposes. *Id.* 1866, 828, ch. 871, § 1.

For building and keeping a hotel, or building and maintaining museums, or for curative purposes. *Id.* 1866, 1749, ch. 799.

For buying a suitable lot and erecting thereon a skating rink; and for holding fairs, meetings, exhibitions, and all other lawful entertainments. *Id.* 1868, 1749, etc. 781.

And in 1866, the title of the act of 1848 was amended so as to read, "An act to authorize the formation of corporations for manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical or curative, mercantile or commercial purposes." *Id.* 1866, 1896, ch. 838.

The election of trustees; their powers and duties; the paying in of capital stock; the liability of stockholders and of officers, for company debts, in certain cases; the alteration of the original organization of the company; and many other details connected with the conduct of the corporate affairs, are regulated in detail, in New York, by provisions of ch. 40 of the act of 1848 and subsequent acts, particularly *Laws of 1850*, ch. 269; 1853, ch. 888; 1854, ch. 201; 867, ch. 29; 1890, ch. 269; 1861, ch. 170; 1862, ch. 472; 1864, ch. 517; 1866, ch. 73, ch. 799, ch. 838; 1867, ch. 961.

in the meaning of a statute authorizing the formation of corporations for manufacturing, agricultural, mining, or mechanical purposes. *Ill. Supreme Ct.* 1855, *Cross v. Pinckneyville Mill Co.* 17 *Ill.* 54.

4. **Filing certificate.** The provision of the Illinois act of 1849 (1 *Ill. Stat.* 211), relative to the formation of manufacturing companies, requiring a duplicate of the certificate of organization to be filed in the office of the secretary of State, is not imperative, and a failure to comply with it does not defeat the organization. *Ill. Supreme Ct.* 1855, *Cross v. Pinckneyville Mill Co.* 17 *Ill.* 54.

5. **Paying in capital.** Under section 10 of the Illinois act of February 10, 1849 (1 *Stat. of Ill.* 217), authorizing the formation of corporations for mechanical and other purposes, a company, to avoid a forfeiture of its franchise, is required within two years from its incorporation to pay in the whole amount of its capital stock. See *Baker v. Backus*, 32 *Ill.* 79.

6. **Power to sell.** A power conferred upon a manufacturing corporation, by its charter, to manufacture a particular species of goods, necessarily implies the power of disposing of them when manufactured, and, if so, of receiving in payment money or property readily convertible into money, or provisions, or stores of merchandise for the payment of their employees; and a contract by such corporation to sell a store of such merchandise owned by them, may be enforced by them, in the absence of evidence that it was acquired by them in some other and unauthorized way. *N. Y. Ct. of Appeals*, 1860, *De Groff v. American Linen Thread Co.* 21 *N. Y.* 124.

7. — **to borrow money.** A manufacturing corporation may borrow money to carry on its operations. *Va. Ct. App.* 1846, *Burr v. McDonald*, 3 *Gratt.* 215.

8. **Insolvency.** Section 43 of the New Jersey statute of 1849, (*Nix. Dig.* 492), authorizing the establishment of manufacturing companies, provides that "in case of the insolvency of any company formed under the provision of the act, the laborers in the employ of said company shall have a lien upon the assets thereof for the amount of wages due them respectively, which shall be paid prior to any other debt of the company." *Held*, that the act of insolvency contemplated by the statute was committed at the time of

the suspension by the company of its ordinary business operations; and that all the laborers in the company's employ at that time, and not those only in its employ at the time of instituting legal proceedings against it as an insolvent corporation, were entitled to priority in payment over the other creditors of the company.* *N. J. Chancery*, 1868, *Bedford v. Newark Machine Co.* 16 *N. J. Eq.* (1 *C. E. Green*), 117.

9. The apprentices of such company are entitled to their wages, in the absence of proof that they were discharged or released from their indentures prior to the act of insolvency, without regard to the time at which they were last actually laboring for the company. Their legal rights cannot be affected by the refusal or inability of the corporation to furnish them with employment.† *Id.*

10. **Individual liability of officers.** Under a statute (*e. g.* *N. Y. Laws* of 1848, ch. 40, § 12),—enacting that if a company shall fail to file an annual report, as required by law, all the trustees shall be liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made,—the liability of a trustee who was in office when default was made in publishing the required annual report, is limited to debts contracted while he remains trustee, and does not include a debt contracted after he ceased to be a trustee, though while the default continued. The true interpretation of such a statute is, that three circumstances must concur in point of time, to render a trustee liable: viz. the existence of the debt; the existence of the default in making the

* The remedy for the collection of debts due by manufacturing corporations organized under the Pennsylvania statute of April 7, 1849 (*Laws* of 1849, p. 568), and its supplements, is special; and the requirements of the statute must be strictly pursued. *Pa. Supreme Ct.* 1864, *Brinham v. Wallersburg Coal Co.* 47 *Pa. St.* 48; *Hoard v. Wilcox*, 47 *Pa. St.* 51.

† Therefore, where a creditor sought to recover from stockholders on the insolvency of such a corporation,—*Held*, that he could not maintain his action against a part of them sued alone, without joining the corporation with them in his action according to the provisions of the statute, even though he had previously obtained judgment against the corporation. *Hoard v. Wilcox*, 47 *Pa. St.* 51.

‡ A receiver of a manufacturing corporation will not be appointed in an action brought against it by a creditor at large, on the grounds that the company is insolvent, and that its trustees, instead of applying to the court for a dissolution, are intending to suffer judgments to be recovered against the company, and thus by priority of lien to give preferences to creditors. This is not a case within the provisions of 2 *N. Y. Rev. Stat.*, 463, §§ 36, 38, 53. *Galway v. U. S. Steam Sugar Refining Co.* 36 *Barb.* 254.

report; and the trusteeship. Where these concur, the trustee is liable for all debts, if he was such trustee when the default occurred. If he was not a trustee at the time of the default, but became such afterward, then his liability is limited to debts created while he remains trustee, and while the default continues. *N. Y. Ct. of Appeals*, 1863, *Shales & Hall Quarry Co. v. Bliss*, 27 *N. Y.* 297.

11. That in Massachusetts recovery of judgment at law against the company, is an essential prerequisite to a bill in equity to enforce the liability of officers,—see *Merchants' Bank v. Stevenson*, 5 *Allen*, 398.

12. — of stockholders. That it is not an essential prerequisite to a bill against stockholders,—see *Cambridge Water Works v. Somerville & Co. Bleaching Co.* 4 *Allen*, 239.

13. In order to maintain an action to charge a stockholder of a manufacturing company individually for the debts of the company, under a statute (*e. g.* *N. Y. Laws* of 1848, ch. 40, § 10),—enacting that stockholders shall be individually liable for debts of the company, until the whole amount of capital stock of the company shall have been paid in,—the plaintiff must show on trial that the capital stock had not been paid in when the debt was contracted. *N. Y. Supreme Ct.* 1863, *Bruce v. Driggs*, 25 *How. Pr.* 71.

14. The Massachusetts statutes relative to manufacturing companies, explained. *Carry v. Holmes*, 2 *Allen*, 498; *Erickson v. Nesmith*, 4 *Allen*, 233; *Cambridge Water Works v. Somerville & Co. Bleaching Co.* 4 *Allen*, 239.

As to what works a Dissolution of a manufacturing company,—see DISSOLUTION.

As to individual liability of Officers and Stockholders,—see INDIVIDUAL LIABILITY.

MEDICAL SOCIETIES.

1. History of the statutes of New York relative to the incorporation of medical societies. Their power to enact by-laws. *People v. Medical Society of Erie*, 24 *Barb.* 570.

2. Their power to refuse admission. Power of a medical society to refuse to admit an applicant, on the ground of unfitness, unprofessional practice, &c. *Exp. Paine*, 1 *Hill*, 665; *People v. Medical Society of Erie*, 32 *N. Y.* 187.

3. A by-law of an English college of phy-

sicians, that no person should be admitted into the class of candidates before admission into the college, unless he had taken a degree of M. D. at Oxford, Cambridge, or Dublin, except in certain specified cases,—*Held*, reasonable, as “tending to insure a proper education, and competence in learning.” See *Rex v. College of Physicians*, 7 *Durnf. & E.* 282.

4. — to demand initiation fee. A county medical society has authority, under the power to pass by-laws relative to the admission of members, to demand an initiation fee as a condition of admittance. *N. Y. Supreme Ct.* 1830, *People v. Medical Society of N. Y.* 8 *Wend.* 426.

5. — to expel. The provisions of 1 *N. Y. Rev. Stat.* 452,—giving county medical societies the right to try members for ignorance, misconduct, or immorality, and expel them therefor—are not unconstitutional. *N. Y. Supreme Ct.* 1833, *Matter of Smith*, 10 *Wend.* 449.

6. A medical society is not precluded from preferring charges against a physician by the fact of having once before refused to prefer the same charges. The society act as accusers, and may receive additional testimony, or reconsider the case and change their determination upon the original evidence. *Id.*

MEETINGS.

[This title embraces the meetings of the members of a corporation at large, and also meetings of boards of directors or trustees, and of committees. Cases upon the joint action of several officers, not involving the idea of their meeting and acting as a composite body, are under OFFICERS. The chapter treats of the conduct of corporate meetings, so far as rules exist which are common to several classes of corporations. Rules apparently applicable to a single class only are under the title of that class.]

1. Compelling the holding of a meeting.

Where it was provided by statute that no rule of a friendly society should be altered, rescinded, or repealed, unless at a general meeting of the members of such society convened by public notice signed by the secretary, or president, or other principal officer or clerk of such society, in pursuance of a requisition for that purpose by seven or more of the members of the society,—*Held*, that the officers of the society were compellable

by mandamus to sign the requisition. *Q. B.* 1851, *Regina v. Aldham &c. Ins. Society*, 6 *Eng. L. & Eq.* 365; 15 *Jur.* 1035.

2. A mandamus will not lie to the master and wardens of an incorporated mercantile company of the city of London, to call a meeting of the company at the next annual day of election, for the purpose of electing a master and warden according to the charters, on the ground that the present officers were improperly elected by a part only of the company, instead of the whole body. *K. B.* 1833, *Rex v. Attwood*, 4 *Barn & Ad.* 481; 1 *Nov. & M.* 286.

3. Who may call meetings. In the absence of a statute or by-law providing for the calling meetings of a manufacturing corporation, the general agent may call a meeting thereof, without any special authority. *Mass. Supreme Ct.* 1852, *Stebbins v. Merritt*, 10 *Cush.* 27.

4. Where the by-laws provide that meetings shall be called upon "a petition signed by" a specified number of corporators, individuals to the number specified, who are corporators, must unite, in order to satisfy the requirement. A less number, although owning as many or more shares among them, are not sufficient. *Me. Supreme Ct.* 1841, *Evans v. Osgood*, 18 *Me.* 213.

5. A by-law which provides that "a special meeting shall be called" by the president, &c., on application made in writing by a specified number of members is mandatory only, and does not preclude the directors from calling special meetings without such an application. To construe it as a restriction upon the authority of the directors would be unreasonable; such a restriction can be created, if at all, only by the most clear and explicit language. * *Mass. Supreme Ct.* 1864, *Citizens' Mutual Fire Ins. Co. v. Sortwell*, 8 *Allen*, 217.

* An article in the by-laws of a religious corporation, provided as follows: "The president shall convene the board of trustees at least once in every month, and may call extra meetings whenever, in his opinion, or in the opinion of three members of that body, it shall be deemed necessary for the interests or welfare of the congregation." Another article provided, that a majority of the board might admit new members. The president, on application of four members of the board, refused to call a meeting thereof; after which a majority of the board convened without such call, after giving the president notice of the time and place of their intended meeting. *Held*, that the board thus convened, had no power to elect new members of the corporation, and that all their acts were illegal and void. *S. C. Ct. of Appeals*, 1886, *State v. Ancker*, 2 *Rich.* 245.

6. Time. It is immaterial in what manner the stated meetings of directors are fixed, provided they are in fact regularly held on stated days. *N. H. Supreme Ct.* 1858, *Atlantic Fire Insurance Co. v. Sanders*, 36 *N. H.* 252.

7. By the deed of settlement of a joint stock company, it was provided that the directors should, without notice or summons meet on such a day and hour as they should from time to time agree upon. *Held*, that a meeting on a day which had not been previously fixed or agreed to, and which was not held by adjournment, was not duly convened; and that a call made on the proprietors on that day could not therefore be enforced. *K. B.* 1827, *Moore v. Hammond*, 6 *Barn. & C.* 456; 9 *Dowl. & R.* 482.

8. Presumption as to time. Where it appears from the records of a school district that a meeting duly warned was convened on a day appointed, the presumption of law is, that it was held in a suitable time in the day, and in pursuance of the warning; and if there was any unreasonable delay in opening the meeting, the person claiming this fact in avoidance of liabilities imposed upon by the meeting must show it. *Conn. Supreme Ct.* 1839, *South School District v. Blakeslee*, 18 *Conn.* 227.

9. The meeting should be opened in a reasonable time after the hour specified in the notice; and what is reasonable time depends, in some measure, upon the circumstances of each particular case; but a delay of one hour and five minutes is not, of itself, an unreasonable delay, there being no law necessarily requiring the meeting to be opened within that time. *Id.*

10. Place. Where the by-laws of a corporation required the meetings to be held at the countingroom of the corporation, and it appeared from the records that a meeting was held at the dwelling house of the general agent and clerk, without stating that it was at the countingroom of the corporation. *Held*, that the court would presume, in the absence of all proof, that their counting room was, for the time being, at that place. *Vt. Supreme Ct.* 1850, *McDaniels v. Flower Brook Manufacturing Co.* 22 *Vt.* 274.

For the rule that the corporation can only exercise corporate powers within the State, see **POWERS**.

For the rule that directors can act Out

of the State, see BOARD, 26; DIRECTORS, 83, 84.

11. All must have notice. All the members of a corporation or of a branch of a corporate body who discharge special functions for the society, having the right to consult and vote, must, in some manner, be notified to attend the meetings of the body with which they are connected. *So held* in relation to a township committee. *N. J. Supreme Ct.* 1864, *State ex rel. Reeves v. Ferguson*, 81 *N. J. Law* (2 *Vroom*), 107.

12. The vote of a majority of those present at a meeting of the stockholders has no effect to bind the corporation unless the meeting has been regularly warned. If no particular mode of notifying the stockholders to attend is prescribed, either in the charter or in the by-laws, personal notice must be given. *Conn. Supreme Ct.* 1828, *Stow v. Wyse*, 7 *Conn.* 214; *Mass. Supreme Ct.* 1844, *Wiggin v. Freewill Baptist Church in Lowell*, 8 *Metc.* 301. And see *Rex v. Mayor &c. of Shrewsbury*, *Cas. T. Hardw.* 147; 2 *Str.* 1051.

13. If all the members of a superintending school committee are notified of its meetings, a certificate issued to a teacher by the majority of the board is valid; but if the proper notice is omitted the action of the majority will be void, and absence of a member from home will not excuse a want of notice. *Me. Supreme Ct.* 1841, *Jackson v. Hampden*, 20 *Me.* 87.

14. Where certain acts of a corporation are to be performed at a special meeting of the members of that corporation, all the persons entitled to be present thereat must be summoned, if they are within a reasonable summoning distance—*e. g.* if they are not abroad—and the omission to summon any one so entitled, renders the acts done at such meeting in his absence, invalid. *H. of L.* 1849, *Smyth v. Darley*, 2 *H. L. Cas.* 789.

15. An election of a member by the other members of a corporation not corporately assembled, but casually met together, must be assented to by every one. *K. B.* 1724, *Musgrave v. Nevinson*, 2 *Ld. Raym.* 1358. And see *Rex v. Knyaston*, 2 *Selu.* 1143.

16. Where a quorum of the directors of a bank meet, and unite in any determination, the corporation are bound, whether the other directors are, or are not, notified. *N. H. Superior Ct.* 1851, *Edgerly v. Emerson*, 3 *Fost.* 555.

17. Who must have notice. The pledges

of stock in a private corporation is not to such an extent regarded as the owner of the stock, as to be entitled to receive notice of the meetings of the corporation. *Vt. Supreme Ct.* 1850, *McDaniels v. Flower Brook Manufacturing Co.* 22 *Vt.* 274.

18. A meeting of a manufacturing corporation may be legally held, although one of its members is incapable, from mental imbecility, of receiving a notice thereof. The law cannot look into the capacity of the stockholders to transact business, but can only regard the capacity of the aggregate body when duly assembled. Hence when the corporation is legally called together, the law presumes that the individual members are competent to the transaction of business. *Mass. Supreme Ct.* 1852, *Stebbins v. Merritt*, 10 *Cush.* 27.

19. Where particular powers are lodged in a select number, *e. g.* the mayor and aldermen of a municipal corporation, they must be summoned accordingly, and cannot act upon a general summons of the whole body as the common council. See *Rex v. Mayor &c. of Carlisle*, 1 *Str.* 385.

20. How notice is to be proved. Warnings and proceedings of meetings of an incorporation having a clerk, and whose by-laws require the warnings to be in writing, cannot be proved by parol. *Vt. Supreme Ct.* 1859, *Stevens v. Eden Meeting House Society*, 12 *Vt.* 688.

21. When it may be presumed. That when a part only of the directors of a manufacturing corporation attend a directors' meeting and transact business, it is not necessary to the validity of their transactions that it should appear that the absent directors had notice of the meeting; if the contrary do not appear, the legal presumption is that they had notice,—see *Sargent v. Webster*, 18 *Metc.* 497; *S. P. Conn. Supreme Ct.* 1862, *Lane v. Brainerd*, 30 *Conn.* 565, 577.

22. After lapse of many years, and a long exercise of corporate rights, a regular warrant calling the first meeting of a proprietary may well be presumed to have been issued by competent authority. See *Copp v. Lamb*, 12 *Me.* (3 *Fairf.*) 312. *Proprietors of Monumoi Great Beach v. Rogers*, 1 *Mass.* 159; *Pitts v. Temple*, 2 *Mass.* 588.

23. Votes in ancient records of a town are presumed to have been regularly passed, though no record of a warrant or notice is

found. *N. H. Supreme Ct.* 1857, *Willey v. Portsmouth*, 85 *N. H.* 303.

24. The act of incorporation of a manufacturing company prescribed that nothing should be done at any special general meeting, but the business for which it was called; and certain forms were required for calling it. On a special case stated, which set out entries of the proceedings whereby a grant in the nature of a retiring pension to a retiring officer was authorized, it did not appear that those forms had been gone through; and the company, who were sued on the contract, alleged this irregularity in answer. *Held*, that it lay on them to give strict proof of the default; and this not being done, but a possibility appearing that the forms might have been complied with, the court would not presume the contrary. *K. B.* 1832, *Clarke v. Imperial Gas Light Co.* 4 *Barn. & Ad.* 315; 1 *Nov. & M.* 206.

25. All the members of a corporate body are presumed to have notice of the time of its stated meetings, and are bound by the proceedings at such meetings; but there is no presumption that they know what is done, so as to be charged with notice of anything there transacted, contemplating future action at a time other than that of a stated meeting.

It seems that the rule is otherwise in respect to an adjourned meeting, held in continuation of a prior one and for the purpose of completing its unfinished business. *N. Y. Ct. of Appeals*, 1860, *People v. Batchelor*, 22 *N. Y.* 128.

Compare *infra*, 53.

26. How it may be waived. When some of the stockholders of a corporation are assembled upon due notice, and all the others who have a right to notice attend without it, and agree to enter upon the proceedings, it is a legal waiver of the notice, and the act of the assembly cannot be impeached for the omission of it. *Ind. Supreme Ct.* 1856, *Jones v. Milton & Rushville Turnp. Co.* 7 *Ind.* 547.

27. At the first meeting of subscribers to carry on a common project, they appointed an agent, and authorized him to expend money. A subscriber offered to pay his subscription in a specific article, and declared to a third person that he should have paid if he had not been ill treated by the agent. *Held*, that the facts amounted to a waiver of any objection as to want of notice of the

meeting, and a recognition of his original engagement as still subsisting. *Mass. Supreme Ct.* 1827, *Bryant v. Goodman*, 5 *Pick.* 228.

28. How notice is to be given. A statute incorporating a banking corporation appointed commissioners to open books and receive subscriptions for the capital stock, and provided that the first election of directors should be held upon a call made by such commissioners. *Held*, that it was not essential that the call should be the result of any formal order of the commissioners. If the original notice is in the handwriting of the secretary of the commissioners, he being one of them, and the names of the other commissioners are signed by him, and the notice is in no way disavowed by the commissioners, it will be deemed their act. *N. J. Chancery*, 1834, *Hardenburgh v. Farmers & Mechanics' Bank*, 2 *Green. Ch.* 96.

29. A summons by the proper officer, may, by virtue of a by-law, be given so as to warn a meeting, by posting up a written notice. *Stevens v. Eden Meeting House Society*, 12 *Vt.* 688; *Taylor v. Griswold*, 2 *Green (N. J.)* 222. And see *Rex v. Hill*, 4 *Barn. & C.* 442.

30. Necessity of specifying the business intended. Where by a by-law of a corporation a particular day is appointed in each year for the transaction of all business, the warrant calling the annual meeting need not mention the particular business to be done, although another by-law prescribes the contrary. *Ma. Supreme Ct.* 1853, *Sampson v. Bowdoinham Steam Mill Corp.* 36 *Me.* 78. And see *Warner v. Mower*, 11 *Vt.* 885.

31. Where a meeting of a board of directors of a bank in New Haven was called by the cashier, in pursuance of instructions from the president, then in New York, by personal notice to the directors in New Haven, without specifying, in such notice, the object of the meeting, it was *Held*, that this was a legal meeting for ordinary transactions; and that the giving of security for a debt of the bank, by a mortgage of its real estate, was of this description. [1 *Kyd Corp.* 430-448; 5 *Burr.* 2601; 1 *Strange*, 386.] *Conn. Supreme Ct.* 1880, *Savings Bank v. Davis*, 8 *Conn.* 191.

32. Where a corporation remove an officer on a day not appointed for the transaction of business of such a character, each member should be summoned and have notice of the particular business intended to

be proceeded upon, or the action upon it will be void. *K. B.* 1759, *Rex v. Mayor &c. of Doncaster*, 3 *Burr.* 788.

33. Effect of so doing. If the members of a corporation are summoned to appear for one particular purpose, they cannot proceed to any other matter without the unanimous consent of the whole body. But if every member is present and gives his consent, it is sufficient, although they were not assembled for that particular purpose. *K. B.* 1724, *Machell v. Nevinson*, 11 *East*, 86, n. a.

34. A meeting of a mutual fire insurance company, called "for the purpose of making such alterations in the by-laws of said company as may be deemed necessary, and for the transaction of such other business as may come before them," cannot, after voting to increase the number of directors (which is not limited by the by-laws), elect the additional directors; and an assessment or call made at a meeting of the board of directors, at which only the additional directors so chosen are present, is void.* *Mass. Supreme Ct.* 1860, *People's Mut. Ins. Co. v. Westcott*, 14 *Gray*, 440.

35. Where a notice of an election for a school district specifies several purposes, in such a way as that no doubt is left as to its meaning, it will be sufficient, although there may be an omission in it of a copulative conjunction. *III. Supreme Ct.* 1859, *Merritt v. Farris*, 22 *Ill.* 303.

36. Where it is necessary that a warrant calling a meeting of proprietors should state the purposes for which it is convened, a vote to raise a certain sum, under an article in the warrant to raise money for certain purposes, does not exhaust the efficacy of the article, but further sums may be lawfully raised at adjournments of the same meeting, until the objects of the proprietors are effected. *Me. Supreme Ct.* 1831, *Farrar v. Perley*, 7 *Me.* (7 *Greenl.*) 404.

37. "Special-general" meetings. The meaning of a "special meeting" is, that the meeting shall not be convened unless the parties have notice of the purpose of the meet-

ing. A meeting may be both general and special; general for the purpose of doing general business, and special for a particular purpose: then it becomes a special-general meeting. *Each.* 1847, *Cutbill v. Kingdom*, 1 *Each.* 494; 17 *Law J. N. S. Each.* 177.

38. Who must attend. When a meeting, at which a specified thing is to be done, is to consist of the different integral parts of a corporation, and each of these integral parts consists of a definite number of corporators, then the meeting will not be properly constituted unless it be attended by a majority of the members of each integral part respectively. Where an act is to be done by a select body consisting of a definite number of corporators it will not be valid unless a majority of the select body are in existence when the act is done. It is not necessary that they should all concur in the election, or other act done, but they must be present at the meeting. If the act is to be done by an indefinite body it is valid, if passed by a majority of those present at the meeting, however small a fraction they may be of the body at large. *K. B.* 1792, *Rex v. Bellringer*, 4 *Durnf. & E.* 810; 1803, *Rex v. Morris*, 4 *East*, 17.

39. Compelling attendance. By-laws for compelling, by means of pecuniary penalties, the attendance of members of a corporation at corporate meetings, and the acceptance of corporate offices, are reasonable, and may be enforced by action at law. *K. B.* 1826, *Tobacco Pipe Makers' Co. v. Woodroffe*, 7 *Barn. & C.* 883; 8 *Dowl. & R.* 530.

40. Effect of withdrawal. Where the mayor of a borough, who was constituted an integral part of the elective assembly, departed from it after the meeting for an election of mayor, regularly convened, had entered upon the election, but before it was completed,—*Held*, that an election made after his departure was void. *K. B.* 1807, *Rex v. Butler*, 8 *East*, 389.

41. Where, at a parish meeting convened for the election of officers, a number of the legal voters protested against the proceedings on account of the reception of several illegal votes, and withdrew without voting, but the persons declared to be elected received the votes of a majority of the legal voters who remained and voted,—*Held*, that the officers thus chosen were duly elected. *Mass. Supreme Ct.* 1838, *First Parish in Sudbury v. Stearns*, 21 *Pick.* 143.

* A power conferred by the act of incorporation of a joint stock company upon a general meeting of the company to modify, by special resolution, the regulations of the company, —*Held*, to be limited to an alteration of the regulations concerning the management of the company, and not of its constitution. *V. Cham. Ct.* 1865, *Hutton v. Scarborough Club Hotel Co.* 2 *Drew. & S.* 531.

42. When the requisite attendance is presumed. If the records of a corporation show that a meeting was duly called; that a proper notice of the same was seasonably given; and that business was there transacted; the presumption is that a quorum of members was present, unless the contrary clearly appears. *Mass. Supreme Ct.* 1864, *Citizens' Mut. Fire Ins. Co. v. Sortwell*, 8 *Allen*, 217.

43. Where the charter of a corporation required that two-thirds should be assembled for the transaction of business, and it appeared from the minutes that "after due invitation the corporators met,"—*Held*, that this was evidence sufficient to prove a meeting of two-thirds, as the custom had not been to mention the names or number of those present. *Pa. Supreme Ct.* 1817, *Commonwealth v. Woelper*, 3 *Serg. & R.* 29.

As to what constitutes a Quorum, see QUORUM.

44. Who may preside. It is not necessary that the president of a manufacturing corporation should be present at a meeting of the directors in order to authorize them to transact business. See *Sargent v. Webster*, 18 *Metc.* 497.

45. A person not a stockholder in a manufacturing corporation may be legally elected a moderator at one of its meetings. *Mass. Supreme Ct.* 1852, *Stebbins v. Merritt*, 10 *Cush.* 27.

46. Who may vote. A surviving partner has the right, under the California act of May, 1850, regulating the settlement of the estates of deceased persons, the partnership business remaining unsettled, to vote upon corporation stock standing in the name of the firm, or which, although standing in the name of the deceased partner, is shown actually to be firm property. *Cal. Supreme Ct.* 1860, *Allen v. Hill*, 16 *Cal.* 118.

47. Under the banking law of Vermont, enacting that no stockholder residing out of the State shall, either personally or by proxy, vote in the meetings of the corporation, a transfer of bank stock to citizens of the State, by a non-resident holder, for the purpose of enabling them to vote under the statute, without any real change in the ownership,—*Held*, not to make the transferees legal voters. *Vt. Supreme Ct.* 1856, *State ex rel. Danforth v. Hunton*, 28 *Vt.* 594.

48. It seems, upon principle, that the actual and not the record owner of stock should

be permitted to vote at corporation meetings. *Id.*

49. Who are presumed to vote. The presumption is, that all the members present who observe silence when a question is put, concur with the majority of those who actually vote; that is, if the question be put audibly and explicitly. *Pa. Supreme Ct.* 1889, *Commonwealth v. Green*, 4 *Whart.* 581.

50. Casting vote. The section of the New York statute relative to religious corporations, which provides that the rector or one of the church wardens must preside at every meeting of the board of trustees and have the casting vote is to be construed as authorizing the chairman after having voted first with the rest, upon a tie occurring, to give a second vote. *N. Y. Supreme Ct.* 1866, *People v. Rector &c. of Church of Atone-ment*, 48 *Barb.* 608.

For the Effect of the action of a meeting, to bind those present, and those absent, see RESOLUTION.

For the rules that Corporate powers can be exercised only in a corporate meeting; and that they are vested in the majority, see POWERS.

51. Adjournments. That a corporation may transact any business at an adjourned meeting, which they might have transacted at the original meeting,—see *Warner v. Mower*, 11 *Vt.* 385.

52. No fresh notice requisite of an adjourned meeting where the business was entered on at the regular meeting. See *Rex v. Harris*, 1 *Barn. & Ad.* 936.

53. The by-laws of a corporation having nine directors, established certain days for regular meetings, and provided that when at such a meeting less than a quorum, but three or more directors, should be present, they should have power to adjourn to any time prior to the next regular meeting,—*Held*, that a majority of the directors at such adjourned meeting might exercise the ordinary corporate powers, although the absentees had no other notice of the meeting than that with which they were chargeable from the by-law. *N. Y. Ct. of Appeals*, 1860, *Smith v. Law*, 21 *N. Y.* 296. Compare *supra*, 25.

54. The powers of commissioners appointed under acts of incorporation of banking institutions, to open books and receive subscriptions for capital stock, cease upon the regular organization of the company; and

the commissioners cannot, having advertised a meeting of the subscribers for choice of officers, as specified by charter, adjourn or postpone the election at their pleasure. *N. J. Chancery*, 1834, *Hardenburgh v. Farmers & Mechanics' Bank*, 2 *Green*, Ch. 68.

55. If such postponement however be directed by the commissioners, but the subscribers nevertheless refuse to accede to the postponement, and proceed with the election of their officers, the election will not be avoided, unless it appears to the court that a postponement was clearly necessary. *Id.*

56. It is not good ground for postponing an election of officers of a banking corporation, called by the commissioners appointed by the charter to open subscription books, &c., that the treasurer of the commissioners withholds the funds received from subscriptions from the control of the commissioners to whom it rightfully belongs. *Id.*

MEMBERS.

[This title embraces rules relative to membership which are common to all classes of corporations. Those which are peculiar to membership in corporations having a stock capital, are under STOCKHOLDERS, unless they are confined to a particular species of corporations, in which case they are under its corporate title. This title shows who are members, and who are not,—what are the ways by which membership may be acquired and lost,—and how far members are deemed disqualified as judges, witnesses, jurors, &c., when the corporation is a party. The duties of members to attend meetings and to accept office, are under MEETINGS and OFFICERS, respectively. The liability of members in the place of the corporation, is under INDIVIDUAL LIABILITY. The right of a member to sue the corporation is included here; but his right to sue officers of the corporation, being regarded as a species of liability of officers, is under OFFICERS.]

I. WHO ARE.

II. RIGHTS AND POWERS.

1. In general.

2. *Their interest in the corporate property, &c., and its consequences.*

3. *Their rights of action.*

1. **Integral parts.** A corporation cannot be considered as composed of distinct, definite, integral parts, unless the number of the members of each class is definite, and a majority of the members of each is necessary to constitute a corporate meeting or assembly. *Md. Ct. of Appeals*, 1838, *Regents of University of Maryland v. Williams*, 9 *Gill & J.* 365.

2. **How membership is acquired.** No person can be made, or become a member of a parochial incorporation without his consent, evidenced by a written application, neither can any person thrust himself into any such body against its will. The authority to prescribe the mode of admitting members necessarily implies the power of determining whether they shall be admitted or not. This power may be exercised by a direct vote of the parish, or by proper by-laws be delegated to a committee or certain officers of the society, and until the parish have acted upon the application of persons for admission, and agreed to receive the applicants, they do not become members of the corporation, and consequently have no right to vote at elections of officers. *Mass. Supreme Ct.* 1838, *First Parish in Sudbury v. Stearns*, 21 *Pick.* 148.

3. Where the legislature incorporated certain persons, "with their families," into a religious society,—*Held*, that the minor sons, as members of the father's family, became members of the corporation; and continued such, after arriving at full age, until they changed their membership in some mode provided by statute. *Me. Supreme Ct.* 1828, *Bradford v. Cary*, 5 *Me.* (5 *Greenl.*) 339.

4. **Effect of subscription.** A subscription to the articles of association is not an act indispensable to membership of the company. A subscription to a legal and valid instrument by which a party engages to become a member of the company when organized, and to pay a given sum which is to be a part of the capital stock, followed up by an acceptance of a certificate for the stock, will make such subscriber a member of the corporation. The acceptance of the certificate is a waiver of any informality that may have intervened, short of an absolute defect of jurisdiction. *N. Y. Supreme Ct.* 1849, *Hamilton & Deansville Plank Road Co. v. Rice*, 7 *Barb.* 157. Compare *Eastern Plank Road Co. v. Vaughan*, 14 *N. Y.* (4 *Kern.*) 546.

5. That a subscriber is not made a member of a corporation by a mere subscription to the stock; especially when such subscription is conditional,—see *Chase v. Sycamore & Courtland R. R. Co.* 38 *Ill.* 215.

6. — **of changes in corporate organization.** An act of the legislature, by which "the members of" several mutual insurance

companies are made a new corporation, but which by its terms "shall not affect the legal rights of any person," and is to take effect "when accepted by the members of said corporations," does not constitute a member of one of the old companies, who does not expressly assent to it, a member of the new corporation so as to render him liable to the new corporation for premiums, although the act be duly accepted by a majority of the members of each of the old companies. *Mass. Supreme Ct.* 1854, *Hamilton Mutual Ins. Co. v. Hobart*, 2 *Gray*, 548.

7. The promoters of a steamship company, without fully organizing the corporation, applied the money received on subscriptions for stock, in the construction of a vessel; and the majority of them then formed another corporation, in the name of which they registered the vessel, and which corporation subsequently sold the vessel. *Held*, That a subscriber to the original company, who was not included in the new company, was entitled as a stockholder, or at least as a partner, to an accounting for the proceeds of the vessel, from those of his fellow subscribers who had participated in its sale. *N. Y. Supreme Ct.* 1864, *Dyckman v. Valiente*, 43 *Barb.* 181; 28 *How. Pr.* 346.

8. Necessity of certificate. It is not necessary, in order to constitute one a member of a manufacturing corporation, that he should have a certificate of his shares. He may have all the rights, and be liable to all the duties, of a member, without such certificate. *Mass. Supreme Ct.* 1819, *Chester Glass Co. v. Dewey*, 16 *Mass.* 94; *Mass. Supreme Ct.* 1844, *Agricultural Bank v. Burr*, 24 *Mass.* 256; *Same v. Wilson*, *Id.* 273.

9. That in trading and joint stock corporations, no vote to admit owners of shares to membership, is requisite; for any person, who owns stock, either by original subscription, or by transfer, is, in general, entitled to, and cannot be refused, the rights and privileges of a member.—see *Gilbert v. Manchester Iron Co.* 11 *Wend.* 627.

10. By-laws relative to membership. That a by-law made by a vestry of an Episcopal church, enacting that no person should be admitted a member of the church, or be entitled to the privilege of a vote in the election of the vestry, unless he should pay the sum of fifty dollars, a qualification not named in the charter, is void; inasmuch

as it requires a new qualification to entitle persons otherwise qualified to vote, and is therefore an attempt to transcend the powers given,—see *Vestry of St. Luke's Church v. Mathews*, 4 *Des. Ch.* 578.

11. Where a select body is empowered by a by-law to examine and approve candidates for admission, their examination and approval does not confer a right to be admitted; but the company is as free to refuse admission as before examination. See *Rex v. Askew*, 4 *Burr.* 2186.

12. A chartered company made a by-law in the following terms, in the year 1799:—"That no person who has been a bankrupt, or become otherwise insolvent, shall hereafter be admitted a member of the court of assistants of the company, unless it be proved to the satisfaction of the court that such person after his bankruptcy or insolvency has paid and satisfied his creditors the whole of their debts, or shall have established a fair and honorable character for seven years subsequent to such his bankruptcy or insolvency."

Held, 1. That the words "or become otherwise insolvent" meant, notorious or avowed insolvency, evidenced by some overt act, as stopping payment, compounding with creditors, &c.

2. That this being the proper construction, the by-law was valid.

3. That a person whose election and admittance was not a nullity, could not be removed without being heard in his defence. *H. of Lords*, 1863, *Regina v. Saddlers' Co.* 9 *Jur. N. S.* 1081; 9 *Law Times N. S.* 60.

13. A by-law, that any person should be admitted to the freedom of a corporation, upon payment of money, together with the fees, is bad. *K. B.* 1768, *Rex v. Mayor &c. of Northampton*, 4 *Burr.* 2260.

14. Right to admission. When a party having a clear presumptive title applies to be admitted to the exercise of a corporate franchise, the application should not be denied unless the right of immediate expulsion be plain and unquestioned. Thus, where one who had the legal qualifications for membership applied to be admitted to a county medical society,—*Held*, that he could not be excluded on the ground of a previous course of practice which, in a member of the society, would have been a violation of its conventional regulations. *N. Y. Ct. of Appeals*, 1865,

People *ex rel.* Bartlett v. Medical Society of Erie, 83 N. Y. 187.

15. A mandamus to a trading company granted, to admit to membership one entitled to become such. *Dacosta v. Russia Co.* 2 *Str.* 788; *Rex v. Turkey Co.* 2 *Burr.* 999.

16. How membership is terminated. Where the charter declares all persons who should insure with the corporation to be members thereof during the period they should remain so insured, and no longer, a loss does not terminate the membership of the insured, but he remains liable to assessment upon his note during the term of the policy. *N. Y. Ct. of Appeals*, 1860, *Bangs v. Skidmore*, 21 N. Y. 136.

17. — by resignation. Where neither the charter nor by-laws prescribe any particular form in which members may resign their membership and their resignation be accepted, such resignation and acceptance may be implied from the acts of the parties. *S. C. Ct. of Appeals*, 1846, *State v. Ancker*, 2 *Rich. Law*, 245.

18. Where the acts of certain members of a religious Jewish corporation were given in evidence to prove such resignation, they offered to prove, in explanation of such acts and to show that they did not amount to a resignation, but only to a temporary withdrawal, that the majority had made alterations in the established ritual of the congregation, and had changed some important articles of the ancient Jewish faith. *Held*, that the testimony was inadmissible. *Id.*

19. An association formed under the name of the New England Protective Union, for the purpose of supplying its members with cheap goods, was so organized as to constitute the members copartners. Its articles provided for the admission of new members with the consent of the directors, on payment of five dollars, without the assent of the other partners, and that "any member of the division, by surrendering his certificate of membership to the storekeeper, might draw from the store, in goods, a sum not exceeding four dollars, said certificate to be returned when the amount thus drawn should have been paid, if paid within thirty days."

Held, 1. That it was designed by this provision to provide a way for members to withdraw from the association without embarrassing its business, and to be released from all liability as between themselves and the association,

and not a method by which credit with the firm could be obtained; but that the association, if insolvent, might refuse to accept the surrender of the certificate.

2. That it was in the power of members to transfer their interests to fellow members, and thereby terminate their connection with the association, with the assent of the directors. *Vt. Supreme Ct.* 1863, *Stimson v. Lewis*, 86 *Vt.* 91.

20. The by-laws of a loan and fund association provided that in case any member should be unable to continue the payment of his subscription, he might give notice to the secretary of his intention to withdraw from the association; and in case the directors were satisfied as to the grounds of withdrawal, his whole amount of subscription should be returned except the entrance fee. *Held*, that a member who had complied with the by-laws in other respects might withdraw without leave of the directors. *Mass. Supreme Ct.* 1857, *Fuller v. Salem &c. Fund Association*, 10 *Gray*, 94.

21. The articles of a building association provided that if any member, by sickness, removal, or misfortune, should be unable to continue paying his subscription, he might give notice to the secretary of an intention to withdraw from the association; and if the trustees were satisfied as to the grounds of withdrawal, the whole amount which had been paid by him should be returned. *Held*, that it was not, in all cases, an indispensable condition to the right to withdraw, and to a return of the money, that the trustees should declare themselves satisfied as to the grounds of withdrawal. They had no right to withhold that declaration arbitrarily. *N. Y. Superior Ct.* 1858, *Wetterwulgh v. Knickerbocker Building Association*, 2 *Bow.* 381.

22. By expulsion. The charter of an incorporated company stated that the company was formed, among other things, "to inculcate just and equitable principles in trade." *Held*, that they might expel a member for obtaining goods under false pretences, though the offence was not committed within the local jurisdiction of the corporation, nor against a member of the association. Where a member of a corporation performs an act in direct contravention of the purposes for which the charter was obtained, he may be expelled. [24 *Barb.* 571; 2 *Kent's Com.* 297; 13 *Wend.* 478.] *N. Y. Supreme Ct. Sp. T.* 1864, *People*

ex rel. Thacher v. N. Y. Commercial Association, 18 *Abb. Pr.* 271.

See the right and mode of Expelling members, treated under EXPULSION.

23. Restoration to membership. A member of an incorporated benevolent society who is expelled from such society for the non-observance of a by-law which is not authorized by the statute or the constitution of the State, may be restored to membership by mandamus. *N. Y. Supreme Ct. Sp. T.* 1862, *People ex rel. Schmitt v. St. Franciscus Benevolent Society*, 24 *How. Pr.* 216.

24. Mandamus lies to directors of a chamber of commerce, to restrain them from disqualifying a member. *State ex rel. Graham v. Chamber of Commerce, City of Milwaukee*, 20 *Wis.* 63.

II. RIGHTS AND POWERS.

1. In general.

25. Member cannot be compelled to surrender. A corporator is not bound to elect between resigning his corporate franchise and submitting to persons who have illegally seized upon the corporate authority. He may refuse to give up his corporate privileges while the authority is in the possession of usurpers, and yet be exempt from pecuniary contribution for the support of such unlawful authority. *Pa. Supreme Ct.* 1836, *Ebaugh v. Hendel*, 5 *Watts*, 43. And see *Stevens v. Rutland, &c.* 1 *Am. Law. Reg.* 154.

26. Cannot dispute incorporation. The members of a corporation cannot defend actions upon their obligations to it by questioning its legal existence,—see *Cooper v. Beaver*, 41 *Barb.* 151; *Sands v. Hill*, 42 *Id.* 651.

As to who may deny or demand proof of Incorporation, see INCORPORATION.

27. Is bound by by-laws. A person by insuring in a mutual insurance company becomes thereby a member of the corporation, and must be deemed bound, aside from the express provision of the policy relating to the point at issue, to take notice of the by-laws of the company. *Conn. Supreme Ct.* 1860, *Treadway v. Hamilton Mut. Ins. Co.* 29 *Conn.* 68.

28. A by-law of a mutual insurance company, which is passed after a person has become a member of the corporation, cannot, if

unassented to, change or impair his rights under the previous contract. *N. H. Supreme Ct.* 1864, *Great Falls Mutual Fire Ins. Co. v. Harvey*, 45 *N. H.* 292.

29. The assent of a member of a mutual fire insurance company to a by-law adopted after the making of the contract with him, will not be presumed, if the by-law is in conflict with the charter, and if it would change and impair his rights under the contract. *Id.*

See the obligation and effect of By-laws, treated under BY-LAWS.

30. How far he can bind corporation. A corporation is not bound by the declaration or acts of individual members thereof, made or done at a time when they were not acting as agents of such corporation. *Me. Supreme Ct.* 1839, *Ruby v. Abyssinian Society*, 15 *Me.* 306; *Cal. Supreme Ct.* 1856, *Shay v. Tuolumne County Water Co.* 6 *Cal.* 73; *Ga. Supreme Ct.* 1855, *Mitchell v. Rome R. R. Co.* 17 *Ga.* 574.

31. The admissions of a stockholder and director, in an incorporated turnpike company,—*Held*, not evidence against the corporation. *Conn. Supreme Ct.* 1839, *Fairfield Co. Turnpike Co. v. Thorp*, 13 *Conn.* 173.

32. The circumstance that a person is a member of a corporation gives him no authority to release a debt due to the corporation. *Ind. Supreme Ct.* 1836, *Harris v. Muskingum Manuf. Co.* 4 *Blackf.* 267.

33. As the individuals who compose a corporation do not directly own its property, so they act in the transaction of its business primarily as agents. Therefore, where the individuals composing one corporation formed a majority of another and separate corporation,—*Held*, that they could not as agents of the first, apply to themselves as agents of the second, for a lease of the property of the latter, and then, as agents of the same, grant it on such terms as should please themselves as agents of the former, in opposition to the wishes and protests of their co-corporators of the latter corporation, and to their exclusion. *La. Supreme Ct.* 1861, *Knabé v. Ternot*, 16 *La. Ann.* 13.

34. A member of an incorporated company, entering into a contract with the company, must be deemed, in respect of that contract, a stranger. *K. B.* 1833, *Hill v. Manchester Waterworks Co.* 5 *Barn. & Ad.* 866; 2 *Nev. & M.* 573.

35. In equity the members of the governing body of a corporation are looked upon as the agents of the corporation; and if they exercise their functions for the purpose of injuring its interests, and alienating its property, they will be held personally liable for any loss occasioned thereby. *Chancery*, 1840, Attorney General v. Wilson, 1 *Craig & P.* 1.

36. **Liability.** The Pennsylvania statute of 1849, relative to manufacturing corporations, provided that all the stockholders of companies incorporated under it, should be jointly and severally liable, in their individual capacities for all debts of the company, to the amount remaining unpaid on their shares. The supplemental act of April 20, 1853, provided that such individual liability should exist for debts, &c., contracted during the time such stockholders respectively held their stock, or were beneficially interested therein. *Held*, that the stockholders of companies, incorporated in pursuance of the provisions of the act of 1853, or under the act of 1849, and its supplements, were liable for all debts contracted while they were stockholders, although they had paid up the whole of their stock. *Pa. Supreme Ct.* 1861, Patterson v. Wyomissing Manuf. Co. 40 *Pa. St.* 117.

37. Although the corporation is in such case the principal debtor, and the liability of the stockholders is only secondary and collateral, yet the form of the remedy and the character of the right, under the acts of assembly, allow the use of separate actions against the primary and secondary debtors; and in such action against stockholders, brought to enforce such liability, the plaintiff may join the corporation, even though he has previously obtained a judgment against it for a portion of the debt sued for. *Ib.*

For the Liability of members for company debts, see INDIVIDUAL LIABILITY.

38. — as sureties. Where members of a corporation are sureties for it, they may be exonerated by dealings between the creditor and the corporation which would exonerate any other sureties. They cannot be deemed bound by a vote of the corporation authorizing such dealings, unless they assented to the vote. *Mass. Supreme Ct.* 1842, American Bank v. Baker, 4 *Metc.* 164.

39. — upon corporate contracts. Where all the members of a corporation covenanted

on behalf of it under their private seals, binding themselves and their heirs, that the corporation should do certain acts,—*Held*, that they were personally bound. *Mass. Supreme Ct.* 1816, Tileston v. Newell, 18 *Mass.* 406.

See CONTRACTS.

40. — for embezzlement. That a clerk of a joint stock company, may be convicted of embezzling the money of the company notwithstanding he is a shareholder or partner in such company,—see Regina v. Atkinson, 1 *Carr. & M.* 525.

41. **Controversies between members.** When the by-laws provide a tribunal or mode of settling controversies between members, the courts will not review a decision made, except to see that it was regularly and fairly had. See Anacosta Tribe v. Murback, 18 *Md.* 91; White v. Brownell, 4 *Abb. Pr.* 162.

42. Upon the effect of such by-laws of building societies in England,—see Cutbill v. Kingdom, 1 *Exch.* 494; 17 *Law J. N. S.* 177; *Exp. Payne*, 5 *Dowl. & L.* 679; 13 *Jur.* 634; 18 *Law J. N. S. Q. B.* 197; Morrison v. Glover, 4 *Exch.* 430; 19 *Law J. N. S. Exch.* 20; Morrison v. Glover, 15 *Q. B.* 108; Knox v. Shepherd, 2 *Law Times, N. S.* 351.

43. Where the charter of an incorporated beneficial society, provided that sick members should be entitled to a certain allowance, whilst so much remained in the funds. *Held*, that an action would not lie by a member to recover the allowance, as it must be presumed the proper authorities had determined the corporation was not in funds. The member is concluded by the forum of his own selection. *Pa. Supreme Ct.* 1846, Toram v. Howard Beneficial Association, 4 *Pa. St.* 519.

44. The rules of a marine insurance society provided that the sum to be paid to any member for any loss should in the first place be ascertained by the committee, and if the suffering member was dissatisfied, then the matter should be referred to arbitrators; and they further provided that no member who refused to accept the amount assessed by the committee, should be entitled to maintain a suit on his policy, until arbitrators had made an award, and then only for such sum as they had awarded; and such award was declared to be a condition precedent to a suit,—*Held*, that the latter proviso was legal and binding on the members. *H. of Lords*, 1856, Scott v. Avery, 36 *Eng. L. & Eq.* 1.

2. *Their interest in the corporate property, &c., and its consequences.*

45. **Member's interest.** That whether individual corporators have any personal interest in the property of the corporation, depends entirely upon the nature of the corporation,—see *Bennett v. American Art Union*, 5 *Sandf.* 614; 10 *N. Y. Leg. Obs.* 132.

46. Where a community was formed, making a common stock of property, and renouncing individual ownership, and became incorporated;—*Held*, that the individual members of the community, or the heirs upon their death, were not entitled to a partition of the property. *U. S. Supreme Ct.* 1852, *Goesele v. Bimeler*, 14 *How.* 589.

47. **How far it disqualifies.** In New York, a member of a corporation is not deemed a party to a suit brought against such corporation, in any such sense as to excuse him from testifying on behalf of the complainant. He is, in general, competent *against* the corporation; and if not personally interested is competent *for* it. *N. Y. Chancery*, 1829, *Matter of Kip*, 1 *Paige*, 601. And see 2 *N. Y. Rev. Stat.* 407, § 81.

48. Members of a turnpike corporation are not, in general, incompetent witnesses to prove the signature of a party to an agreement to take and pay for shares in the company. *Ky. Ct. of Appeals*, 1838, *Danville &c. Turnp. Road Co. v. Burdett*, 7 *Dana*, 99.

49. A member of a private corporation is not a competent general witness for the plaintiff, in a suit by the company against another corporator. *Del. Superior Ct.* 1848, *Jefferson v. Stewart*, 4 *Harring*, 82.

50. In California, corporators are personally liable, and are responsible for the costs, at least of suits wherein the corporation is a party, and therefore are not competent witnesses. *Cal. Supreme Ct.* 1859, *Mokelumne &c. Mining Co. v. Woodbury*, 14 *Cal.* 265.

51. A member of a corporation, who is its surety for the payment of a debt not in controversy in the suit on trial, is not on that account an incompetent witness for the corporation. *Me. Supreme Ct.* 1830, *Miller v. Mariners' Church*, 7 *Me.* (7 *Greenl.*) 51.

52. In an application for an alternative mandamus to restore a person to his membership in a beneficial society—members of the society are incompetent as a witness for the defendants: 1. Because the fund, to which the members would have to

look for aid, in case of sickness, would be diminished by the relator's recovery. 2. Because, *it seems*, the members may be compelled in equity to raise a fund for the payment of the relator's damages. *Pa. Supreme Ct.* 1855, *Marion Beneficial Society v. Commonwealth*, 31 *Pa. St.* 82.

53. The provisions of a statute (*e. g.* *Mass. Rev. Stat. ch. 94, § 54*) enacting that where any county, city, town, district, or precinct, or any parish, or any incorporated or legally organized religious society, or any school district, or any incorporated mutual fire insurance company, shall be in its corporate capacity, a party to a suit, any member of such corporation may be admitted, on the trial, as a witness,—*Held*, to apply to the members of corporations of the same nature created by the authority of other States. *Mass. Supreme Ct.* 1839, *First Baptist Church in Bristol v. Slade*, 23 *Pick.* 160.

54. But, *it seems*, the court will, before applying this rule to any particular foreign corporation, look into the character of the corporation, to see that it is of the class of corporations contemplated by the statute, not in name merely, but in substance. *Id.*

55. The members of a charitable corporation, having themselves no pecuniary or personal interest in the corporate property and assets, but acting merely as trustees for a benevolent object, are competent witnesses for the corporation.* *Ohio Supreme Ct.* 1831, *Methodist Episcopal Church of Cincinnati v. Wood*, 5 *Ohio*, 283; *Ark. Supreme Ct.* 1854, *Hershy v. Clarksville Institute*, 15 *Ark.* 128. And see *Miller v. Mariner's Church*, 7 *Me.* (7 *Greenl.*) 51; *Burdine v. Grand Lodge of Alabama*, 37 *Ala. N. S.* 478.

56. Where a corporation created for pious and charitable uses, were made the residuary legatees in a will,—*Held*, that the members were competent as witnesses on the question of the sanity of the testator, which was at issue between the executors and the heirs at law. *Mass. Supreme Ct.* 1811, *Nason v. Thatcher*, 7 *Mass.* 398.

57. So the pastor and members of a church are not incompetent to prove the

* In Vermont, members of a society organized with corporate powers, under the statute for the support of the gospel, are not competent witnesses, at common law, for the corporation; nor are they competent under the act of 1816, making corporators witnesses in their own behalf in certain cases. *Vt. Supreme Ct.* 1849, *Stone v. Berkshire Cong. Soc.* 14 *Vt.* 86.

execution of a will containing a devise to the church. *Pa. Supreme Ct.* 1851, *Davies v. Morris*, 17 *Pa. St.* 205.

58. In suit between parties who are litigating the right to the exclusive use of a church, one of the members of the church who is himself no party to the suit, is a competent witness. *Ky. Ct. of Appeals*, 1847, *Hadden v. Chorn*, 8 *B. Monr.* 70.

59. The members of the society of Shakers in an action of trespass *quare clausum*, by the deacons of the society for an injury to the common property, are competent witnesses, on releasing to the plaintiffs their interest in the action, and receiving releases from the plaintiffs of all obligation to contribute to the costs of the suit. *Me. Supreme Ct.* 1825, *Anderson v. Brock*, 8 *Greenl.* 248.

For any disqualification of an Officer or Stockholder in a corporation to testify, serve as arbitrator, juror, &c., in litigation affecting the company, see OFFICERS; STOCKHOLDERS.

3. Their rights of action.

60. Member's right to sue instead of company. Where persons owning lands as tenants in common, were incorporated for the purpose of selling the lands in common, and making improvements thereon, and the charter was accepted:—*Held*, that the title to the property rested in the corporate body; and that one of the tenants could not maintain a suit to enjoin a trespass on the same, the corporation having power alone to sue; nor to enjoin a breach of covenant on the part of a purchaser of the corporation. *Ga. Supreme Ct.* 1852, *Colquitt v. Howard*, 11 *Ga.* 556.

61. Where members of a corporation bring an action on behalf of the corporation, the complaint must allege that the officers whose duty it is to sue have been requested to institute proceedings for that purpose, and have refused to do so. *N. Y. Superior Ct. Sp. T.* 1856, *Vanderbilt v. Garrison*, 8 *Abb. Pr.* 361; *N. Y. Supreme Ct. Sp. T.* 1858, *House v. Cooper*, 16 *How. Pr.* 292.

62. Where a church is composed of several congregations, any one or more of such congregations, if incorporated, may maintain a bill in equity in behalf of itself and other congregations belonging to that church and entitled to the use of its funds, to en-

force the execution of a trust in favor of the church. *N. J. Chancery*, 1837, *Associate Reformed Church in Newburgh v. Trustees of Theological Seminary at Princeton*, 8 *Green, Ch.* 77.

63. — to sue associates. Plaintiff alleged that he and the defendants were members of a joint stock company; that defendants excluded him from sharing in the business or benefit thereof; that they received much money from the same, and refused to account with plaintiff, or to pay him anything, &c. *Held*, that plaintiff's complaint, if its averments were proved, entitled him to a decree affirming his interest, and directing an account. *Cal. Supreme Ct.* 1860, *Smith v. Fagan*, 17 *Cal.* 178.

64. The business of a joint stock trading company was to be managed by a committee, but no time fixed for the duration of the partnership. The directors being about to send a vessel on a voyage which some of the members of the company disapproved of, the latter filed a bill to restrain the committee from proceeding, and for delivering up all books, &c. *Held*, that as the partnership was dissolved at any moment, the court would not interfere. It only does so when the act complained of tends to the destruction of the partnership. *Chancery*, 1839, *Miles v. Thomas*, 9 *Sim.* 606.

65. — to sue the corporation. The general rule is that a member of a corporation is not disabled by his membership from maintaining an action against the corporate body, upon any cause of action he may have against it. *Mass. Supreme Ct.* 1807, *Gray v. Portland Bank*, 3 *Mass.* 364; *S. O. Const. Ct.* 1797, *Waring v. Catawba Co.* 2 *Bay*, 109; *Cal. Supreme Ct.* 1855, *Barnstead v. Empire Mining Co.* 5 *Cal.* 299; *Ark. Supreme Ct.* 1857, *Exp. Booker*, 18 *Ark.* 338. Compare *Schrick v. St. Louis &c. Co.* 34 *Mo.* 423; *Knabé v. Ternot*, 16 *La. Ann.* 13; *Culbertson v. Hubush Nav. Co.* 4 *McLean*, 544.

66. A court of equity cannot, at the instance of one, or of a minority of corporators, interpose to prevent an appropriation of the corporate fund to the purposes for which it was raised, against the decision of a majority of the managers appointed under the charter. *Ky. Ct. of Appeals*, 1847, *Fountain Ferry Turnp. Road Co. v. Jewell*, 8 *B. Monr.* 140.

67. Land was conveyed to two persons in

trust for an unorganized religious society, and upon its organization the legal and equitable title to the estate was vested in the society, upon condition that they should hold, occupy, and improve the same for religious worship, and support a minister there. *Held*, that the minister, and a minority of the society, not being pewholders, nor having paid any purchase money, could not maintain a bill in equity to restrain the society from reconveying the estate to the trustees, discharged of any trust; nor to compel them to permit the minister to preach in the house. *Mass. Supreme Ct.* 1858, *Clark v. Evangelical Society in Quincy*, 12 *Gray*, 17.

68. Although a policy holder in an insurance company has, by virtue of his contract, no priority over other creditors of the company, and cannot interfere with the directors in their management of the business under the provision of the deed of settlement, he is entitled to file a bill to restrain acts by the directors in direct violation of their powers, such as a transfer of the business and funds of the company to another company, without first setting apart a fund to provide for the claims of the policy holders. *V. Chan. Ct.* 1864, *Adelbert v. Leaf*, 1 *Hem. & M.* 681; 10 *Law Times*, *N. S.* 185; 12 *Week. Rep.* 462.

69. *Exception.* Where in an action by a member of a jointstock association to enforce a dissolution, it appeared that the nominal plaintiff was not the real party in the suit, but that the suit was prosecuted wholly at the instigation and in the interest of rival companies,—*Held*, that this was fatal to the suit. An illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival and competing company cannot be maintained for the purpose of dissolving or restraining an association or company of which the nominal plaintiff may be a member. *N. Y. Supreme Ct. Sp. T.* 1867, *Waterbury v. Merchants' Union Express Co.* 3 *Abb. Pr. N. S.* 163; *S. P. V. Chan. Ct.* 1863, *Filder v. London &c. Railway Co.* 1 *Hem. & M.* 489.

70. An information of *quo warranto* refused, to a corporator who appeared to be the mere tool of some other person, on whose application a writ would have been refused. *Rex v. Stacey*, 1 *Durnf. & E.* 1; *Rex v. Cudlipp*, 6 *Durnf. & E.* 503; *Rex v. Trevenen*, 2 *Barn. & Ald.* 479.

For applications of these principles to actions by shareholders in stock companies, see **STOCKHOLDERS.**

For the duty of a member to serve as an **Officer**, and for his right to compensation for any services rendered to the company, see **OFFICERS.**

MINING COMPANIES.

1. What a certificate of incorporation of a mining company must set forth,—see *Harris v. McGregor*, 29 *Cal.* 124.

2. *Power to contract.* A purchase by a mining company of certain property necessary for their business of smelting; and an agreement by them to assume a contract which their vendors had made relative to carrying ore to market,—*Held*, within the scope of their business. *Moss v. Averell*, 10 *N. Y. (6 Seld.)* 449.

3. — *to increase the capital.* When and how the complement of shares allowed by the charter of incorporated mining company may be increased, *what manner and when.* *Smith v. North American Mining Co.* 1 *Nev.* 428.

4. *Power of a superintendent of a mining company to bind the corporation*,—stated *Gillig v. Lake Bigler Road Co.* 2 *Nev.* 214.

5. A manager of a mine is authorized to incur debts for wages and goods necessary for carrying on the mine. *Chancery*, 1853, *Re German Mining Co.* 19 *Eng. L. & Eq.* 591; 22 *Law J. N. S. Ch.* 926; 17 *Jur.* 745.

6. By the deed of association of a mining company it was provided, that the affairs of the company should be managed by a committee of seven shareholders, called managing directors, and they were empowered, at their meetings, to vote by proxy; and B. was appointed the resident director, or manager, to superintend the mine and the local concerns thereof, hire workmen, provide machinery, &c., but subject to the instructions he might from time to time receive from the managing directors, to whom he was to transmit monthly accounts of the ore raised, wages paid, &c., and a full statement of all debts and liabilities due from the company; with a proviso that he should not expend or engage the credit of the company for any sum not exceeding 50*l.* in any one month, without the express authority, in writing, of three of the

managing directors:—*Held*, that this deed did not authorize B. to draw or accept bills of exchange in the name of the company, even for the necessary purposes of the mine, without the express authority of the managing directors. *Exch.* 1847, *Brown v. Byers*, 16 *Law J. N. S.* 112; 16 *Mees. & W.* 252.

7. The members of a mining company have authority, by law (in the absence of any proof of a more limited authority), to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or usual in the management of mines. *Exch.* 1840, *Tredwen v. Bourne*, 6 *Mees. & W.* 461; 4 *Jur.* 747.

8. Member's interest. An original member of an incorporated mining company failed to pay an assessment on his stock, and the same was sold at public auction. He then sued the company for his undivided proportion of the mining claim, as it existed prior to the incorporation of the company. *Held*, that the action could not be maintained; it being for a specific interest in the corporate property. *Cal. Supreme Ct.* 1861, *Smith v. Maine Boys' Tunnel Co.* 18 *Cal.* 111.

9. It seems that an original corporator in a mining company, whose property is a mining claim, to be held only by occupation and possession, cannot question the title of the corporation to property held by it at and since its formation. *Id.*

See also, MANUFACTURING COMPANIES.

MISDEMEANOR.

INDICTMENT.

MISNOMER.

[Under this head are stated cases upon the effect of errors in giving the names of corporations; whether occurring in contracts, statutes, wills, legal proceedings, or otherwise. The legal sufficiency of abbreviations, is also included. The principles which govern the selection and correct use of the corporate name, are under NAME.]

1. The general rule in respect to errors in naming a corporation in written instruments, is that the name must be in substance the true name; but need not be identical in every word and syllable. See *Case of Mayor &c. of Lynne*, 10 *Co.* 1226; *Alock v. Alray*, 11 *Co.*

186; *Rex v. Haughley*, 4 *Barn. & Ad.* 655; *Croydon Hospital v. Farley*, 6 *Taunt.* 467.

2. Mere matter of addition does not amount to a misnomer.* *Meltor v. Spate-man*, 1 *Saund.* 340, *a.*

3. Transposition of the words composing the name is not always important, if it is evident what corporation is intended. *Ill. Supreme Ct.* 1862, *Chadsey v. McCreery*, 27 *Ill.* 253.

4. Misnomer in agreements. A departure from the strict style of a corporation will not avoid its contract, if it substantially appears that the particular corporation was intended. And a latent ambiguity may, under proper averments, be explained by parol evidence to show the intention. *Pa. Supreme Ct.* 1820, *Berks & Dauphin Turnp. Co. v. Myers*, 6 *Serg. & R.* 12; *Ohio Supreme Ct.* 1840, *Milford & Chillicothe Turnp. Co. v. Brush*, 10 *Ohio*, 111; *S. P. Mass. Supreme Ct.* 1813, *Medway Cotton Manufactory v. Adams*, 10 *Mass.* 360.

5. A contract is not avoided by the misnaming therein of the corporation with which it is made. *N. J. Chancery*, 1861, *Hoboken Building Association v. Martin*, 2 *Beas.* 427.

6. — In bonds.† A mistake in the name of the corporation, in the official bond of a cashier of a bank, by the omission of the words "and company," does not render the bond invalid. *Ky. Ct. of Appeals*, 1824, *Pendleton v. Bank of Kentucky*, 1 *T. B. Monr.* 171.

7. — In deeds.‡ A variation from the precise name of a corporation, when the true name can be collected from the instrument, or is shown by proper averments, will not invalidate a conveyance by or to a corpora-

* The addition to a lease made by the president and scholars of Corpus Christi College in Oxford by the name of president and scholars of Corpus Christi College in Oxon of the words *in comitatu Oxon*,—*Held*, not to be a material variance. See *Dumper v. Syme*, *Cro. Elia.* 815.

† The old name of a corporation was, "mayor, masters, and burgesses;" by a new charter, their name was changed, and by that name, a mayor *de facto*, &c., made a bond, which was put in suit against them by their old name with an *alias dictus*; the bond was held good, but that they were not well sued. *Knight v. Corp. of Wells*, 1 *Luth.* 508, 519.

‡ Where a deed is made to a corporation, by a name varying from the true name, they may sue in their true name, and aver in the declaration, that the defendant made the deed to them, by the name mentioned in the deed. And an allegation that defendants acknowledged themselves to be bound unto the plaintiffs, by the description of, &c., is equivalent to such an averment. [10 *Co.* 125, b; 1 *Kyd on Corp.* 287.] *N. Y. Supreme Ct.* 1816, *N. Y. African Society v. Varick*, 18 *Johns.* 88.

tion. *Ky. Ct. of Appeals*, 1854, *Kentucky Seminary v. Wallace*, 15 B. Monr. 85; *Ala. Supreme Ct.* 1851, *Douglass v. Branch Bank at Mobile*, 19 Ala. N. S. 659. And see *Bank of Tennessee v. Burke*, 1 *Coldw.* 623; also *DEEDS*, 10.

8. Where a deed was executed with the corporate seal, by the chairman of the board of trustees of the Kentucky Seminary, its corporate name, in the name of the Kentucky Academy, and it appeared that there was no such corporation in existence in the State as the Kentucky Academy,—*Held*, that the instrument might be admitted as evidence to show the grantee's title, and that the corporation had power to sell and convey the land. The words seminary and academy are generally regarded as synonymous. *Ky. Ct. of Appeals*, 1854, *Kentucky Seminary v. Wallace*, 15 B. Monr. 85.

9. In legal proceedings.* Debts due to a corporation must be sued for in the corporate name, and cannot be recovered in an action brought in the name of A. B., president, &c., and directors of such company. *N. C. Supreme Ct.* 1837, *Brittain v. Newland*, 2 Dev. & B. 863.

10. Where a corporation declares by a name, with which the description in the charter does not exactly correspond, but it appears that there is a body politic substan-

tially answering the appellation, the declaration will be held good.* *K. B.* 1818, *Mayor &c. of Malden v. Miller*, 1 *Barn. & Ald.* 699; *Kentucky Seminary v. Wallace*, 15 B. Monr. 85.

11. In an action against an incorporated bank, the writ described the defendants by their corporate name of the president and directors of the Marine Bank of Baltimore. The declaration was against "the said Marine Bank;" and the plea was, that the Marine Bank did not assume, and the verdict and judgment used the corporate name. *Held*, that the declaration was sufficient. *Md. Ct. of Appeals*, 1818, *Marine Bank of Baltimore v. Biays*, 4 *Harr. & J.* 388.

12. It seems that a judgment against a corporation by a wrong name is void. *Britton v. Gradon*, 1 *Ld. Raym.* 117.

13. That a writ of mandamus addressed to a corporation otherwise than by its true name is void,—see *Rex v. Mayor of Ripon*, *Salk.* 483; *Rex v. Morris*, *Ld. Raym.* 1238.

14. A corporation must prosecute criminally in their corporate name; and the addition of such name as a description of the persons of which the corporation is composed, is not sufficient in an indictment. See *Rex v. Patrick*, 1 *Leach Cr. Cas.* 258.

15. Accuracy is required in stating the name of a corporation in all criminal proceedings in which they are concerned. Thus a coroner's inquisition describing an engine causing the death of a party, as the goods and chattels of the "Proprietors of the Hull or Selby Railway," was quashed; that not being the name of the corporation. *Exch.* 1841, *Regina v. West*, 2 *Eng. Railw. Cas.* 618.

16. — In notice. A notice served on the clerk of the B. Railway Co. at their office, was addressed "to the B. & C. Railway Co." There was no such company as the last named, but the B. railway ran from B. to C; and the company had not been misled. *Held*, a good notice. *Exch.* 1854, *Eastham v. Blackburn Railway Co.* 25 *Eng. L. & Eq.* 498; 28 *Law J. N. S. Exch.* 199.

17. A misnomer of the corporation, in a public notice to subscribers for stock to pay

Where a deed is made to a corporation by its true name, and a suit is commenced against the corporation with a different name, on a condition in said deed, an assignment of the deed, or a change of the name, must be averred, and must be proved where the general issue has been interposed. *Ill. Supreme Ct.* 1853, *Joliet &c. R. R. Co. v. Jones*, 20 *Ill.* 221.

If the king grants land unto a corporation by another name than that which they were named before,—the lands pass, and the letters patent operate as a new charter. *Dean &c. of Christ Church v. Parot*, 4 *Leon.* 190.

* In general, misnomer in a suit by corporation can only be taken advantage of by plea in abatement. *Ill. Supreme Ct.* 1863, *Hoereth v. Franklin Mill Co.* 30 *Ill.* 181. And see *Mellor v. Spatzman*, 1 *Sawnd.* 340, a; *Mayor &c. of Stafford v. Bolton*, 1 *Boe. & P.* 40.

If a corporation be sued by a name varying only in words and syllables, and not in substance, from the true name, the misnomer must be pleaded in abatement; otherwise it will not be regarded. But if the name be mistaken in substance, the suit cannot be regarded as against the corporation. *N. H. Superior Ct.* 1831, *Burnham v. Strafford County Savings Bank*, 5 *N. H.* 446; *S. P. Briggs v. Nantucket Bank*, 5 *Mass.* 94.

Amendment of a writ, in respect to the name of a corporation plaintiff, allowed, in a special case. *Sherman v. Proprietors of Connecticut River Bridge*, 11 *Mass.* 383. And see *Lea v. American & C. Canal Co.* 3 *Add. Pr. N. S.* 1.

A judgment against a corporation, omitting part of the corporate name; may be amended by the docket roll,—see *Healings v. Mayor &c. of London*, *Cro. Car.* 374.

* The plaintiffs sued by the name of "The National Bank of St. Charles," the name given by the charter of the king of Spain was "The Bank of St. Charles." *Held*, no variance, the bank being in fact a national one. *National Bank of St. Charles v. De Bernal*, 1 *Car. & P.* 569; *Eyes & M.* 190.

installments, is immaterial in an action by the corporation to recover the installment. *Pa. Supreme Ct.* 1841, *Gray v. Monongahela Nav. Co.* 2 *Watts & S.* 156.

18. — in promissory note. A note purporting to be the promise of "The President and Directors of the Woodstock Glass Co." and signed "W. H., President," is binding on the company, although their real name was "The Woodstock Glass Company." *N. Y. Supreme Ct.* 1823, *Mott v. Hicks*, 1 *Cow.* 513; *S. P.* 1837, *Brockway v. Allen*, 17 *Wend.* 40; *Ind. Supreme Ct.* 1839, *Pitman v. Kintner*, 5 *Blackf.* 250.

19. A joint stock copartnership, whose proper title by the deed of settlement was "The Union Bank of Calcutta,"—*Held*, sufficiently described in a promissory note under the name of "The Proprietors of the Union Bank of Calcutta." *Exch.* 1855, *Forbes v. Marshall*, 32 *Eng. L. & Eq.* 589; 11 *Exch.* 166.

20. — in statute. That although a corporation be misnamed in an act of Parliament, yet if there is enough from which to tell what corporation is meant by the legislature, the statute is not thereby rendered inoperative,—see *Chancellor of Oxford's Case*, 10 *Co.* 44, 57, *b.*

21. — in tax list. The corporate name of a company was the "Souhegan Nail, Cotton & Woollen Factory." A tax assessed against the company was entered in the tax list, as against the "Souhegan Nail, Cotton & Woollen Corporation." It appeared that there was no other corporation of that name in the town.—*Held*, that the corporation was substantially described by its corporate name, and that the tax was legally assessed. *N. H. Superior Ct.* 1834, *Souhegan Nail & Co. Factory v. McConihe*, 7 *N. H.* 309.

22. — in will. A mistake in the name or description of a devisee will not vitiate the devise, where the intention of the testator is clearly ascertained, and the corporation really intended by him is identified. *Mass. Supreme Ct.* 1825, *First Parish in Sutton v. Cole*, 8 *Pick.* 232; *Vt. Supreme Ct.* 1851, *Button v. American Tract Society*, 23 *Vt.* 336; *Md. Ct. of Appeals*, 1852, *Vansant v. Roberts*, 3 *Md.* 119. And see *Chapin v. School District & Co.* 35 *N. H.* 445.

23. A devise to a municipal or other corporation of a local character, though it be misnamed in the devise, is good, if the name

in the devise be that by which the corporation is popularly known, and it is distinguished sufficiently from other bodies. See *Chancellor of Oxford's Case*, *Co.* 44, 57 *b.*; *Foster v. Walter*, *Cro. Eliz.* 106; *C. P.* 1817, *Attorney General v. Mayor & Co. of Rye*, 7 *Taunt.* 546; 1 *Moore*, 267.

24. A claim of a religious society to a legacy will be sustained, if all the circumstances indicate that this and no other society was intended, although the name of the association is not stated with precision in the will. *Ms. Supreme Ct.* 1858, *Preachers' Aid Society v. Rich*, 45 *Ms.* 552.

25. A legacy may be given to a corporation either by its corporate name or by description; if in the latter case the corporation is so defined as to be distinguished from every other. [1 *Jarm. on Wills*, 380; *Ang. & A. on Corp.* 60; *Hob.* 29, *a.*; 11 *Co.* 20, *b.*] *N. Y. Ct. of Appeals*, 1854, *N. Y. Institution for the Blind v. How*, 10 *N. Y.* (6 *Seld.*) 84.

26. Under a bequest to "the trustees of the institution for the instruction and maintenance of the indigent blind in the city of New York:"

Held, 1. That plaintiffs, "The New York Institution for the Blind," could not take the bequest as made to them by name.

2. But that, as it appeared that there was no other institution for the blind in that city, and that, although the plaintiffs were chartered for the purpose of *instructing* blind children, without regard to their indigence and without provision for their maintenance, the State had for several years placed certain indigent blind persons between eight and twenty-five years of age, in their institution, to be maintained and instructed at the expense of the State,—*Held*, that the plaintiffs were sufficiently *described* to entitle them to the legacy, and this though their officers were entitled managers, and not trustees. *Id.*

27. Where a testator gave a legacy to the "Boys' Asylum and Farm School," and it appeared that there was no institution or association of any similar name, except a body incorporated by the name of the "Boston Asylum and Farm School for Indigent Boys,"—*Held*, that the latter corporation was entitled to the legacy. *Mass. Supreme Ct.* 1844, *Minot v. Boston Asylum & Co. for Indigent Boys*, 7 *Metc.* 416.

See also, DEVISE, 14, 26.

MONEYED CORPORATIONS.

[The statutes of New York contain a somewhat systematic code of provisions regulating the management of "moneyed corporations." We give under this title the adjudications under these statutes which seem likely to be of general application where similar statutes exist, and which have not found a more appropriate plan under other titles; and we also present the provisions of statutes adjudicated upon, in juxtaposition with the cases. Many other provisions of the New York statutes, equally important within that State, but which are not necessary to the understanding of New York decisions elsewhere serviceable, exist; but should be examined in the statute books themselves.]

1. The term "moneyed corporations,"—as used in 1 N. Y. Rev. Stat. pt. 1, ch. 18, tit. 2,—declared to mean every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances. 1 N. Y. Rev. Stat. 598, § 51.

2. A mutual insurance company is within the above mentioned definition.* N. Y. Sup. Ct. S. T. 1853, Hill v. Reed, 16 Barb. 280.

3. Prohibitions. The "directors" of moneyed corporations forbidden:

1. To make dividends except from surplus profits.

2. To "withdraw," &c., "any part of the capital stock."

3. To discount or receive any evidence of debt "in payment of any installment actually called in and required to be paid, or with the intent of providing the means of making such payment."

4. To receive or discount any evidence of debt; "with the intent of enabling any stockholder to withdraw any part of the money paid in by him, on his stock."

5. To apply any funds of the corporation except surplus profits to the purchase of shares of its own stock.

6. To receive any such shares in payment, &c., of any debt due to the corporation, except, &c.

7. To receive from any other corporation in exchange for shares or evidences of debt of their own corporation, those issued by such other corporation.

8. 9. To make certain loans or discounts. 1 N. Y. Rev. Stat. 589, § 1.

4. The restrictions imposed by the above

* So a mutual insurance company, required by its charter to invest its premiums, up to a certain amount, and forbidden to make dividends therefrom, is a "moneyed corporation," and the sum so invested, is "capital" within the provisions of a statute, declaring "all moneyed or stock corporations deriving an income or profit from their capital, or otherwise, liable to taxation on their capital." N. Y. Ct. of Appeals, 1851, Mutual Ins. Co. v. Supervisors of Erie, 4 N. Y. (4 Comst.) 442; S. P. 1853, Sun Mutual Ins. Co. v. Mayor &c. of N. Y. 8 N. Y. (4 Seld.) 241; N. Y. Supreme Ct. 1850, Sun Mutual Insurance Co. v. Mayor &c. of N. Y. 8 Barb. 450.

The same principle applies to the case of a life insurance company, notwithstanding that by its charter the representatives of each person insured are entitled to receive from the accumulated fund the amount for which his life was insured, and a proportionate share of the profits accumulated during the policy. N. Y. Ct. of Appeals, 1857, People v. Supervisors of N. Y. 16 N. Y. 424.

are binding, not alone upon the *directors* of the company as individuals, but upon the *corporation itself*. The object of the legislature was to prevent the corporation from doing any of the acts prohibited in this section of the statute. And the term "directors" is used for the corporation itself, or as the board or body exercising the corporate franchises, by whom or under whose direction or authority alone these violations of the statutes could ever occur. N. Y. Chancery, 1837, Bank Commissioners v. Bank of Buffalo, 6 Paige, 497.

5. Accepting a surrender of stock, in payment of securities held by the corporation as a part of their capital, is a fraud upon stockholders and creditors, and a withdrawal of capital within subdivision 2 of the above section. N. Y. Chancery, 1848, Johnson v. Bush, 3 Barb. Ch. 207. And see Nathan v. Whitlock, 9 Paige, 153.

6. Subdivision 3 of the above section refers to an original subscriber for stock, and to the payment of the sum so subscribed. The object of this provision is, to require an actual cash payment of the whole of each subscription. Subdivision 4 is designed to prevent the withdrawal of any part of it by a discount of any note of the stockholder, with the intent to enable him to withdraw it. But it is not unlawful for a bank to sell, on credit, shares of its stock which it may have previously purchased, or to take a note for the amount, payable at the expiration of the stipulated credit. N. Y. Superior Ct. 1857, U. S. Trust Co. v. Harris, 2 Bosw. 75.

7. Directions for selling shares of its own stock which may have been pledged to a moneyed corporation, in case of default in paying the debt. 1 N. Y. Rev. Stat. 591, § 6.

8. Where a bank discounts a note upon a pledge of shares of its own stock as collateral security, the facts that such shares are transferred to an officer of the bank in trust for it, that they are not sold at the maturity and non-payment of the note, and that they were not marked off as a reduction of the capital stock, as required by 1 Rev. Stat. 591, § 6, constitute no defence to an action by the bank upon the note. N. Y. Superior Ct. 1859, Butterworth v. Kennedy, 5 Bosw. 143.

9. Assignments to be direct. No conveyance, &c., or "transfer of any effects" for the benefit, &c., of a moneyed corporation, shall be valid unless made to the corporation directly and by name. Exceptions as to assignments in trust

for creditors, or under insolvent laws. 1 *N. Y. Rev. Stat.* 591, § 7.

10. A loan of credit to a moneyed corporation, under an agreement that the evidences or securities so loaned shall be placed in the hands of a third person as trustee, to be used by him as he may deem proper for the benefit of such corporation, and a pledge of securities by the corporation to such trustee for the repayment of such loan, are valid transactions, notwithstanding the provision (above mentioned) which forbids transfers of effects for the use of a moneyed corporation, not made to such corporation directly and by name. This is not a transfer of effects. *N. Y. Superior Ct.* 1859, *Holbrook v. Basset*, 5 *Bow.* 147.

11. Authority for making transfer. "No conveyance, assignment, or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such corporation, of any of its real estate, or of any of its effects, exceeding the value of one thousand dollars; but this section shall not apply to the issuing of promissory notes, or other evidences of debt, by the officers of the company, in the transaction of its ordinary business; nor to payments in specie or other current money, or in bank bills, made by such officers; nor shall it be construed to render void any conveyance, assignment, or transfer, in the hands of a purchaser for a valuable consideration, and without notice." 1 *N. Y. Rev. Stat.* 591, § 8.

12. The above provision only extends to such moneyed corporations as are by their charters subject to the management of a board of directors, trustees, or other officers. *N. Y. Supreme Ct.* 1845, *Gillett v. Campbell*, 1 *Den.* 520.

13. Exchanges. That an exchange of securities is within the operation of a statute prohibiting the transfer of securities of a certain description, except upon certain formalities,—see *Highland Bank v. Dubois*, 5 *Den.* 558.

14. Ratification. An assignment, though made without the previous resolution of the board of directors required by the above statute, may be ratified and made valid by a subsequent resolution. *N. Y. Superior Ct.* 1849, *Palmer v. Yates*, 8 *Sandf.* 137. To the same effect, *Ct. of Appeals*, 1857, *Curtis v. Leavitt*, 15 *N. Y.* 9.

15. A judgment held by a bank, and by it transferred by assignment, on its being paid, is not a part of the effects of the bank, requiring a resolution of the board of directors to authorize the assignment. *N. Y. Ct.*

of Appeals, 1854, *Eno v. Crooke*, 10 *N. Y.* (6 *Seld.*) 60.

16. Form of resolve. That a resolution of the directors of a moneyed corporation, authorizing the transfer of its property, need not specify the precise things to be transferred,—see *Holbrook v. Basset*, 5 *Bow.* 147; *S. P. Brookman v. Metcalf*, *Id.* 429; *Elwell v. Dodge*, 83 *Barb.* 336.

17. That no one but the corporation itself, its stockholders, or creditors, or some one claiming under it or them, can impeach the validity of a transfer of its effects on the ground that it exceeded \$1,000 in amount, and was not authorized by a previous resolution,—see *Eno v. Crooke*, 10 *N. Y.* (6 *Seld.*) 60; *Elwell v. Dodge*, 83 *Barb.* 336.

18. Evidence of vote. An assignment of property of a corporation stated that the corporation had caused its seal to be affixed and the assignment to be signed by the president, and its execution to be attested by the secretary. The secretary proved its execution before a commissioner of deeds, for the purpose of having it recorded; testifying that the corporate seal was affixed by authority of the corporation. *Held*, *prima-facie* evidence that the assignment was authorized by a vote of the board, as required by the statute. *N. Y. Chancery*, 1848, *Johnson v. Bush*, 8 *Barb. Ch.* 207.

19. Rights of bona-fide purchaser. A transfer of the effects of a moneyed corporation, to an amount exceeding \$1,000, is valid, as to a holder for value and without notice, notwithstanding the transfer was not authorized by a previous resolution of the directors. *N. Y. Supreme Ct.* 1860, *Warner v. Chappell*, 32 *Barb.* 309.

20. Every person who, for any consideration that the law judges to be valuable, has acquired, directly or indirectly, a legal or equitable title or interest, by an assignment or transfer from a moneyed corporation, is to be deemed a purchaser within the meaning of the protecting clause in the above mentioned statute; and within this definition, every assignee of a bond and mortgage, whether the assignment is made to him directly, or to a trustee for his benefit and security, and whether it is made absolutely or as collateral security, is plainly included. *N. Y. Superior Ct.* 1849, *Palmer v. Yates*, 8 *Sandf.* 137.

21. An assignment and delivery of bonds

and mortgages, in trust to secure certain bonds of the corporation proposed to be issued as the foundation of a loan, though unauthorized by any previous resolution of the board of directors, becomes effectual, by virtue of the protecting clause of the above mentioned statute, the moment the bonds of the company intended to be secured by it, come to the hands of a holder for value and without notice. *Id.*

22. Where a note which has belonged to a moneyed corporation, comes into the hands of a holder for value, he has a right to presume that it was transferred in pursuance of a resolution of the board of directors, and is therefore protected by the statute, notwithstanding the transfer from the corporation was illegal for the want of such notice. *N. Y. Supreme Ct. 1860, Akin v. Blanchard, 32 Barb. 527.*

23. The indorsee of a note exceeding \$1,000, indorsed to him by the president of an insurance company, is presumed to be a *bona-fide* purchaser without notice of the fact that the transfer was unauthorized by a previous resolution of the board of directors, and the burden of proving such notice is on the party alleging it. *N. Y. Superior Ct. 1849, Caryl v. McElrath, 3 Sandf. 176; S. P. 1859, Ogden v. Andre, 4 Bosw. 588. And see Palmer v. Yates, Id. 187.*

24. Officer deemed to have notice. A transfer of over \$1,000 worth of promissory notes, by a cashier to a director, without a previous resolution of the directors authorizing the same, is void; for the director is chargeable with notice as an officer of the bank, and cannot be a *bona-fide* purchaser. *So held*, where there was some evidence also of actual notice. *N. Y. Ct. of Appeals, 1855, Gillet v. Phillips, 18 N. Y. (3 Kern.) 114.*

25. The president of an insurance company took, to satisfy a claim due him, notes belonging to the company, with their indorsement, but without any resolution on the part of the directors. *Held*, that the transfer was in violation of the statute and void, and he could not recover on the note. *N. Y. Supreme Ct. Circuit, 1857, Marsh v. Brett, 16 How. Pr. 95.*

26. Effect of notice. Where the transfer is unauthorized, and the purchaser has notice, he is not, in an action by the receiver of the corporation to avoid the sale and recover the property transferred or its pro-

ceeds, entitled to recoup or be allowed the consideration paid by him to the bank. *N. Y. Ct. of Appeals, 1855, Gillet v. Phillips, 18 N. Y. (3 Kern.) 114.*

27. Assignments in contemplation of insolvency. No assignment, &c., by any moneyed corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid. 1 *N. Y. Rev. Stat. 591, § 9.*

28. The moment a moneyed corporation becomes insolvent, the rights of all its creditors attach equally to all its assets, and whoever takes its bills afterward, being indebted to such corporation, takes them subject to this right of all the creditors to share equally in its assets. *N. Y. Supreme Ct. 1861, Diven v. Phelps, 34 Barb. 224.*

As to the validity of Assignments by corporations, see ASSIGNMENTS.

29. Payment or transfer made by a corporation, even when actually insolvent, is not to be deemed void as made with intent to prefer a particular creditor, unless the intent, as well as the insolvency, is alleged and proved. *N. Y. Ct. of Appeals, 1857, Curtis v. Leavitt, 15 N. Y. 9, 109, 138, 198.*

30. Thus where a moneyed corporation was in great danger of insolvency, if not actually insolvent, but its officers had an honest and intelligent expectation that it would be able to go on with business and pay all its debts,—*Held*, that a pledge and transfer of assets, consisting of bonds and mortgages received from subscribers in payment for capital stock, to secure the payment of bonds about to be issued, to raise money upon, was valid, for the reason that no intent appeared to prefer any particular creditor. *Id.* And see *Leavitt v. Blatchford, 17 N. Y. 521.*

31. Directors who violate the above provisions declared personally liable to creditors and stockholders of the corporation, to the full extent of any loss they may sustain from such violation.* 1 *N. Y. Rev. Stat. 591, § 10.*

32. An action founded on the above section cannot be maintained by one who became owner of his stock after the alleged violations. *N. Y. Superior Ct. 1858, Mabey v. Adams, 3 Bosw. 346.*

For the Personal Liability of directors in corporations generally, instead of their corporations, see INDIVIDUAL LIABILITY.

* And punishable for misdemeanor, whether a loss shall or shall not result. 1 *N. Y. Rev. Stat. 592, § 11.*

MORTGAGES.

I. THE POWER.

II. FORM AND EFFECT.

III. ENFORCING.

1. When implied. The general right to borrow money, on the part of a corporation, implies the power to mortgage its property, real and personal, to secure the payment, which can be restrained only by express prohibition in the act of incorporation. *Md. Ct. of Appeals*, 1852, *Susquehanna Bridge & Co. v. General Ins. Co.* 3 *Md.* 305; *N. H. Supreme Ct.* 1862, *Richards v. Merrimack & Conn. River Railroad*, 44 *N. H.* 127.

2. Where the charter of a railroad company authorized the company, in express terms, to borrow money on its credit, but did not confer the right of making a mortgage, —*Held*, that the corporation had power by virtue of its implied power to accomplish the purposes for which it was formed to mortgage its property as security for its loans. *Ky. Ct. of Appeals*, 1862, *Bardstown & Louisville R. R. Co. v. Metcalfe*, 4 *Meto.* 199.

3. A power in the charter "to sell and dispose of," clearly gives a power to mortgage. *Pa. Supreme Ct.* 1883, *Gordon v. Preston*, 1 *Watts*, 885.

4. Under a power in the charter to hold real estate necessary for the immediate accommodation of the corporation in its business, and to convey the same for its use, the corporation have power to mortgage their real estate answering this description to secure their debt. If the mortgage was made for the use of the corporation, whether given in payment of a debt, or as security either direct or collateral, is not important. *N. J. Chancery*, 1882, *Leggett v. The N. J. Banking Co.* 1 *Satt.* 541. Compare *Taber v. Cincinnati & C. R. R. Co.* 15 *Ind.* 459.

5. A power to mortgage the land of the society for the purpose of building thereon, authorizes making a mortgage to secure demands for materials and labor in erecting a building. *N. Y. V. Chan. Ct.* 1840, *Miller v. Chance*, 3 *Edu.* 399.

6. That a corporation authorized to raise money by mortgage, may mortgage to a trustee for creditors, —see *Wright v. Bundy*, 11 *Ind.* 398.

7. A power to pledge the franchises and rights of a corporation, implies, as incident thereto, the power to pledge everything that

may be necessary to the enjoyment of the franchise, and upon which its real value depends. *Ky. Ct. of Appeals*, 1857, *Phillips v. Winalow*, 18 *B. Monr.* 431.

8. A power to purchase lands necessary and convenient for the prosecution of the works of a corporation, and to dispose of the same, implies a power to mortgage them to secure the debts of the company. But the mortgage must be executed in conformity with the by-laws of the company, if any exist upon the subject, or it will be voidable on their part. *Pa. Supreme Ct.* 1883, *Gordon v. Preston*, 1 *Watts*, 885.

9. Trustees of a public turnpike with power by statute to erect houses and mortgage the tolls, are not authorized to mortgage the toll houses or gates; the act expressly prohibiting the giving of preferences to creditors. *K. B.* 1787, *Fairtitle v. Gilbert*, 2 *Durnf. & H.* 169.

10. A power given by a charter to mortgage for a particular purpose, does not abridge the general power to mortgage for the security of creditors. *Ala. Supreme Ct.* 1849, *Mobile & Cudal Point R. R. Co. v. Talman*, 15 *Ala. N. S.* 472.

11. A corporation, although empowered by a special provision in its charter, to mortgage its effects, &c., for a particular purpose, has also general power to execute a mortgage for the security of creditors. The general powers of such a corporation extend to the creation of a lien on all its property, without reference to the mode of creating the debt. *Ala. Supreme Ct.* 1847, *Allen v. Montgomery R. R. Co.* 11 *Ala. N. S.* 487.

12. Under the power conferred upon officers of a company by virtue of a resolution of its board of directors, of mortgaging "the road and its property, &c.;" —*Held*, that the company might mortgage the railroad with all its rights and privileges. *Ky. Ct. of Appeals*, 1862, *Bardstown & Louisville R. R. Co. v. Metcalfe*, 4 *Meto.* 199.

13. An authority to mortgage a railroad and its property must design a transfer of the right to operate the road. *Id.*

14. Mortgage of the franchise. A corporation cannot, in general, mortgage its franchise. Even a charter power authorizing it to acquire and convey all such property as may be necessary and convenient to carry in-to effect the objects of incorporation, will not be deemed to extend to the franchise.

Ohio Supreme Ct. 1859, *Coe v. Columbus &c. R. R. Co.* 10 *Ohio St.* 372, 377.

15. A railroad corporation at common law has no power to mortgage its franchise, without authority other than that derived from the fact of its own incorporation. *Mass. Supreme Ct.* 1865, *Commonwealth v. Smith*, 10 *Allen*, 448.

16. A canal company cannot, without the consent of the legislature, mortgage either its tolls, or such real estate as is necessary for the enjoyment of its corporate franchises. *Pa. Supreme Ct.* 1856, *Steiner's Appeal*, 27 *Pa. St.* 318.

17. Among the franchises of a corporation is that of being a body politic, with rights of succession of members, and of acquiring, holding, and conveying property, and suing and being sued by a certain name. Such an artificial being, only the law can create, and when created it cannot transfer its own existence into another body, nor can it enable natural persons to act in its name, save as its agents, or as members of the corporation, acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law by some positive provision has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchise to build, own, and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable. Whether when they have been granted to a corporation created for the purpose of holding and using them, they may legally be mortgaged by such corporation, in order to obtain means to carry out the purpose of its existence, must depend upon the terms upon which they are granted, or, in the absence of anything special in the grant itself, upon the intention of the legislature, to be deduced from the general purposes it had in view, the means it intended to have employed to execute those purposes, and the course of legislation on the same or similar subjects; or, as it is sometimes compendiously expressed, upon the public policy of the State. *U. S. Cir. Ct. (N. H.)* 1857, *Hall v. Sullivan* *R. R. Co.* 11 *Low Rep. N. S.* 188.

18. — of future acquisitions. A com-

pany may mortgage its property to secure future advances to be made to the contractor of the company. *Rolls Ct.* 1866, *Crewer &c. Mining Co. v. Williams*, 14 *Law Times, N. S.* 93; 14 *Week. Rep.* 444.

19. The validity of a railroad mortgage upon future as well as present property, and upon the franchises and privileges as well as actual property of the company, under special provisions of statute governing the case—determined. *Coe v. Columbus &c. R. R. Co.* 10 *Ohio St.* 372, 394.

20. — after consolidation. That property of one of several consolidating railroad companies may be mortgaged for its own debts, even after the consolidation,—see *Wright v. Bundy*, 11 *Ind.* 398.

21. Power to take a mortgage. A deed of trust is a mortgage, and therefore a banking corporation empowered by its charter to hold land mortgaged to it by way of security, may take a deed of trust on real estate for the security of debts due the corporation. *Tenn. Supreme Ct.* 1845, *Bennett v. Union Bank*, 5 *Humph.* 612.

22. A bank may receive a deed of, and hold, land in trust for the security of a just debt due to it; and if the deed secures also other debts which are void, as for usury, the trust will fail as to them but will be treated as a valid security for the valid debt. *Ohio Supreme Ct.* 1847, *Morris v. Way*, 16 *Ohio*, 469.

23. If an incorporated bank of another State lends money and takes a mortgage in New York, this is not a violation of the provisions of the New York act of 1818, restraining banks from investing in real property. A mortgage taken to secure a loan, advanced *bona fide* as a loan, in the course and according to the usage of banking operations, is not within the prohibition. *N. Y. Chancery*, 1820, *Silver Lake Bank v. North*, 4 *Johns. Ch.* 370.

24. A bridge corporation authorized to take tolls, may appoint a toll collector, and take from him a mortgage as security for his payment of all toll money taken by him, although no special power to this effect be given by the charter. *Ind. Supreme Ct.* 1862, *Peru Bridge Co. v. Hendricks*, 18 *Ind.* 11.

25. Mortgage upon land made to corporation in Kentucky, for the purpose of securing a debt, valid,—see *Lathrop v. Commercial Bank*, 3 *Dana*, 114.

26. A statute of Arkansas, placing its State bank in liquidation, authorized the bank to take mortgages to secure doubtful debts, and to extend payment of such debts, "not exceeding two years." The payment of a note due the bank prior to the passage of said act was extended a longer time, and a mortgage taken as security. *Held*, that the clause in the statute must be considered directory, and that the mortgage was not void. *Ark. Supreme Ct.* 1856, *Magruder v. State Bank*, 18 *Ark.* 9.

27. To an action of debt on a note by a banking corporation it is a good plea at law by the surety, that the bank took a mortgage security from the principal, and gave him day of payment, without the consent of the surety; but under the issue to such plea, the defendant must prove that the security was accepted and ratified by the board of directors. *Ark. Supreme Ct.* 1848, *Ferguson v. State Bank*, 8 *Ark.* (3 *Engl.*) 416.

28. That a corporation of another State authorized to loan money on mortgage, may, by comity, hold mortgages in Michigan, and convert them into money,—see *New York Dry Dock Co. v. Hicks*, 5 *McLean*, 111; *Farmers' Loan & Trust Co. of New York v. McKinney*, 6 *McLean*, 1.

II. FORM AND EFFECT.

29. Execution. A mortgage executed and acknowledged by the members of a board of directors who were present, the seal of the corporation being duly affixed,—*Held*, to be well executed and acknowledged. *Pa. Supreme Ct.* 1838, *Gordon v. Preston*, 1 *Watts*, 385.

30. That a mortgage given to secure a bond for a corporate debt, naming, as parties of the first part, four persons, "president, directors, and members of" the company, concluding, "In witness whereof, the said parties of the first part hereunto set their hands and affix their seals," and signed by the said four persons with their private seals only, is not a mortgage of the corporation. *Cal. Supreme Ct.* 1868, *Richardson v. Scott River &c. Co.* 22 *Cal.* 150.

31. Delivery. Though a mortgage given to the president of a banking association, for stock subscription, is null, if the association was not organized under the statute; if, after due organization, the subscriber receives the stock, and pays interest on the mortgage, a

redelivery may be inferred. *N. Y. A. V. Chan. Ct.* 1843, *Valk v. Crandall*, 1 *Sandf. Ch.* 179.

32. Consideration. A subscription for shares of the stock of a manufacturing company is a good consideration for giving a bond and mortgage to secure the amount subscribed; and the neglect or refusal of the company to issue, to the mortgagor, scrip for the shares, is no defence to an action by its receiver, for the foreclosure of the mortgage. *So held*, where the law forbid the issue of scrip until paid for in money. *N. Y. Supreme Ct. Sp. T.* 1860, *Battershall v. Davis*, 31 *Barb.* 323.

33. Necessity of stockholder's assent. Where the president of a dock company executed a mortgage on the real property and works of the corporation, under a resolution of the directors authorizing such act, to secure a loan effected to complete the works, and the mortgage was not expressly assented to by the stockholders at any meeting, but was never objected to by them,—*Held*, on a bill to foreclose the mortgage, that it was valid as against other creditors of the company, not claiming under the mortgage. *Va. Ct. of Appeals*, 1845, *Enders v. Board of Public Works*, 1 *Gratt.* 364.

34. That a confession of judgment which, if valid, would be a charge upon lands, is deemed a mortgage within a charter provision requiring assent of a specified number of stockholders to be given to a mortgage of the company's lands—see *Cape Sable Company's Case*, 3 *Bland*, 606.

35. Whether mortgage of "rolling stock" is a chattel mortgage. A mortgage of the rolling stock of a railroad is not within the purview or intent of ch. 279 of *N. Y. Laws of 1838*, requiring chattel mortgages to be filed in the town or city where the mortgagor, if a resident of this State, resides, and, if he is not a resident, then in the town or city where the mortgaged property is, at the time of the execution of the mortgage. *N. Y. Supreme Ct. Sp. T.* 1866, *Bement v. Plattsburgh &c. Co.* 47 *Barb.* 104.

36. A mortgage of the personal property of a railroad company must conform to the requirements of the law in regard to chattel mortgages, or the property covered by it will be liable to attachment and sale on execution by the creditors of the road. *Ill. Supreme Ct.* 1860, *Hunt v. Bullock*, 28 *Ill.* 320.

87. How authenticated. A mortgage of personality of a railroad company, sworn to by the agents executing it,—*Held*, not invalid, on the ground that they had not signed the requisite oath professedly as acting for the corporation, it having appeared that the mortgage was made to secure the debts of the corporation. *N. H. Supreme Ct.* 1862, *Richards v. Merrimack & Conn. River Railroad*, 44 *N. H.* 127.

88. What property passes by a mortgage. A railroad company, as security for its bonds, conveyed in mortgage to certain persons their "railroad and franchise, and, also, all the station houses, engine houses, &c., and other appendages, with all the lands thereto belonging and intended for the use and accommodation of said road."

Held, 1. That this conveyance passed such land only of the company as was so connected with, and used by the company for, the railroad, that they would have been authorized to take it compulsorily under the provisions of their charter; and that, if it was so connected and used, it was immaterial whether it actually was taken by proceedings *in in rem*, or purchased by the company.

2. That the words in the conveyance, "intended for the use and accommodation of said road," applied to the intention of the company, in respect to the use of the land at the time the mortgage was executed, and not to the original design of the company when they purchased it.

3. That the mortgage conveyed the full entire surveyed line of the railroad to its whole extent. *Vt. Supreme Ct.* 1861, *Eldridge v. Smith*, 34 *Vt.* 484.

89. Where a railway company were empowered to borrow money upon mortgage of their property, and a form for the instrument was prescribed, by which the company were to charge and assign "the said undertaking, and all and singular the said rates, tolls, and other sums arising," &c., and by the act the mortgagees were to be entitled, one with another, to their proportions of the rates and tolls, sums, and premises, according to the sums advanced, without preference by reason of priority of date of mortgage, and were not to be deemed shareholders by reason of their mortgages,—*Held*, that a mortgage executed in the form prescribed would not convey a title to the land of the corporation, so that ejectment could be maintained, and posses-

sion of the property had. *Q. B.* 1841, *Myatt v. St. Helen's Railway Co.* 2 *Q. R.* 364; 2 *Eng. Railw. Cas.* 756.

40. A mortgage by a corporation of their property, franchises, and effects, given after their entry upon lands, and before judgment for damages, will bind their equitable interest therein, subject to the payment of the judgment for purchase money.—*Held*, therefore, on distribution of the proceeds of the sheriff's sale of the land, that the balance in court after the judgment passed to a prior mortgage in preference to one executed after the entry of the judgment, and the vesting of the legal title in the company. *Pa. Supreme Ct.* 1864, *Borough of Easton's Appeal*, 47 *Pa. St.* 255.

41. Rolling stock, rails, ties, chairs, spikes, and all other property brought upon the realty, if intended to be attached thereto, are covered by a railway mortgage. But fuel, oil, and the like, which are consumed by use, and which may be sold and carried away, and have no distinguishing marks to show that they were specially designed for railroad uses, are personal property. *Ill. Supreme Ct.* 1860, *Palmer v. Forbes*, 23 *Ill.* 300; *Hunt v. Bullock*, 23 *Ill.* 320.

42. A mortgage given by a railroad company to secure their bonds, specifying as the mortgaged premises, the real estate, railroad, bridges, ferries, &c., locomotives, engines, cars, tenders, shops, tools, and machinery, and "all other personal property whatsoever, in any way belonging or appertaining to the said railroad of the said company," does not include canal boats owned by the company, although used and run in connection with the road, forming that connection at the point where the road terminates. *N. Y. Ct. of Appeals*, 1860, *Parish v. Wheeler*, 22 *N. Y.* 494.

43. After-acquired property. A mortgage made by a railroad company containing words which purport to bind future-acquired rolling stock, is operative, at least in equity, to bind rolling stock which the company may afterward acquire. *U. S. Supreme Ct.* 1859, *Pennock v. Coe*, 23 *How.* 117. And see *Pierce v. Emery*, 32 *N. H.* 484; *Willink v. Morris Canal Banking Co.* 3 *Green, Ch.* 377.

44. A mortgage made to trustees by a railroad corporation, in pursuance of an act of the legislature, to secure a loan,—*Held*, on a proper construction of the act and of the deed, to convey to such trustees the whole

road as an entirety, with all its rights and interests, and thereby to include as well subsequently acquired property, as property belonging to the road at the date of the mortgage. *N. H. Supreme Ct.* 1856, *Pierce v. Emery*, 32 *N. H.* 484. *S. P. Ky. Ct. of Appeals*, 1857, *Phillips v. Winslow*, 18 *B. Monr.* 431.

45. The directors of a railroad corporation, authorized by vote of its stockholders "to execute a mortgage of the road with all its franchises," made a mortgage which recited this vote and in terms conveyed their road, houses, lands, and superstructure, and all their locomotives, cars, tools, and implements, "with all improvements made upon such property, and all additions thereto, by adding new locomotives, cars, and other things;" and the legislature afterward ratified and confirmed their "proceedings, whereby they conveyed, agreeably to the vote of the stockholders, their railroad and property in mortgage." *Held*, that cars subsequently purchased by the corporation were included in the mortgage, although the mortgagees had not taken possession for foreclosure. *Mass. Supreme Ct.* 1860, *Howe v. Freeman*, 14 *Gray*, 566.

46. Where an officer of a corporation purchases property with the money of the corporation, and takes the deed in the name of an individual director, the title vests in the corporation, although the transaction was done without the knowledge of the company or the grantee; and the property, upon the execution of the deed, becomes at once subject to any mortgage upon the general property of the corporation. *N. Y. Supreme Ct.* 1867, *Buffalo, N. Y. & Erie R. R. Co. v. Lampson*, 47 *Barb.* 533.

47. A first mortgage of a railroad company contained the following words, as descriptive of the property conveyed: "And all other personal property belonging to said company, as the same now is in use by said company, or as the same may be hereafter changed or renewed by said company." *Held*, that these words did not embrace certain machinery for "burnetizing" ties and timber so as to render them more durable, it having appeared that such machinery was not in existence at the time of the mortgage, and took the place of nothing that was therein specified, but was constructed subsequent to its execution as an experiment. *Vt. Supreme Ct.* 1861, *Brainerd v. Peck*, 34 *Vt.* 496.

48. In the conveyance of property acquired subsequently to this first mortgage, the following words of description were used: "All the articles of personal property acquired by the company since the date of the mortgage, consisting, among other things, of the following, to wit," and then followed an enumeration, by name, of several engines, and, by number, of several different kinds of cars. *Held*, that the general words were to be construed as referring to articles of the same nature and kind as those specifically named. *Ib.*

49. Where a railroad corporation by virtue of a special act of the legislature mortgaged not only all the property then owned by both the new and old portions of the road, but "all the property of said extension subsequently to be acquired,"—*Held*, that wood subsequently purchased with the earnings and for the use of the whole road would not pass by said mortgage, and was attachable. *Me. Supreme Ct.* 1865, *City of Bath v. Miller*, 53 *Me.* 308.

50. A railroad corporation, empowered by law to mortgage their franchise and property, after making a mortgage of all their lands, franchises, and privileges, and "all the locomotive engines, cars, and other articles of personal property whatsoever, now owned or used by the corporation, or which they may hereafter own or use," authorized their directors to issue bonds to a large amount to pay debts contracted in building and furnishing their road, and to secure such bonds by "an additional or second mortgage of the road, franchise and property of every description, including cars and engines," subject to the first mortgage, and "as full and complete" as that. Bonds were issued pursuant to this authority, and a second mortgage made of all the lands, franchises, &c., of the corporation, "and the property and premises whatsoever mentioned, described, or referred to" in the first mortgage. *Held*, that the second mortgage, as against a subsequent attachment, conveyed engines and cars acquired by the corporation after the first and before the second mortgage. *Mass. Supreme Ct.* 1858, *Henshaw v. Bank of Bellows Falls*, 10 *Gray*, 568.

51. A mortgage was executed of a "railroad with its superstructure, track, and other appurtenances made or to be made" together with its furniture, materials, and every other

kind of personal property which should be used for operating said railroad. *Held*, that property thereafter to be acquired by the company, did not pass by the mortgage except so far as it should become appurtenant to or be used in operating the road, and that chairs subsequently acquired, but never used, did not pass to the mortgagee upon the surrender of the road by the company. *Wis. Supreme Ct.* 1860, *Farmers' Loan & Co. v. Commercial Bank*, 11 *Wis.* 207.

52. Where by virtue of a general power in a statute passed for such purpose, a mortgage of a canal was executed, in which the canal was described by its extreme termini, and all the accompanying works of the company, such as aqueducts, locks, bridges, privileges, &c., were included,—*Held*, that the instrument conveyed the entire canal, when completed, although a portion of it was constructed upon land acquired after the execution of the mortgage, and was built after the date of the mortgage; and that the feeder of the canal passed by the mortgage, as part and parcel thereof. *N. J. Chancery*, 1848, *Willink v. Morris Canal & Banking Co.* 3 *Green, Ch.* 377.

53. A railroad mortgage, for the purpose of raising money to complete the road, which contains no language purporting to convey materials acquired subsequently to its execution, does not acquire any validity as to such materials, from its general nature and object. *Wis. Supreme Ct.* 1862, *Farmers' Loan & Trust Co. v. Commercial Bank of Racine*, 15 *Wis.* 424.

54. The franchise. A mortgage, by a railroad company, of its road and franchise, as a security for debt, does not convey its corporate existence or its general corporate powers, but only the franchise necessary to make the conveyance beneficial to the grantees, to maintain and manage the railroad, and receive the profits thereof for their own benefit. *Vt. Supreme Ct.* 1861, *Eldridge v. Smith*, 34 *Vt.* 484.

55. A mortgage of a railroad made under legislative authority, necessarily gives the trustees power to exercise the franchise of the road to satisfy the mortgage, and for the public benefit, either in their own or in any other name; and hence the personal property left on the road, when the mortgagees of the realty take possession under their mortgage, cannot be taken by a creditor of the railroad

company upon a judgment recovered after they had taken possession. *Ill. Supreme Ct.* 1860, *Palmer v. Forbes*, 23 *Ill.* 300.

56. The powers and duties of trustees under railroad mortgages—considered. *Coe v. Beckwith*, 81 *Barb. (N. Y.)* 339; 10 *Abb. Pr.* 296; 19 *How. Pr.* 398.

57. If the mortgage of a railroad create a trust, and provide that the power of sale is to be executed by the trustee on certain contingencies, he may be controlled, restrained, and directed by a court of equity, at the suit of a party standing in the relation of *cestui que trust*; the rule for his guidance being derived from the instrument itself. *Pa. Supreme Ct.* 1860, *Bradley v. Chester Valley R. R. Co.* 36 *Pa. St.* 141.

58. —their compensation. Where a mortgage of real estate, executed by a railroad company to trustees to secure the payment of certain bonds therein described, with semi-annual interest, provided, that in default of payment, the trustees might take possession of the premises, and by themselves or agents use the same, making needful repairs and alterations, and, after deducting the expenses of such repairs, &c., apply the proceeds thereof to the payment of principal and interest of the bonds remaining unpaid, *pro rata*, and that they should be entitled to receive proper compensation for every labor or service performed in the discharge of the trust, in case they should be compelled to take possession of the premises, or to manage the same. *Held*, that the trustees having taken possession for breach of condition, might, on a bill to redeem, be allowed any reasonable sum for their own services, and expenditures authorized by the mortgage, but not for counsel fees in suits between them and the mortgagors, or for insurance procured by them without the request of the company. *Mass. Supreme Ct.* 1864, *Boston & Worcester R. R. Corp. v. Haven*, 8 *Allen*, 359.

59. Interpretation of interest clause. The condition of a mortgage upon a railroad and its franchises authorized a sale, upon failure to pay either the interest or principal, to satisfy the amount claimed and due, but contained no provision that the principal should become due upon failure to pay interest. *Held*, in a suit to foreclose, that the bondholders had a right to a sale of the road for the interest remaining unpaid, although the principal might not be due. *Ky. Ct. of*

Appeals, 1862, Bardstown & Louisville R. R. Co. v. Metcalfe, 4 *Metc.* 199. Compare *Taber v. Cincinnati & C. R. R. Co.* 15 *Ind.* 459.

60. — of power of sale. A power inserted in a mortgage of a railroad, authorizing the mortgagee, upon default of payment, to take possession of the road and other property connected therewith, and use or sell the same, must be exerted upon all the property mortgaged; and does not authorize the mortgagee to detach portions thereof, either from the possession of the company, or an officer succeeding to its rights, by a valid levy thereon. *Ohio Supreme Ct.* 1868, *Coe v. Peacock*, 14 *Ohio St.* 187.

61. Who may impeach mortgage. A creditor of a corporation cannot avoid a mortgage given by it, on the ground that it was given at a meeting which was not lawfully convened, if the corporation have never objected to the validity of the mortgage. It makes no difference if the mortgagees were members of the corporation. *Pa. Supreme Ct.* 1883, *Gordon v. Preston*, 1 *Watts*, 885.

62. A mortgage of a railroad and appurtenances and all materials, this mortgage declaring itself subject to the lien of two prior mortgages mentioned herein, and that they are "in all respects prior, superior, and senior liens upon the property and premises described therein, respectively, acquired and to be acquired," does not estop the mortgagor from denying that materials acquired subsequently to the execution of the first two mortgages were covered by them. *Wis. Supreme Ct.* 1862, *Farmers' Loan & Trust Co. v. Commercial Bank of Racine*, 15 *Wis.* 424.

63. How it may be sustained. A mortgage or pledge of the personal property of a corporation, by one undertaking to act as agent, may be shown to be valid, either by evidence of the acts of the corporation prior to the mortgage, or from which an authority to make it may be inferred, or by subsequent acts showing a ratification. *N. H. Superior Ct.* 1841, *Despatch Line of Packets v. Belamy Manuf. Co.* 12 *N. H.* 205.

64. Legislative ratification. Where a mortgage conveyance of a railroad was executed to trustees without the assent of the legislature, but subsequently an act was passed authorizing the trustees to sell the road,—*Held*, that this amounted to a ratification of the mortgage, so far as the State

and the public were concerned. *N. H. Supreme Ct.* 1862, *Richards v. Merrimack and Conn. River Railroad*, 44 *N. H.* 127.

III. ENFORCING.

65. Who may demand foreclosure. The pledger of railroad bonds on which interest is not paid has a right to ask for the foreclosure of the mortgage securing such bonds, whether the nominal mortgagee desire it or not. *Ky. Ct. of Appeals*, 1858, *Sinking Fund Commissioners v. Northern Bank*, 1 *Metc.* 174.

66. Power of trustees to foreclose. Where a mortgage was assigned to T., "as treasurer of M. University," a corporation, "and to his successors in office;" and he took and held it, and foreclosed it in his official character, stating in the notice of sale that he, "as such treasurer," was "the owner and holder" of the mortgage,—*Held*, that the court would presume, in the absence of proof on the subject, that T., as treasurer, had authority to foreclose the mortgage by advertisement, and sell the premises, to receive all moneys due upon it, and to cancel or satisfy it. *N. Y. Supreme Ct.* 1859, *Howard v. Hatch*, 29 *Barb.* 297.

67. In Kentucky, a trustee to whom a mortgage has been made by a railroad company, for the benefit of bondholders, may, if the mortgage makes it his duty to sue (notwithstanding the provisions of the code of that State), bring an action in his own name for its foreclosure, without making the bondholders parties, upon showing that they are numerous, and that it is impracticable to bring them before the court in a reasonable time. *Ky. Ct. of Appeals*, 1862, *Bardstown & Louisville R. R. Co. v. Metcalfe*, 4 *Metc.* 199.

68. Change of possession. Where a railroad company, being in default respecting the payment of the interest on its first and second mortgage bonds, whereby the whole of the bonds became due by the express provisions of the mortgage, executed a deed of possession to the mortgage trustees, who thereupon, without personally going upon the premises, appointed the president thereof their agent to manage it, and he continued all the old employees in office, notifying them, and causing printed notices to be distributed, of the change of possession,—*Held*, that there was sufficient change of posses-

sion as against third parties. *Ill. Supreme Ct.* 1860, *Palmer v. Forbes*, 28 *Ill.* 300.

69. The mortgage provided that upon default the trustees might enter, and use the road and all the rights and franchises, and as the attorneys in fact of the company, hold and use the same. *Held*, that their possession thereunder was in their own right as mortgagees, not as agents and on behalf of the company, being such as to destroy the liability of the property of the company for the payment of antecedent corporate debts, and that the license to act as attorney, and an accompanying covenant by the trustees to run the road in the name and as attorneys of the railroad, was not intended to, and did not affect their title or possession, but only their manner of using it. *Id.*

70. Discharge. A. entered into a contract with a corporation to build a railroad at a certain price, and executed a mortgage to the corporation to secure the proper application of the advances made on account of the work. He abandoned the work before its completion and while the corporation was in advance to him. The corporation, being in embarrassed circumstances, without valid consideration voluntarily released the mortgage, and discharged A. from his liabilities. *Held*, that the release and discharge were fraudulent and void as to judgment creditors of the corporation. *Miss. Chancery*, 1848, *Wright v. Petrie*, 1 *Smad. & M.* 282.

71. The damages sustained by the corporation, by the non-performance of the contract by A. are to be considered as liquidated to the extent of the advance to him, and so far the mortgage and damages would be subject in equity to a judgment creditor of the company seeking to subject them as equitable assets. *Id.*

72. A member of an unincorporated loan fund association, who was also their secretary, made a bond and mortgage to the association in contemplation of a loan of a certain amount, part of which he received. But he afterward repaid that amount, on the suggestion of the association that they could not make so large a loan on the security offered, and executed a new bond for the lesser loan which they were willing to make, canceling the first bond. *Held*, that if the association never assented to or ratified the canceling of the first bond, they might still

maintain a writ of entry to foreclose the mortgage. *Mass. Supreme Ct.* 1859, *Barter v. McIntire*, 18 *Gray*, 168.

73. Where a member of a loan association obtains a loan and gives a mortgage to secure its payment with interest, and also the installments due on his share of capital stock, payments upon the stock are not *ipso facto* payments on the mortgage debt or loan. The mortgagor, however, or the association, by virtue of an assignment of the stock taken as collateral security for the payment of the mortgage, may so apply them; but, if neither make the application, a stranger cannot compel it. *Pa. Supreme Ct.* 1864, *Spring Garden Association v. Tradesmen's Loan Association*, 46 *Pa. St.* 498.

74. Where a mortgage is given by a member of a loan association conditioned for the payment of a loan and certain monthly dues, a payment of the principal and interest due thereon, does not extinguish the instrument; but it remains as security for the faithful performance of the defendant's obligation as a stockholder of the association, and as such may be enforced against him. [6 Hare, 87.] *Pa. Supreme Ct.* 1864, *Evenham v. Oriental Savings &c. Association*, 47 *Pa. St.* 352.

75. Redemption. The charter of an insurance company provided, that, in case the company should become the purchaser on the foreclosure of a mortgage of real estate on which it had made loans, the mortgagor should have the right to redeem so long as the estate remained in the hands of the company. *Held*, that the mortgagor could redeem, although the company had, in good faith, contracted to sell the property, and had received part of the purchase money, and the purchaser had entered. The right of redemption could be devested only by the delivery of a deed of the premises. *N. Y. Ct. of Errors*, 1841, *Farmers' Fire Insurance & Loan Co. v. Edwards*, 26 *Wend.* 541. To the same effect, *N. Y. A. V. Chan. Ct.* 1839, *Merritt v. Lambert*, *Hoffm.* 166.

For rules applicable to mortgages in common with other Corporate contracts, see CONTRACTS.

Upon the subjects of Bonds, Deeds, and Grants, by or to corporations, see those titles respectively.

For the rules governing Sealing mortgages and other instruments, see SEAL.

MUNICIPAL CORPORATIONS.

[So far as adjudications upon the law of municipal corporations apply or illustrate principles which may be applicable to corporations of other kinds, we have endeavored to present them not under this head, but under titles of a general character; such as AGENTS; AMOTON; CHARTERS; CONTRACTS; FORTITURE; FRANCHISES; INCORPORATION; LEGISLATION; OFFICERS; POWERS; PROPERTY; RECORDS; SEAL; SUTTS.

So far as adjudications upon municipal corporations depend upon local statutes, or fail to appear applicable in various States, they are not within the scope of this work, but should be sought in compilations of the local law. This chapter presents cases thought likely to be, either directly or indirectly, of general application.]

I. CHARTER.

II. POWERS.

1. *General principles.*
2. *Powers in respect to property.*
3. *Powers of government.*
4. *Taxes.*
5. *Assessments.*
6. *Local improvements.*

III. MEMBERS.

IV. MEETINGS.

V. OFFICERS.

VI. ORDINANCES.

1. *How enacted and published.*
2. *Validity and effect.*
3. *How enforced.*

VII. LIABILITIES.

1. *Upon contracts.*
2. *For wrongs.*
3. *To indictment.*

VIII. REMEDIES.

I. CHARTER.

1. The power of a legislature to organize cities and incorporated villages. *Cheaney v. Hooser*, 9 *B. Monr.* 330; *Bank of Chenango v. Brown*, 26 *N. Y.* 467.

2. A constitutional provision requiring the assent of two-thirds of the members elected to each branch of the legislature to every bill creating, continuing, altering, or renewing "any body politic or corporate," must be construed to apply to municipal corporations as well as to private corporations. *N. Y. Ct. of Errors*, 1842, *Purdy v. People*, 4 *Hill*, 384.

3. A statute authorizing the court of quarter sessions to incorporate any town or village containing a certain number of inhabitants, on the petition of a majority of the freeholders residing within the limits of the village, does not authorize the court to incorporate into a borough two or more distinct villages, together with a tract of open

farming country. *Pa. Supreme Ct.* 1843, *Case of the Borough of West Philadelphia*, 5 *Watts. & S.* 281.

4. Acceptance not necessary. Towns exist at the pleasure of the State, and not at their own. *Ms. Supreme Ct.* 1843, *Gorham v. Springfield*, 21 *Ms.* 58.

5. Hence it is not necessary that a newly incorporated town should accept the act of incorporation. The rule requiring acceptance of charters applies only to private corporations. *Id.*

6. By the mere passage of an act incorporating a town or other public corporation of a municipal character, the corporation is completely constituted and entitled to the rights and subject to the liabilities thereof, whether the inhabitants are pleased or displeased. Municipal corporations are absolutely created by the act of incorporation itself, without the acceptance of the people, or any act on their part, unless otherwise provided by the act itself. *N. H. Supreme Ct.* 1856, *Berlin v. Gorham*, 34 *N. H.* 266.

7. A charter granted by the legislature to a municipal corporation, may however be constitutionally submitted to the corporators for their acceptance before it goes into operation; and its going into effect may be made to depend on their acceptance or rejection. It is well settled that the legislative authority cannot be delegated; but a vote of acceptance by the corporators, of the charter as tendered, is not an act of legislation. *N. J. Supreme Ct.* 1854, *City of Paterson v. Society for Establishing Manufactures*, 4 *Zabr.* 385.

8. How it may be expressed. In general, if a charter imposes no particular mode of expressing acceptance, the fact that the corporate body have acted under it, sufficiently evinces that it has been accepted. *N. C. Supreme Ct.* 1855, *Taylor v. Commissioners of Newberne*, 2 *Jones Eq.* 141.

9. What operates as a charter. That the grant or charter of a township does not create a town corporation; though the grantees are a *quasi* corporation for the sale and partition of their lands,—see *Wells v. Burbank*, 17 *N. H.* 393.

10. When proof of incorporation may be dispensed with. In public affairs, where the people have organized themselves under color of law into the ordinary municipal bodies, and have gone on year after year

raising taxes, making improvements, and exercising the usual franchises of a municipal corporation, their rights are properly regarded as depending quite as much on acquiescence, as on regularity of origin, and no *ex post facto* inquiry can be permitted to undo the corporate existence. Whatever may be the rights of individuals prior to such general acquiescence, the corporate standing of the community can be no longer open to question. *Mich. Supreme Ct.* 1867, *People v. Maynard*, 15 *Mich.* 468.

11. What is competent. Where no charter or act of incorporation of a place can be found, its incorporation as a town may be proved by reputation, or by user of the corporate powers of a town with the knowledge or assent of the legislature, for a period so long as to furnish evidence of a prescriptive right. *N. H. Supreme Ct.* 1857, *Bow v. Allentown*, 34 *N. H.* 851. And see *Jameson v. People*, 16 *Ill.* 257.

12. Parol proof of the existence and loss of an act incorporating a town, is admissible, the inhabitants having acted as a town for more than thirty years. *Mass. Supreme Ct.* 1815, *Stockbridge v. West Stockbridge*, 12 *Mass.* 400.

13. Proof that many years ago a town appointed town officers, and conducted its affairs as an organized town, is presumptive evidence of its legal organization. *Vt. Supreme Ct.* 1856, *Londonderry v. Andover*, 28 *Vt.* 416.

14. Evidence of the destruction or disappearance of public records is admissible toward accounting for the loss of a municipal charter. *N. H. Supreme Ct.* 1857, *Bow v. Allentown*, 34 *N. H.* 851; *Mass. Supreme Ct.* 1809, *Dillingham v. Snow*, 5 *Mass.* 547.

See INCORPORATION.

15. Correction of error. A mistake in the charter of a township cannot be corrected by a court of law, in a suit between individuals. [6 *Cow.* 281; 10 *Johns.* 23.] *N. H. Superior Ct.* 1880, *Enfield v. Permit*, 5 *N. H.* 280.

16. Municipal charters subject to alteration. The general rule is that the legislature (if not restricted by the constitution) has full power and control over municipal corporations; and may create, divide, change, or abolish them as, in the judgment of the legislature, the public good requires. *Ill. Supreme Ct.* 1848, *People v. Wren*, 4 *Scam.* 273; 1850, *County of Richmond v. County of Lawrence*,

12 *Ill.*; 1859, *Robertson v. City of Rockford*, 21 *Ill.* 451; *Ind. Supreme Ct.* 1837, *Sloane v. State*, 8 *Blackf.* 361; *Mo. Supreme Ct.* 1845, *City of St. Louis v. Russell*, 9 *Mo.* 507; *N. J. Supreme Ct.* 1854, *Paterson v. Society for Manuf.* 4 *Zabr.* 385.

17. Where the grantees as well as the grantors of a franchise are public bodies, created solely for municipal and political objects, the grant is not beyond the legislative power to revoke. A legislative body cannot part with its powers, or delegate them to municipalities, so as to be unable to exercise them on all suitable occasions. Thus a grant to a town of the right to establish a ferry, is, both from the relation of the parties and the subject-matter, to be deemed rather as a public law than as a contract; and is repealable. *U. S. Supreme Ct.* 1850, *East Hartford v. Hartford Bridge Co.* 10 *How.* 511.

18. Over public corporations, the legislature, as the trustee or guardian of the public interests, has the exclusive and unrestrained control. The right to establish, alter, or abolish such corporations, seems to be a principle inherent in the very nature of the institutions themselves; since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. Such institutions are the auxiliaries of the government in the important business of municipal rule, and cannot have the least pretension to sustain their privileges, or their existence upon anything like a contract between them and the legislature; because there can be no reciprocity of stipulation, and their objects and duties are incompatible with everything of the nature of compact. *Md. Chancery*, 1828, *McKim v. Odom*, 3 *Bland*, 407.

19. The power of the legislature of Connecticut to divide towns at their pleasure, and apportion the common property and common burdens in such manner as to them shall seem reasonable and equitable, is well settled [14 *Conn.* 469; 16 *Id.* 172]. And the court will not inquire into the justice of an act of division which imposes upon one of the two towns the whole burden of maintaining a bridge between them.* *Conn. Supreme*

* See to the same general effect, *Ell v. Village of Cornsag*, 15 *N. Y.* 297; *People v. Draper*, *Id.* 532, 549; *Smith v. Village of Adrian*, 1 *Mich.* 485; *Montpelier v. East Montpelier*, 29 *Vt.* 12; *Waring v. Mayor &c. of Mobile*, 24 *Ala.* 701; *Mayor &c. of Baltimore v. State*, 15 *Md.* 376.

Ct. 1855, *Granby v. Thurston*, 23 *Conn.* 416.

20. Where a town was, by its charter of incorporation, authorized to make all such ordinances as should be consistent with the constitution and laws of the State, and passed an ordinance of that character, it was held that a subsequent general statute, passed by the legislature, might constitutionally annul such ordinance. It is competent for the legislature to modify or restrict the charter of a municipal corporation without its consent. *Ohio Supreme Ct.* 1829, *Town of Marietta v. Fearing*, 4 *Ohio*, (*Hamm.*) 427.

21. As to the power of the legislature to repeal a general statute of limitations in favor of a municipal corporation,—see *Underhill v. Trustees of City of Sonora*, 17 *Cal.* 172.

22. The property of a municipal corporation held for purposes of income or for sale, and unconnected with purposes of municipal government, may be constitutionally subjected by act of the legislature to seizure and sale upon execution for the debts of the corporation. [Reviewing many authorities.] *N. Y. Ct. of Appeals*, 1865, *Darlington v. Mayor*, 31 *N. Y.* 164, 187; 28 *How. Pr.* 352. But compare *City of Louisville v. University of Louisville*, 15 *B. Monr.* 642.

23. Validity of submission to the people. It is competent for the legislature to enact a penal law which shall have effect only in those towns, &c., which by vote adopt it. *N. H. Supreme Ct.* 1855, *State v. Noyes*, 10 *Post.* 279.

24. Although the legislature cannot delegate the law making power, it is competent for them to enact a law with a provision that such law shall cease to exist unless a municipal corporation which it affects signify their assent to it within a specified period. *N. Y. Superior Ct.* 1856, *Corning v. Greene*, 23 *Barb.* 83.

25. It is competent for the legislature to enact amendments to the charter of a municipal corporation, with a proviso that the electors of the village should be allowed and required to signify their consent and acceptance of such amendments before they should take effect. This is not delegation of legislative powers, but is simply authorizing the members or electors of a corporation to signify whether they will accept a grant of additional powers, or submit to new restrictions. There is a distinction between a bill

submitted to the people of the State at large to determine whether it shall take effect and become a law, and submitting to the inhabitants of a particular locality the prudential question whether they will avail themselves of powers conferred upon them. *N. Y. Ct. of Appeals*, 1863, *Bank of Chenango v. Brown*, 26 *N. Y.* 467.

26. Where an amended charter of a city (New York charter of April 12, 1853) was held a nullity, for the reason that the taking effect of the act was made dependent upon a popular election;—*Held*, further that the defect was cured by a supplementary act (June 14, 1853) providing that the former act should take effect as a law immediately. The latter act was not a mere amendment, but a re-enactment, which gave it effect from that time. *N. Y. Supreme Ct. Sp. T.* 1856, *People v. Stout*, 23 *Barb.* 349; 4 *Add. Pr.* 22; 13 *How. Pr.* 314.

27. Effect of constitutional provisions. The provision of the New York constitution of 1846, art. 8, § 9,—that “it shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations,”—does not restrain the legislature from conferring in their discretion such power upon a municipal corporation. It recognizes a discretion in the legislature, the exercise of which the courts will not review. *N. Y. Ct. of Appeals*, 1858, *Bank of Rome v. Village of Rome*, 13 *N. Y.* 88.

28. And it is not every law affecting the organization of a local court, which is to be deemed a violation of the chartered rights of the municipal corporation, within the provision of the constitution requiring a two-thirds vote to effect such alteration. *N. Y. Ct. of Errors*, 1846, *Morris v. People*, 3 *Den.* 381.

29. The provision of art. 8, § 9, of the constitution of New York of 1846, does not prohibit the legislature from granting to municipal corporations any new and enlarged powers, in respect to the creation of debt. Section 9 concedes and necessarily involves the exercise of a new and enlarged power; and contains only this qualification, that the power granted is to be restricted so as to pre-

vent abuses. The judiciary have no power to correct the errors of indiscretion which the legislature may commit in the exercise of the power it possesses. *N. Y. Supreme Ct.* 1857, *Benson v. Mayor &c. of Albany*, 24 *Barb.* 248. To similar effect are *Clarke v. City of Rochester*, *Id.* 446; 5 *Abb. Pr.* 107; 14 *How. Pr.* 198; *Grant v. Courter*, 24 *Barb.* 232; *N. Y. Ct. of Appeals*, 1858, *Bank of Rome v. Village of Rome*, 18 *N. Y.* 38.

30. Even if a court could properly enter upon the inquiry, as to what is wise and expedient in such matters, no more restrictive rule could be maintained, than that the powers conferred on a municipal corporation must relate to the public interests of the territory, or body of persons within its limits. *N. Y. Ct. of Appeals*, 1858, *Bank of Rome v. Village of Rome*, 18 *N. Y.* 38.

31. Any act which affects the powers of a municipal corporation by enlarging or abridging them, or applying them to new subjects, or authorizing their exercise on new occasions, or in new modes and forms, alters the corporation, within the meaning of a constitutional restriction requiring the assent of two-thirds of the members elected to each branch of the legislature, to the passage of a bill altering a body politic or corporate. *N. Y. Supreme Ct.* 1856, *Corning v. Green*, 23 *Barb.* 33, 53.

32. A statute authorizing the commissioners of highways of a chartered village to alter a highway, is but an exercise of the right of eminent domain. Since it does not impair or enlarge the powers or duties of the officers of the village is not forbidden by a constitutional provision requiring the assent of two-thirds of the members elected to each branch of the legislature to a bill altering a body politic, &c. *N. Y. Supreme Ct.* 1849, *Smith v. Helmer*, 7 *Barb.* 416.

33. Effect of general statutes upon corporate acts. Where the right to pass by-laws, and fix penalties, and sue for and recover them for their own sole use, has been given to a municipal corporation by its charter, a subsequent statute imposing a penalty for an act, does not necessarily operate as a repeal of a previous municipal ordinance which imposed a penalty for the same act. Unless irreconcilably inconsistent, both may stand together. *N. Y. Com. Pl.* 1854, *Mayor &c. of N. Y. v. Hyatt*, 8 *E. D. Smith*, 156; *N. Y. Superior Ct. Sp. T.* 1853, *Russ v. Mayor &c. of N. Y.* 12

N. Y. Leg. Obs. 38. Compare *Mayor &c. of N. Y. v. Nichols*, 4 *Hill*, 209.

34. If, after the legislature have conferred upon a borough power to make by-laws or municipal ordinances, they pass a general statute prohibiting acts under specified penalties, which the borough had the power to prohibit, such general law takes away the power of the borough to pass an ordinance affixing any penalty to the same acts. There is no difference in this respect between an ordinance adopted before and one adopted after the enactment of such a law. The law would abrogate any ordinance previously adopted, and it equally takes away the power of the municipality to pass such an ordinance subsequently, for the same reason, viz., that a by-law would be unreasonable or oppressive which should have the effect that a person might be tried and punished twice for the same offence. *Conn. Supreme Ct.* 1854, *Southport v. Ogden*, 23 *Conn.* 128.

35. A general statute repealing all acts contrary to its provisions does not repeal the ordinances in any municipal corporation on the same subject matter. *N. J. Supreme Ct.* 1852, *State v. Branin*, 3 *Zabr.* 484; 1855, *State v. Clarke*, 1 *Dutch.* 54. Compare *Altamus v. Mayor &c. of N. Y.* 6 *Duer*, 446.

36. A statute erecting a borough into a city does not, of itself, affect existing borough ordinances. A change in the form of government does not necessarily abrogate the existing law. *Pa. Supreme Ct.* 1858, *Trustees of Erie Academy v. City of Erie*, 81 *Pa. St.* 515.

37. Where the charter of a city forbade incurring any debts beyond a specified amount, and the debt had reached the limit, and afterward, by a special act of the legislature, they were authorized to issue bonds for a specified amount, so as to aid in the construction of a railroad,—*Held*, that the validity of the bonds was not affected by the fact that such issue made the total debt of the city exceed the amount limited in the charter. *U. S. Supreme Ct.* 1860, *Amey v. Mayor &c. of Alleghany City*, 24 *How.* 364. Compare *St. Louis v. Alexander*, 38 *Mo.* 483.

See LEGISLATION.

38. Effect of municipal charter on statutes. A provision in a general law is repealed, *pro tanto*, by a provision in a charter of a municipal corporation passed subsequently thereto, when such provisions are in direct conflict, or the intention of the legislature to that

effect is clearly expressed. *Minn. Supreme Ct.* 1864, *Tierney v. Dodge*, 9 *Minn.* 166.

39. That an act incorporating a town, and vesting the authorities of the town with certain powers, does not divest the State or county courts of powers vested in them by the general law, unless the act of incorporation declares the powers vested in the corporation to be exclusive,—see *Baldwin v. Green*, 10 *Mo.* 410.

For the general rules applicable to Charters of municipal in common with other corporations, the extent of the legislative power over them, &c., see CHARTERS; INCORPORATION; LEGISLATION.

For Constitutional provisions relative to municipal corporations, see CONSTITUTIONS.

II. POWERS.

1. General principles.

40. Municipal corporations cannot abridge their powers. A municipal corporation cannot—*e. g.* by making a contract—abridge the legislative power with which it is invested by its charter. *U. S. Supreme Ct.* 1821, *Gosler v. Corporation of Georgetown*, 6 *Wheat.* 593.

41. It is not in the power of a common council to bind its legislative capacities by any private arrangement or stipulations, so as to disable itself from enacting any law that might be deemed essential for the public good. *N. Y. Supreme Ct.* 1844, *Mayor &c. of N. Y. v. Britton*, 12 *Abb. Pr.* 367, *note*; *S. C. sub nom. Britton v. Mayor &c. of N. Y.* 21 *How. Pr.* 251.

42. A distinction is to be observed between the legislative powers of a municipal corporation and the exercise of their rights over property belonging to them; and no act done by them in regard to their property, can be set up as an estoppel to restrain them from acting in matters which require legislation for the interests of the city. *N. Y. Supreme Ct. Sp. T.* 1858, *Opening of Albany Street*, 6 *Abb. Pr.* 278.

43. — cannot delegate them. That a municipal corporation holds its powers in trust, and cannot delegate them,—see *Oakland v. Carpentier*, 13 *Cal.* 540; *Whyte v. Nashville*, 2 *Swan*, 364.

44. The common council of a municipal corporation must exercise the functions imposed on them by their charter, and have no power to delegate them to others. The power

to sell granted to such a body does not include the power to make a deed of trust, or place the property committed to their custody in charge of others, for a term of years, with power to sell as they may deem advisable; nor to create a new department of city government, to divert the revenues and property of the city from their legitimate source, and place them in the hands of those, neither chosen by, nor responsible to its corporators. *Cal. Supreme Ct.* 1852, *Smith v. Morse*, 2 *Cal.* 524.

45. Mode of exercise. The rule is general and applicable to the corporate authorities of all municipal bodies, that where the mode in which their power on any given subject can be exercised, is prescribed by their charter, the mode must be followed; it constitutes the measure of the power.* *Cal. Supreme Ct.* 1862, *Zottman v. City of San Francisco*, 20 *Cal.* 96.

46. Mistake as to statute. When a municipal corporation attempt to conduct a proceeding under the provisions of a law which has ceased to exist, their doings are valid if there are other laws in existence authorizing the proceeding, and the proceedings are found to be in accordance therewith. *N. J. Supreme Ct.* 1859, *State v. Jersey City*, 3 *Dutch.* 493.

47. Presumption in favor of discretion. Courts are bound to assume, where a discretion is vested in a municipal body exercising functions of a legislative character, that good reasons existed for doing an act which was the result of such a discretion. *N. Y. Com. Pl. Sp. T.* 1858, *N. Y. & Harlem R. R. Co. v. Mayor &c. of N. Y.* 1 *Hilt.* 562.

48. No implied powers. Towns, like other corporations can exercise no powers except such as are expressly or impliedly delegated to them by the legislative power of the State. *Conn. Supreme Ct.* 1864, *Booth v. Town of Woodbury*, 32 *Conn.* 118; *Webster v. Town of Harwinton*, *Id.* 181; *Ms. Supreme Ct.* 1866, *Alley v. Inhabitants of Edgecomb*, 58 *Me.* 446.

49. That all powers not expressly granted by the charter of a municipal corporation, or necessary to carry out those powers, are denied; the corporation can take nothing

* An authority given to the "city of Pittsburgh" to subscribe for the stock of a railroad company,—*Held*, properly exercised by the mayor, aldermen, and citizens of Pittsburgh, that being the corporate title of the city. *Pa. Supreme Ct.* 1856, *Commonwealth v. Pittsburgh*, 34 *Pa.* 344.

by implication,—see *Leavenworth v. Norton*, 1 *Kans.* 432; *Parker v. Baker*, 1 *Clarke Oh.* 228; *Kyle v. Malin*, 8 *Ind.* 34; *Ezzy. Burnett*, 30 *Ala. N. S.* 461; *Hooper v. Emery*, 14 *Me.* 375.

50. A municipal corporation has not, in general, power to make ordinances for the construction of canals, turnpikes, or railroads, beyond the territorial limits of its jurisdiction; nor to borrow money and pledge or incumber the individual property of its citizens for that purpose. And where special legislative authority is asserted for such purposes, it must be shown to have been conferred in express terms, and is not to be assumed from inference or construction. [*Wilc. on Corp.* 26; 1 *Durnf. & E.* 124.] *U. S. Circ. Ct. (Pa.)* 1853, *Oevricke v. City of Pittsburgh*, 7 *Am. Law Reg.* 725.

51. What is a corporate purpose. The question what is a "corporate purpose" within the constitutional provisions relating to the powers of municipal corporations, must be decided by the facts of each particular case; but the judgment of the local government of such a corporation may in general be safely taken as *prima facie* evidence as to whether the object proposed is a legitimate "corporate purpose." It is not necessary that the object for which a tax is imposed by the corporate authorities should be within the corporate limits to make it a corporate purpose. It is sufficient if it be a matter of vital importance to the permanent interests of the corporation, although situated beyond the limits thereof; and an appropriation may consequently be made to the construction of a part of a public work lying beyond the limits of the State. *Tenn. Supreme Ct.* 1859, *McCallie v. Mayor &c. of Chattanooga*, 8 *Head*, 317.

52. Enlistments. It is no part of the corporate duty of towns, as such, to provide for the public defence. *Me. Supreme Ct.* 1866, *Alley v. Inhabitants of Edgecomb*, 53 *Me.* 446.

53. Towns have no authority, as part of their ordinary powers, to raise money to pay bounties to volunteers in the military service of the United States. *N. H. Supreme Ct.* 1863, *Crowell v. Hopkinton*, 45 *N. H.* 9.

54. A town has no power to raise money to pay commutations to men drafted into the military service of the United States; and a vote of the town for such purpose, without subsequent legislation to render it valid, is

wholly unauthorized and illegal. *Me. Supreme Ct.* 1865, *Barbour v. Inhabitants of Camden*, 51 *Me.* 608.

55. Military service is due from the citizen to the country in which he resides, and is not rendered for or in behalf of his town. The adoption of town boundaries, as convenient limits of sub-districts in raising quotas, imposed no new duties upon the municipal corporations; which were created for other special purposes. *Me. Supreme Ct.* 1866, *Alley v. Inhabitants of Edgecomb*, 53 *Me.* 446.

56. Where a town having no power conferred upon it by the legislature for such purpose, voted money for bounties to men drafted into the military service of the United States;—*Held*, that the legislature had power to authorize such town to confirm its action by vote, and such confirmatory action of the town would be valid. *Conn. Supreme Ct.* 1864, *Booth v. Town of Woodbury*, 32 *Conn.* 118; 1866, *Bartholomew v. Harwinton*, 33 *Conn.* 408.

57. Apprehension of criminals. A town cannot legally raise money for the apprehension and conviction of criminals. *Me. Supreme Ct.* 1863, *Gale v. Inhabitants of South Berwick*, 51 *Me.* 174.

58. 4th of July. The power of a town to appropriate money for the celebration of the Fourth of July,—denied. *Hood v. Lynn*, 1 *Allen*, 108; *New London v. Brainard*, 23 *Conn.* 552.

59. Maintaining nuisance. A municipal corporation has no more right to maintain a nuisance on its lands than a private person possesses. *N. Y. Supreme Ct. Sp. T.* 1848, *Brower v. Mayor &c. of N. Y.* 8 *Barb.* 254.

60. Extra territorial power. A municipal corporation having power by its charter "to purchase, hold, and convey any estate, real or personal, for the public use of said corporation, is not thereby authorized to hold lands beyond its boundaries, for governmental purposes,—*a. g.* to be used as a highway,—for this would conflict with the jurisdiction of surrounding towns; and a conveyance to such corporation, of lands beyond its boundaries, for the purpose of a street is void. *N. Y. Ct. of Appeals*, 1853, *Riley v. City of Rochester*, 9 *N. Y.* (5 *Seld.*) 64.

61. Assuming liability of another. A municipal corporation has no right to assume

the defence of an action to which it is not a party, and which it has no interest in resisting,—*e. g.* actions brought against the supervisors of the county for penalties for an alleged neglect of duty in refusing to audit and allow salaries to associate judges of general sessions of the city and county, appointed under an unconstitutional law,—nor to pay judgments and costs in such suits; and negotiable drafts drawn for such payments are void. *N. Y. Ct. of Appeals*, 1850, *Halstead v. Mayor &c. of N. Y.* 3 *N. Y.* (3 *Comst.*) 430.

62. **Property rights of municipal corporations.** Although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property, in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons. *Cal. Supreme Ct.* 1855, *Touchard v. Touchard*, 5 *Cal.* 306.

63. A municipal corporation, outside of its governmental capacity, is in many respects to be regarded the same as a private corporation; and the officers and agents through whom it acts must be presumed to know the contracts it enters into, the purchases it makes, and the property it uses. The knowledge of such matters must rest with some of its officers, and the corporation cannot shelter itself under an assertion of ignorance. *Cal. Supreme Ct.* 1858, *San Francisco Gas Co. v. City of San Francisco*, 9 *Cal.* 453.

64. A railroad company was authorized by grant from the legislature to construct and operate a railroad through the streets of a city, and the common council of the city gave its assent to the construction of the road upon a particular route. *Held*, that the common council had no power by resolution to impair or annul the grant to the company. *N. Y. Supreme Ct.* 1860, *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.* 23 *Barb.* 358.

65. **Effect of amending charter.** An act amending the charter of a corporation may so entirely change the corporate body, that in order to transfer to the new the particular powers of the old corporation, it will be nec-

essary that there should be an enabling clause, empowering the new corporation to act in the particular case, or a general clause embracing the particular case. *U. S. Supreme Ct.* 1830, *Fowle v. Common Council of Alexandria*, 3 *Pet.* 398. And see *Mayor &c. of Savannah v. Steamboat Co. of Georgia*, *B. M. Charlt.* 342.

66. **Effect of division of town.** A town incorporated may acquire property, real or personal; it enjoys corporate rights and privileges, and is subject to obligations and duties. If a part of its territory and inhabitants are separated from it, by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights and privileges, and remains subject to all its obligations and duties, unless some new provision is made in the act. Thus it continues seized of all its lands, possessed of all its personal property, entitled to all its rights of action, bound by all its contracts, and subject to all its duties. And by a separation of a part of its territory and inhabitants, by annexation, or a new incorporation, the obligation in relation to the support of the poor remains unaltered. Where no other legislative provision is made, the settlement of any person in the old town is not affected by the new incorporation, unless, at the time of incorporation he shall dwell within the limits of it, and as a party to it acquire a new settlement in the new town. *Mass. Supreme Ct.* 1868, *Inhabitants of Windham v. Inhabitants of Portland*, 4 *Mass.* 384. And see *North Yarmouth v. Skillings*, 45 *Me.* 133; *Ashby v. Wellington*, 8 *Pick.* 524; *Baptist Society v. Candia*, 2 *N. H.* 20.

67. Where an act incorporating a part of a town, and erecting it into a new town, provides that all the debts due to or from the original town shall be divided between the towns in proportion to the State valuation; and that the poor with which the original town was then chargeable, together with those then removed therefrom, and afterward returning for support, shall be divided in the same proportion; the legal construction of such a provision is, that the debts are to be paid to or by the original town, who may be compelled by the new town to pay over to it its proportion of debts received, and may compel such new town to reimburse its proportion of debts paid; and that the

charges of maintaining the poor, and not their persons, are to be divided, each town having a remedy against the other for the reimbursement of any excess of such charges beyond its due proportion. *Mass. Supreme Ct.* 1808, *Inhabitants of Brewster v. Inhabitants of Harwich*, 4 *Mass.* 378.

68. Under the provision of the Massachusetts statute of 1788, ch. 10, § 4,—that, where one or more parishes are set off from a town, the remaining part constitutes the first parish,—the property remains in the first parish; and a subsequent statute authorizing “the town” to apply the interest “as the inhabitants in legal town meeting shall direct,” must be taken to mean that the *first parish* may do so. *Ma. Supreme Ct.* 1830, *Richardson v. Brown*, 6 *Greenl.* 355.

69. Erecting a new town does not, without express provision, impair or take away the rights of the old town, in regard to the common property not within the limits of the new. *N. Y. Chancery*, 1817, *Denton v. Jackson*, 2 *Johns. Ch.* 320.

70. A *quo warranto* will not issue to disqualify a justice of the peace from executing the functions of his office, because the township in which he was elected and where he resides, has been changed into a new municipality. *N. J. Supreme Ct.* 1864, *State v. Dilloway*, 31 *N. J. Law* (2 *Vroom*), 42.

71. Where a part of a town had been annexed, by the legislature, to a parish in another town, without previous notice to such town or the inhabitants of the part so annexed, and the same had been acquiesced in for nearly eighty years,—*Held*, that it might be presumed that the act was afterward ratified by such acquiescence. *Mass. Supreme Ct.* 1818, *Cobb v. Kingman*, 15 *Mass.* 197.

For the effect of Division of corporations upon the corporate identity, and for other changes, see SUCCESSION.

2. Powers in respect to property.

72. The power to take property. A municipal corporation may, at common law, purchase and hold real property necessary for its powers. *N. Y. Ct. of Appeals*, 1856, *Ketchum v. City of Buffalo*, 14 *N. Y.* (4 *Kern.*) 356; S. P. 1858, *Peterson v. Mayor &c.* of N. Y. 17 *N. Y.* 449.

73. That they may lawfully take by purchase or devise, and hold, real estate, other than such as may be necessary to erect pub-

lic buildings upon,—see *Worcester v. Eaton*, 18 *Mass.* 371.

74. — by devise. A municipal corporation, empowered by charter to take, purchase, and hold forever, both real and personal estate, without any limitation as to the amount thereof, or as to the purposes to which the same is to be applied, and the objects of which corporation include the suppression of vice and immorality, the advancement of public law and order, the promotion of trade, industry and happiness, may take by devise, a bequest of real and personal estate for the erection and support within its limits of an orphan's college, &c.* *U. S. Supreme Ct.* 1844, *Vidal v. Girard*, 2 *How.* 127.

75. A legacy to a town, for the purpose of erecting a town house, for transacting town business, is valid as a charitable bequest. *N. Y. Chancery*, 1823, *Coggeshall v. Pelton*, 7 *Johns. Ch.* 292.

76. — to execute trusts. That a municipal corporation is not incompetent to hold property as a trustee and to administer the trust,—see *Chambers v. St. Louis*, 29 *Mo.* 543; *Holland v. San Francisco*, 7 *Cal.* 361; *Webb v. Neal*, 5 *Allen*, 575.

77. Disposing of streets. That the authorities of a municipal corporation hold the title to streets, &c., in trust for the public use, and cannot convey them or grant easements upon them except in the execution of that trust,—see *Milhau v. Sharp*, 15 *Barb. (N. Y.)* 198; *Stuyvesant v. Pearsall*, *Id.* 244; *Giltner v. Trustees of Carrollton*, 7 *B. Monr.* 680.

78. Money which is paid into the treasury of a town under the provisions of a statute, becomes part of the general funds of the town, and can be appropriated and used only for such purposes as come within the scope of legitimate municipal expenditures, and are recognized by law to be for the public benefit and advantage. Thus, under a statute providing that the profits of the herring fisheries of a certain river should be paid

* The city of Cincinnati,—*Held*, capable, under the law of Ohio, of taking, as a corporation, property devised to it in trust for a charitable use. *Perrin v. Carey*, 24 *How. (U. S.)* 463.

S. P. as to the city of Philadelphia under the laws of Pennsylvania. *Girard v. City of Philadelphia*, 4 *Pa.* 412.

S. P. as to the city of St. Louis under the laws of Missouri. *Chambers v. St. Louis*, 29 *Mo.* 543.

History of the power of municipal corporations to take by will; and the rules of law on this subject in force in Louisiana,—reviewed. *McDonough v. Murdoch*, 15 *How. (U. S.)* 367.

into the treasuries of certain towns, in proportion to their respective valuations;—*Held*, that the towns had no authority to vote to distribute the money on the polls. *Mass. Supreme Ct.* 1865, *Allen v. Inhabitants of Marion*, 11 *Allen*, 108.

79. The power of expending money for public purposes in municipal corporations is lodged with the legislative and not the executive authorities. Hence the city councils, and not the heads of departments, are empowered to authorize public expenditures. *Pa. Supreme Ct.* 1864, *City of Philadelphia v. Flanigen*, 47 *Pa. St.* 21.

As to the power of municipal corporations to incur obligations by contract, see *infra*.

As to their power to bind themselves by subscriptions to stock of railroad and other improvement companies, see SUBSCRIPTIONS.

3. Powers of government.

80. Power to pass ordinances. It is competent for the legislature to grant to a municipal corporation a power to make by-laws and ordinances for the government of the place. *N. H. Superior Ct.* 1854, *State v. Clark*, 8 *Foot.* 176. And see *City of Peoria v. Calhoun*, 39 *Ill.* 317.

81. A municipal government may be authorized to pass ordinances imposing new and superadded penalties for acts already penal by the laws of the State. *N. Y. Supreme Ct.* 1857, *City of Brooklyn v. Toynbee*, 31 *Burr.* 282. And see *State v. Cowan*, 29 *Mo.* 830; *Amboy v. Sleeper*, 31 *Ill.* 499.

82. That a statute allowing a magistrate of police of an incorporated town to fine offenders for disorderly conduct not cognizable by the general law, is not unconstitutional,—see *Commissioners v. Harris*, 7 *Jones, Law*, 281.

83. A power given by charter to a municipal corporation to legislate by ordinances upon nuisances, does not have the effect to abrogate the common law rule, that a common nuisance—*e. g.* keeping a public gaming table—is an offence in itself; at least until the municipal corporation adopt a by-law covering the whole extent of the common law offence. The grant of a power to prohibit all kinds of gaming, followed by the adoption of a by-law prohibiting the keeping a faro table, leaves one who keeps a public faro table liable to two prosecutions—

one under the by-law, and one at common law. *Circ. Ct. D. C.* 1829, *United States v. Holly*, 3 *Cranah C. Ct.* 656.

84. Under section 5 of the amended charter of 1804, giving the common council of Alexandria power to make “all laws which they shall conceive requisite,” “for the regulation of the morals and police of the town,” and “for the prevention and removal of nuisances,” “and to enforce the observances of their said laws by reasonable penalties and forfeitures, to be levied upon the goods and chattels of the offender;” the common council have power to prohibit, by by-laws, the keeping of gaming tables in the town, under a penalty, to be recovered by warrant before the mayor, in the name of the common council, and to be levied upon the goods and chattels of the offender; although he may be also liable to prosecution under the Virginia act of 1798, 373, adopted by the act of Congress of Feb. 27, 1801. *Circ. Ct. D. C.* 1818, *McLaughlin v. Stephens*, 2 *Cranah C. Ct.* 148.

85. But an ordinary power to pass ordinances for the well being and good police of the town, does not authorize the passage of ordinances in relation to matters already provided for by the general laws of the country. *Superior Ct. of Ark. T.* 1832, *Dep. Smith, Hempst.* 201. But compare *Borough of York v. Forscht*, 23 *Pa. St.* 391.

86. The legislature cannot confer upon a municipal corporation the power to repeal by ordinance a statute of the State. A by-law of a corporation, repugnant to the constitution, common or statute law of the State, is void. *Ga. Supreme Ct.* 1858, *Haywood v. Mayor &c. of Savannah*, 13 *Ga.* 404. And see *March v. Commonwealth*, 12 *B. Monr.* 25.

As to the Passage, validity, interpretation, and enforcement of ordinances, see *infra*.

87. — as respects non-residents. That a municipal corporation has no power to make a by-law which will be binding on owners of property within its limits, who reside without its limits, as a ground of criminal punishment,—see *Reed v. People*, 1 *Park. Cr. R.* 481.

88. That town ordinances may be binding upon the persons and property, not only of the citizens of the town, but also of non-residents, when they come within the corporate limits of the town,—see *Kennedy v. Sowden*, 1 *M'Mull.* 323.

89. Streets. Upon the power of municipal

authorities to regulate the streets and sidewalks,—see *Dubuque v. Maloney*, 9 *Iowa*, 450; *Commonwealth v. Worcester*, 8 *Pick.* 462; *Washington v. Mayor &c. of Nashville*, 1 *Swan*, 177.

Or the passage of animals through them,—see *Commonwealth v. Bean*, 14 *Gray*, 52; *Commonwealth v. Curtis* 9 *Allen*, 266; *Roberts v. Ogle*, 30 *Ill.* 459.

90. Whether they can subject stray animals, owned by persons not resident in the town, to such ordinances,—see *Marietta v. Fearing*, 4 *Ohio (Hamm.)* 429; *Gilmore v. Holt*, 4 *Pick.* 257.

91. Wharves. The legislature may delegate to a municipal corporation the power to pass ordinances regulating wharves, &c. *N. Y. Com. Pl.* 1854, *Mayor &c. of N. Y. v. Ryan*, 2 *E. D. Smith*, 368.

92. The municipal corporations on the Mississippi river, when authorized by the legislatures of their respective States, have the right to pass rules and regulations relative to their landings; and it is the duty of the courts of the United States to respect them. *U. S. Dist. Ct. (La.)* 1854, *Culbertson v. The Southern Belle*, 1 *Newb.* 461. And see *Remy v. New Orleans*, 15 *La. Ann.* 657.

93. Markets. That municipal corporations have, very generally, the power to establish and regulate markets, within their limits,—see *St. John v. Mayor &c. of New York*, 6 *Duer*, 315; *Wartman v. Philadelphia*, 33 *Pa. St.* 202; *St. Louis v. Jackson*, 25 *Mo.* 37; *Cougot v. New Orleans*, 16 *La. Ann.* 21; *Yates v. Milwaukee*, 12 *Wis.* 678.

94. Upon the extent and limits of the power,—see *Wartman v. Philadelphia*, 33 *Pa. St.* 202; *Davenport v. Kelley*, 7 *Iowa*, 102; *Bethune v. Hughes*, 7 *Ga.* 560.

95. Licenses. That municipal corporations may require persons exercising vocations within their limits which require regulation, to take out licenses therefor; and may impose reasonable license fees,—see *Norwich Gaslight Co. v. Norwich City Gas Co.* 25 *Conn.* 19; *Lawrenceburg v. Wuest*, 16 *Ind.* 387; *Cheney v. Shelbyville*, 18 *Ind.* 84; *Bennett v. People*, 30 *Ill.* 389; *Ash v. People*, 11 *Mich.* 347; *Chilvers v. People*, *Id.* 48; *Baker v. Cincinnati*, 11 *Ohio St.* 584; *Pendue v. Ellis*, 18 *Ga.* 586; *Mayor v. Yuille*, 3 *Ala. (N. S.)* 187; *Carroll v. Mayor &c. of Tuscaloosa*, 12 *Ala. (N. S.)* 178; *Intendant & Council of Greensboro v. Mullins*, 13 *Ala. (N. S.)* 341;

City Council v. Ahrens, 4 *Strobb. Law*, 241; *Harrington v. Trustees of Rochester*, 10 *Wend.* 547; *People v. Mayor &c. of N. Y.* 7 *How. Pr.* 81. But compare *Day v. Green*, 4 *Cush.* 488; *Portland v. O'Neill*, 1 *Or.* 218.

96. Where the trustees of a village corporation were authorized to make such prudential by-laws, rules, and regulations, as they from time should deem meet, relative "to huckster shops in said village," provided they were not inconsistent with the laws of the State or the United States,—*Held*, that a by-law passed by the trustees, that hucksters should take and pay for a license from the trustees under a penalty, especially where it did not expressly appear that prudence required such a by-law, was in restraint of trade, and void, as contrary to the general principles and policy of the laws of the State. *N. Y. Supreme Ct.* 1826, *Dunham v. Trustees of Rochester*, 5 *Cow.* 462. And see *Freeholders v. Barber*, 2 *Halst.* 64.

97. A power in a city charter "to tax or entirely suppress all petty groceries," does not confer the right to "license" liquor retailers, the word "license" being used in other parts of the charter to express its ordinary meaning. *Mass. Ct. of Errors*, 1858, *Leonard v. City of Canton*, 35 *Mass.* 189.

98. The distinction between a "license fee" and a "tax"—explained. *Ash v. People*, 11 *Mich.* 347; *Chilvers v. People*, *Id.* 48; *People v. Mayor &c. of N. Y.* 7 *How. Pr.* 81.

99. Money charged by a municipal corporation for a license, and paid with full knowledge of the facts, will be deemed to have been paid voluntarily though paid under protest, and cannot be recovered back. *Mass. Supreme Ct.* 1864, *Cook v. City of Boston*, 9 *Allen*, 398.

100. An ordinance relating to a market, provided that the clerk should collect the license fee; give a certificate, and that a license should issue upon payment of the fee. *Held*, that the payment of the fee conferred on the party the right to use the stand against the city though the license has not been issued; and that the paper in the form of a receipt signed by the clerk, acknowledging the payment of a fee for a license stand, was a certificate of payment of the license fee, and not for rent. *Md. Supreme Ct.* 1859, *Hatch v. Pendergast*, 15 *Md.* 251.

101. That the grant by the city of a license and lease of a market stall, does not amount

to a contract on their part to prevent unlicensed sales by other persons, the breach of which will excuse payment of rent; although it is the duty of the officers of the city under its ordinances to prevent such sales—see *Peck v. Austin*, 23 *Texas*, 261.

102. That the grant of a license from a day past releases the penalties for retailing without license after that day, though before the taking out of the license,—see *City Council v. Corleis*, 2 *Bailey*, 186.

103. Nuisances. That the legislature has authority, under the constitution, to confer on an incorporated town the power to declare what shall be nuisances, and to provide for their abatement,—see *Roberts v. Ogle*, 30 *Ill.* 459.

104. A municipal corporation has authority to punish nuisances by fine, and may prescribe, by ordinances, what is to be deemed a nuisance in the obstruction of a private street; but it cannot thereby create a civil liability where none exists by law. *Cincinnati Superior Ct.* 1857, *Chambers v. Ohio Life Ins. & Trust Co.* 1 *Disney*, 327; *Vandyke v. City of Cincinnati*, *Id.* 532. See also, *State v. Jersey City*, 5 *Dutch*, 170.

105. The power of making regulations concerning the removal of snow from the tracks of street railroads is vested, in Massachusetts, in the mayor and aldermen of the cities, and the selectmen of the towns, in which such tracks are located. And in the exercise of this power, the removal of snow by the company itself, may be prohibited at such times and places, by the aldermen and selectmen, as in their judgment, the public interests may require. *Mass. Supreme Ct.* 1865, *Union Railway Co. v. Mayor &c. of Cambridge*, 11 *Allen*, 287.

106. Such power may be delegated by the mayor and aldermen of a city to a street commissioner. *Id.*

107. A court will not restrain the erection and continuance, by a municipal corporation, of a lamp post and lamp near a dwelling, upon the ground that it is a nuisance, unless the fact that it is so is clearly established by the proofs. Whether such an erection shall be permitted or continued, rests in the discretion of the corporation, and when no special injury is shown, the court has no right to restrain the exercise of this discretion. *N. Y. Superior Ct.* 1853, *Parsons v. Travis*, 1 *Duer*, 439.

108. A general power conferred upon a municipal corporation to abate nuisances, does not necessarily give the corporation power to destroy a valuable dam which was lawfully erected. They must proceed by indictment or otherwise. *N. Y. Supreme Ct.* 1852, *Clark v. Mayor &c. of Syracuse*, 13 *Barb.* 32.

109. That under such a power the corporation cannot demolish a house because it is occupied by a business which is a nuisance,—see *Welch v. Stowell*, 2 *Dougl. (Mich.)* 332.

110. Under a power to make by-laws relative to nuisances, a by-law prohibiting the keeping of a ball alley for gain is valid. *N. Y. Supreme Ct.* 1843, *Tanner v. Trustees of Albion*, 5 *Hill*, 121. Compare *Jackson v. People*, 9 *Mich.* 111; *Smith v. City of Madison*, 7 *Ind.* 86.

111. Health. In Massachusetts, under Gen. Stat. ch. 26, § 52, providing for the prohibition by a board of health of offensive trades, the selectmen of a town, acting as a board of health, may, by a general order forbid the exercise of an offensive employment therein, without first giving notice to those who are at the time engaged in carrying on the same. *Mass. Supreme Ct.* 1864, *Belcher v. Farrar*, 8 *Allen*, 325.

112. That selectmen of a town exposed to small pox may take measures for its prevention by inoculation, and the town may legally vote a tax to defray the expense,—see *Hazen v. Strong*, 2 *Vt.* 427; *Commissioners v. Powe*, 6 *Jones Law*, 134. But compare *Wilkinson v. Albany*, 8 *Post*, 9.

113. A board of health of a city—*Held*, authorized to rent a building, to be used as a hospital, to protect the city from the cholera. *Ault v. Lexington*, 18 *Mo.* 401.

114. A board of health—*Held*, not authorized to charge the city, by an appointment of a sanitary commission, for services rendered to the board. *Barton v. New Orleans*, 16 *La. Ann.* 317.

115. Burial laws. By-law of the city of New York, prohibiting interments within certain limits of the city, sustained as constitutional and valid. Such by-law is within the power of the corporation to make necessary police regulations. It does not involve a taking of private property for public use, so as to give a right to compensation. Nor does it operate to impair the obligation of contracts, even when the proprietors of

the ground hold it by a lease from the corporation, containing a covenant for quiet enjoyment. *N. Y. Com. Pl.* 1824, Mayor &c. of New York v. Slack, 8 *Wheel. Cr.* 287; *N. Y. Supreme Ct.* 1826, Brick Presbyterian Church v. Mayor &c. of New York, 5 *Cow.* 588; 1827, Coates v. Mayor &c. of New York, 7 *Id.* 585.

116. Thus where the corporation granted a lot to be used as a burying ground, covenanting for quiet enjoyment, and afterward, by ordinance, forbade it to be so used;—*Held*, that this was not a breach of the covenant, but an effectual legislative abrogation of it. *N. Y. Supreme Ct.* 1826, Brick Presbyterian Church v. Mayor &c. of N. Y. 5 *Cow.* 588.

117. Under the Massachusetts Gen. Stat. ch. 28, § 6,—which empowers boards of health to make necessary regulations concerning burial grounds and interments within their respective limits,—a board of health of a city may regulate the removal of the bodies of deceased persons for the purpose of burial. *Mass. Supreme Ct.* 1866, Commonwealth v. Goodrich, 13 *Allen*, 546.

4. Taxes.

118. The power to lay taxes. That in general a legislature may confer upon a municipal corporation the power to levy taxes for the support of their local government,—see *Merrick v. Inhabitants of Amherst*, 12 *Allen*, 500; *Gilkeson v. Frederick County*, 18 *Gratt.* 577; *Wingate v. Sluder*, 6 *Jones Law*, 552; *New Orleans v. Turpin*, 18 *La. Ann.* 56; *Newman v. Justices of Scott County*, 5 *Sneed*, 695.

119. A law authorizing a public corporation to contract a debt, and pay it by means of a tax, is not liable to the objection, that it takes private property for public purposes without compensation; for that clause of the constitution is a limitation, not on the taxing power, but on the right of eminent domain. [4 *N. Y. (4 Comst.)* 419.] *U. S. Supreme Ct.* 1862, *Gilman v. City of Sheboygan*, 2 *Black*, 510. And see *Alexander v. Mayor &c. of Alexandria*, 5 *Cranch*, 1.

120. A provision in the charter of a municipal corporation, authorizing the council, for a special purpose, to levy a special tax on all lands within the corporate limits subject to taxation, not including any improvements made thereon, is not in violation of a consti-

tutional provision requiring uniformity in taxation; the latter provision not applying to special assessments by municipal corporations for local improvements. *Wis. Supreme Ct.* 1833, *Bond v. City of Kenosha*, 17 *Wis.* 284.

121. That the legislature has no right to grant to a town the power of taxing a bank, which is made by its charter exempt from taxation; the State cannot delegate a power to impose a tax which she herself has no right to levy,—see *O'Donnell v. Bailey*, 24 *Miss.* 386; *Bank of Chester v. Chester*, 10 *Rich. Law*, 104.

122. That a legislature may confer upon a city the power to tax a foreign corporation,—see *Commonwealth v. Milton*, 12 *B. Monr.* 212.

123. That a municipal corporation may be authorized to tax property lying within the corporate limits, notwithstanding it is owned by non-residents,—see *Alexander v. Mayor &c.* 5 *Cranch*, 1; *Turner v. Burlington*, 16 *Mass.* 208; *Jones v. Columbus*, 25 *Ga.* 610.

124. But cannot be authorized to tax, for its own local purposes, lands lying beyond the corporate limits,—see *Wells v. City of Weston*, 23 *Mo.* 384; *Wilkey v. City of Pe kin*, 19 *Ill.* 160.

125. Nor to tax property which has merely a legal or constructive status, and is regarded as being with its owner wherever he may be domiciled;—*e. g.* money and choses in action,—see *Johnson v. Lexington*, 14 *B. Monr. (Ky.)* 648.

126. That a power conferred upon a municipal corporation to lay a tax does not prevent the legislature from afterward modifying the tax,—see *Gilman v. City of Sheboygan*, 2 *Black*, 510.

127. It must be expressly conferred. A municipal corporation has no power to levy taxes which are not expressly authorized, either by its charter or by some general provisions of law; and a mandamus cannot be granted to compel the levying of a tax for the payment of a demand due the relator, where no such authority to tax exists. *U. S. Cir. Ct. (Iowa)*, 1863, *United States v. Mayor &c. of Burlington*, 2 *Am. Law Reg. N. S.* 394.

128. That municipal corporation cannot exercise the power or right of taxation, unless such power is expressly given to it by the legislature,—see *Clark v. Davenport*, 14 *Iowa*, 494.

129. Where the State itself has never taxed income, the power to do so in a corporation, must appear by express words or unavoidable implication. *Ga. Supreme Ct.* 1850, *Mayor &c. of Savannah v. Hartridge*, 8 *Ga.* 28.

130. A charter authorizing a municipal corporation to tax real and personal estate, does not of itself necessarily confer the right to tax income. *Ga. Supreme Ct.* 1850, *Mayor &c. of Savannah v. Hartridge*, 8 *Ga.* 28.

131. A municipal corporation, which is empowered by charter to make assessments on inhabitants holding taxable property, may lay taxes on bonds bearing interest. *S. C. Const. Ct.* 1817, *State v. City Council of Charleston*, *Mills*, 86.

132. Authority to purchase stock in a manufacturing corporation, cannot be derived from the ordinary power of taxation conferred on municipal corporations. *Tenn. Supreme Ct.* 1854, *Cook v. Sumner Manuf. Co.* 1 *Sneed*, 698.

133. Interpretation of such laws. Although it is true that laws conferring the power of taxation upon a municipal corporation are to be construed strictly, it is also true that exemptions from taxation are to be construed strictly; and when the power of taxation has been once conferred, it is not to be crippled or destroyed by strained interpretations of subsequent laws. It must be sustained in its full extent under the original grant, until abridged or taken away by a clear expression of the legislative will. *Va. Ct. of Appeals*, 1867, *Orange & Alexandria R. R. Co. v. City Council of Alexandria*, 17 *Gratt.* 176.

134. That where a city government is required to levy a special tax, and set apart the proceeds for a special purpose, this duty will not be performed by the levy of a general tax,—see *State v. Davenport*, 12 *Iowa*, 335.

135. That a charter giving a board power to assess a tax by ordinances, but not fixing any day upon which it shall be assessed, gives power to pass an ordinance under which the tax may be levied upon any day,—see *Harper v. Commissioners*, 28 *Ga.* 566.

136. For what purposes. That although the power to lay taxes is conferred upon a municipal corporation in general terms, and without restriction as to the purposes for which money may be raised, the corporation is limited in the exercise of the power, by the objects of its creation, and can employ it

only for municipal purposes,—see *Foster v. Kenosha*, 12 *Wis.* 616.

137. Under a power conferred upon the freeholders and inhabitants of a city by charter to raise, by tax, in the manner directed, such sums of money as the exigencies of the city may require, a tax imposed for the purpose of raising money to assist the county in building a court house, on condition that the board of justices would contract to allow the corporation the use of the buildings to be erected, is unauthorized by charter and void. The board of justices cannot legally enter into any such stipulation and therefore the foundation of the transaction fails. *N. J. Supreme Ct.* 1796, *Bergen v. Clarkson*, 1 *Halst.* 352.

138. Time allowed for exercise of power. A power given by statute to a public corporation to act within a certain time, must be exercised within that time, or it will be lost. *So held*, as to the power of a board of trustees of a town to assess and levy taxes by a specified day. *Ind. Supreme Ct.* 1860, *Town of Williamsport v. Kent*, 14 *Ind.* 306.

139. Compelling exercise of discretionary power. Where an act says that a city council “may, if it believes that the public good and the best interests of the city require” it, levy a tax to pay its funded debt, a mandamus will lie, at the suit of a judgment creditor on such debt, to make it levy a tax, if it does not. *U. S. Supreme Ct.* 1866, *City of Galena v. Amy*, 5 *Wall.* 705.

140. And when such a power is conferred upon a city, it is no return to an alternative mandamus commanding it to lay a special tax to pay judgments obtained against it for non-payment of its funded debt, that it did, in one year, levy such a tax, and that the funds raised by it are wholly exhausted,—nor that it owes other debts, and that, if the taxes are collected, other creditors will be entitled to share in the proceeds. *Id.*

141. Restraining unauthorized tax. That a tax levied by a city may be declared void by the judiciary for oppression,—see *Mayor of Columbia v. Beaseley*, 1 *Humph.* 232; *Claurent v. Commissioners*, 8 *Md.* 259; *Kip v. Patterson*, 2 *Dutch.* 298.

142. Collection. In New Jersey when a tax has been legally assessed by a corporation clothed with competent powers, the proportion which each individual is bound to pay becomes a debt which may be recover-

ed in an action at the suit of the corporation; but, unless they are expressly authorized by the charter, summary proceedings by distress and warrant of sale to collect this tax, though directed by a by-law, are void; and such by-law is no justification in an action of trespass brought against the officer executing the process at the suit of a person whose goods have been seized. *N. Y. Supreme Ct.* 1796, *Bergen v. Clarkson*, 1 *Halst.* 352.

143. Public moneys raised by a municipal corporation pursuant to law,—*e. g.* by tax,—for purposes of government, and in the hands of its fiscal officer, are not the property of the corporation, or a debt due to it within the meaning of a statute, entitling a judgment creditor of the corporation to an order requiring the officer to pay over the moneys in satisfaction of the judgment. [6 *Hill*, 581; 5 *Abb. Pr.* 104, 268.] *N. Y. Supreme Ct. Chambers*, 1858, *Lowber v. Mayor &c.* of *N. Y.* 7 *Abb. Pr.* 248.

144. Exemption. A municipal corporation authorized to tax lands, cannot, even by a grant or stipulation in a conveyance, exempt a particular parcel of land from taxation. The power to tax, being derived by the corporation from the legislature, must be exercised according to the grant. The corporation have no power either to lay any tax not authorized by statute, nor to change or modify any public law regulating taxation. *N. H. Supreme Ct.* 1850, *Mach v. Jones*, 1 *Forst.* 898; *S. P. Wis. Supreme Ct.* 1860, *Weeks v. City of Milwaukee*, 10 *Wis.* 242.

5. Assessments.

145. Constitutionality of laws authorizing them. An assessment by a municipal corporation, under its charter, of the expense of a local improvement,—*e. g.* grading a street,—upon the owners and occupants of lands deemed benefited thereby, is constitutional. *N. Y. Ct. of Appeals*, 1851, *People ex rel. Griffin v. Mayor of Brooklyn*, 4 *N. Y.* (4 *Comst.*) 419.

146. There being no constitutional prohibition, the legislature may create a district for the special purpose, or they may tax a class of lands or persons benefited, to be designated by the public agents appointed for that purpose, without reference to town, county, or district lines. *Id.* And see *Livingston v. Mayor of New York*, 8 *Wend.* 85.

147. An assessment for benefit to pay the expenses of a local improvement, is taxation, and falls within the legitimate exercise of the taxing power [8 *Wend.* 101; 8 *Paige*, 45]; and hence a sale of property assessed, for non-payment of the assessment, is not a taking of private property for public use which is forbidden by the constitution unless on making compensation. *N. Y. Supreme Ct.* 1844, *Striker v. Kelly*,* 7 *Hill*, 9.

148. That it is competent for the legislature to authorize municipalities to levy special assessments for the purpose of improving streets, upon real estate peculiarly and specially benefited, and in proportion to such benefit,—see *Hill v. Higdon*, 5 *Ohio St.* 248; *Northern &c. R. R. Co. v. Connelly*, 10 *Ohio St.* 159; *Maloy v. Marietta*, 11 *Ohio St.* 636; *Bonsall v. Lebanon*, 19 *Ohio*, 418; *Peoria v. Kidder*, 26 *Ill.* 351; *St. Joseph v. Anthony*, 80 *Mo.* 537.

149. Though the charter of a city require the consent of a majority of owners to be benefited by an improvement, to be obtained before proceeding, this does not make the owners who consent, parties to the contract of the corporation with a contractor for the work, in such sense as to render unconstitutional a statute authorizing the corporation to lay a tax to pay the contractor an extra compensation. Such a statute does not impair the obligation of any contract. *N. Y. Ct. of Appeals*, 1859, *Brewster v. City of Syracuse*, 19 *N. Y.* 116.

150. Combining several objects. Ordinarily, the combining in one proceeding, of improvements and assessments therefor so dissimilar in their natures as the grading of a street and erecting a bridge thereon, and the construction of a sewer, would be vicious in principle. Yet where the sewer is a part of the bridge, and its only purpose is to relieve the bridge from the effect of water collecting upon the street, no valid objection exists. *N. Y. Supreme Ct.* 1863, *People v. Village of Yonkers*, 39 *Barb.* 266.

151. Principles of valuation. The assessment for benefit cannot exceed the actual benefit. One of the jury acted under the belief that it was his duty to assess all the damages upon the property benefited, though such damages, in his opinion, exceeded the benefit,—*Held*, erroneous. *N. Y. Supreme Ct.*

* Reversed on other grounds. *N. Y. Ct. of Errors*, 1845, 2 *Don.* 323.

1882, *Canal Bank v. Mayor of Albany*, 9 *Wend.* 244.

152. Valuing the land at a certain sum per foot is sufficient, for the gross amount is then matter of computation. Verdicts, or estimates in street cases are not scanned with the same technical strictness which is applied to the verdict of a common law jury. *N. Y. Supreme Ct.* 1838, *Coles v. Trustees of Williamsburgh*, 10 *Wend.* 659.

153. Church edifices not likely to be soon appropriated to renting or sale, should be deemed but slightly benefited by local improvements, and should not be assessed in the same proportion as other property.* *N. Y. Supreme Ct.* 1814, *Matter of the Mayor &c. of N. Y.* 11 *Johns.* 77.

To similar effect, in case of a cemetery. 1834, *Matter of Albany Street*, 11 *Wend.* 149.

To similar effect, in case of a reservoir. 1836, *Owners of Ground &c. v. Mayor &c. of Albany*, 15 *Wend.* 188.

154. Apportioning the burden: Though the apportionment of the burden among those who are chargeable is in the discretion of the commissioners, the question who are chargeable is not. The whole district with regard to the benefit of which the improvement is made, must be assessed. Thus where an open drain became a nuisance, and it was necessary to construct a common sewer to obviate it;—*Held*, that the whole ground drained by the sewer must be assessed, not merely that part which might have been alone affected by the nuisance. *N. Y. Supreme Ct.* 1823, *Le Roy v. Mayor &c. of N. Y.* 20 *Johns.* 480.

155. Under the New York city charter of 1850,—providing that the expenses in the construction of sewers shall be assessed and be a lien upon the property to be benefited thereby, in proportion to the benefits,—the jurisdiction conferred is limited to the property to be benefited. When it becomes a question of fact whether a proposed improvement will be advantageous to the property in any designated direction, the decision of the corporate authorities is conclusive. But where it is entirely clear that any portion of a proposed district cannot be benefited,—*e. g.* as where a railroad tunnel lies between the sewer and the portion of the district in ques-

tion,—the corporate authorities in so far have no jurisdiction. [20 *Johns.* 480.] *N. Y. Supreme Ct.* 1856, *People v. City of Brooklyn*, 23 *Barb.* 166.

156. Where a statute relative to a municipal corporation authorized the expenses of paving streets to be assessed upon the owners of lots thereon,—*Held*, that it was not competent for the corporation to pass an ordinance without any consideration moving to them, which should bind them to assess the expenses upon the city at large. When the law authorizes the expenses of such an improvement to be assessed in a particular manner, it is an undue assumption of power to collect them from taxpayers at large. *N. Y. Supreme Ct. Sp. T.* 1862, *Rhineland v. Mayor &c. of N. Y.* 21 *How. Pr.* 304.

157. Where an ordinance directs the assessors to assess an equal amount of the expense upon the city treasury and upon the owners of the lots benefited, the direction can only be satisfied by charging one-half the amount to the treasury, and assessing the other half upon the owners, including the city as owner of public parks adjoining. *N. Y. Supreme Ct.* 1865, *Matter of Turfler*, 44 *Barb.* 46; 19 *Abb. Pr.* 140.

158. Where the assessment for benefit is required to be upon the houses and lots of ground which are intended to be benefited, both must be regarded; and a damage which would be caused to the house by the improvement, must be deducted from the benefit to the lot. *N. Y. Supreme Ct.* 1832, *Canal Bank v. Mayor of Albany*, 9 *Wend.* 244.

159. On an assessment for benefit, required to be laid on the lands "in proportion to the advantage which each shall be deemed to acquire," a parcel is chargeable with such proportion, though it exceeds the cost of the work adjacent to its front. *N. Y. Supreme Ct.* 1840, *Exp. Mayor, &c. of Albany*, 23 *Wend.* 277.

160. Compelling authorities to proceed. A mandamus does not lie to compel a municipal corporation to file and confirm an assessment of damages for the laying out of a street. If the relator's rights are vested, he should sue in assumpsit for the money, or on the case for the refusal to proceed. *N. Y. Supreme Ct.* 1828, *People v. President &c. of Brooklyn*, 1 *Wend.* 318.

161. Relief against unauthorized assessments. That courts of general jurisdiction,

* Compare *Matter of William and Anthony Streets* (19 *Wend.* 673), where this rule was limited to cases where the owner cannot apply the property to general uses; and hospital grounds were held chargeable at market value.

in a city, may examine into the proceedings of the common council, as to all matters connected with a tax, or assessment, without a resort to the common law writ of *certiorari*,—see *Pease v. Chicago*, 21 *Ill.* 500.

162. Assessments are not the subject of equitable relief, except in special cases,—*a. g.* where they assert a lien upon real property, and the defect is not apparent upon the face of the proceedings, or where perhaps, in the case of personal property, enforcing them is shown to be an irreparable injury, or to cause a multiplicity of suits. [2 *N. Y.* 118; 26 *Wend.* 132; 9 *Paige*, 388; 16 *N. Y.* 518; 4 *Barb.* 9.] *N. Y. Supreme Ct.* 1860, *Von Beck v. Village of Rondout*, 15 *Abb. Pr.* 48.

163. An assessment made by a board or body having no power to make it, is a nullity. The power to make an assessment must be conferred by law, and if the assessment is without authority so conferred, it is not even an apparent lien. Hence, in an action to restrain the collection of an alleged illegal assessment, made by a municipal corporation, which, if legal, was a lien on plaintiff's real estate,—if the complaint does not show that its invalidity does *not* appear on the face of the proceedings imposing it, the action cannot be maintained. *N. Y. Ct. of Appeals*, 1826, *Heywood v. City of Buffalo*, 14 *N. Y.* (4 *Kern.*) 534.

164. An owner of land assessed for a local improvement, cannot invoke the equitable powers of the court to relieve against omissions or irregularities in the proceedings of the commissioners. *N. Y. Supreme Ct.* 1860, *Kelsey v. King*, 32 *Barb.* 410; 11 *Abb. Pr.* 180.

165. Chancery has not power to interfere with, or set aside, an assessment on the proprietors and occupants of lots, made by commissioners of estimate and assessment under authority of a statute, for the purpose of a local improvement, on the ground merely of a mistake in judgment of the commissioners and of the common council in ratifying it, where there is no allegation of partiality or unfairness. The remedy, if any, is at law. *N. Y. Chancery*, 1820, *Le Roy v. Mayor &c.* of *N. Y.* 4 *Johns. Ch.* 352; 8 *P.* 1822, *Moore v. Smedley*, 6 *Id.* 28. Followed, 1828, *Patterson v. Mayor &c.* of *N. Y.* 1 *Paige*, 114; 1829, *Whitney v. Mayor &c.* of *N. Y.* *Id.* 548. Compare *Woodruff v. Fisher*, 17 *Barb.* 224.

166. A mistake which, if brought before

the proper officers before confirmation, might have been corrected or explained, is not an error sufficient to vacate the assessment without proof of fraudulent intent. *N. Y. Supreme Ct. Sp. T.* 1862, *Matter of Babcock*, 23 *How. Pr.* 118.

167. That one who is assessed for benefit has a right to object to the report for an erroneous allowance of damages to another, for it enhances his burden. *N. Y. Supreme Ct.* 1841, *Matter of Thirty-ninth Street*, 1 *Hill*, 191. Compare *Coles v. Trustees of Williamsburgh*, 10 *Wend.* 659.

168. Ratification. That where the proceedings for laying an assessment for a municipal improvement, are originally invalid, by reason of a failure to comply with the proper legal requirements, such proceedings cannot be ratified by the subsequent passage of a city ordinance,—see *Matter of Buhler*, 32 *Barb.* 79; 19 *How. Pr.* 817; *Baltimore v. Porter*, 18 *Md.* 284. But compare *Bennett's Case*, 13 *Abb. Pr.* 127.

6. Local improvements.

169. The corporate power to make them.

That a city as a corporation, has control over the public places and highways within its bounds, and it is the province of the corporation, and not of a judicial tribunal, to determine what improvements shall be made in the streets and canals of the city,—see *Inhabitants v. New Orleans*, 14 *La. Ann.* 452; *Howard v. First Independent Church*, 18 *Md.* 145.

170. The power of a municipal corporation to repair or rebuild a bridge, necessarily includes the right of determining, upon the plan and mode of doing it. *N. Y. Supreme Ct.* 1857, *Ely v. City of Rochester*, 26 *Barb.* 133.

171. That an ordinance is not necessary, to authorize the making of ordinary street improvements by a city,—see *Allen v. Silvers*, 22 *Ind.* 491.

172. The existence of a plank road in a street of a city, under authority of a legislative grant to a corporation of the right to build it, does not in itself, and as towards third persons, prevent the city government from exercising their general power on that street, by passing an ordinance to fill it up. *N. J. Supreme Ct.* 1857, *State v. Jersey City*, 2 *Dutch.* 444.

173. That a municipal corporation have authority to employ a surveyor to furnish

copies of an original map, or to make new surveys, and furnish a new map, exhibiting the streets, squares, wharves, &c.—see *People v. Flagg*, 17 *N. Y.* 584; 16 *How. Pr.* 86.

174. It cannot be delegated. A statute authorized the common council of the city of Schenectady to make certain improvements "in such manner as they may prescribe, under the superintendence and direction of the city superintendent." They passed an ordinance, directing certain of such improvements to be made "in such manner as the superintendent, under the direction of the committee on roads of the common council, shall direct and require." *Held*, in an action against the owner of lots for expenses of improvements, that the common council could not so delegate the discretion conferred to fix the manner in which the improvement should be made; and that the ordinance was void. *N. Y. Ct. of Appeals*, 1851, *Thompson v. Schermerhorn*, 6 *N. Y.* (2 *Seld.*) 92.

175. Improvements in another town. That one town cannot raise money to build or repair a bridge in another,—see *Concord v. Boscawen*, 17 *N. H.* 465.

176. The power to aid in works of improvement. That the authority of municipal corporations to loan their credit for works of internal improvement, such as railways, harbors, &c., is derived entirely from legislative grants,—see *Hasbrouck v. Milwaukee*, 18 *Wis.* 87.

For cases upon the power of public corporations to subscribe for stock in railroad companies and other corporations for local improvements, see SUBSCRIPTION.

177. Interference with private property. In the exercise of its corporate powers no city has a right to occupy or appropriate private property without compensation, or do wanton or unnecessary damage, direct or incidental, to private property; but the discretion of the authorities, exercised within its proper limits, cannot be controlled in equity. *N. J. Chancery*, 1854, *Plum v. Morris Canal & Banking Co.* 2 *Stockt.* 256.

178. That neither a town nor its officers have any right to appropriate or interfere with private property, except so far as that right is conferred by statute,—see *Mitchell v. Rockland*, 45 *Me.* 496; *State v. Newark*, 4 *Dutch.* 529.

179. A tract of land within the corporate

limits of the city of Chicago, belonging to the United States, having been reserved for a fort, and public buildings placed thereon, a portion of the tract was afterwards sold, pursuant to a plan on which the whole tract was laid down as divided into lots, and having streets laid out thereon.—*Held*, that it was not within the corporate powers of the city to open these streets on the land not sold to private persons. *U. S. Supreme Ct.* 1848, *United States v. Chicago*, 7 *How.* 185. Compare *Wright v. Victoria*, 4 *Tex.* 375.

180. Where the trustees have no power to remove any building, the value of which exceeds a certain limit, the consent of the owner of a building that they may remove it without any stipulation to estimate the value as within the limit, does not give the trustees jurisdiction. Those who are to be taxed, have a right to object. *N. Y. Supreme Ct.* 1831, *Starr v. Trustees of Rochester*, 6 *Wend.* 564. And see *Cuyler v. Trustees of Rochester*, 12 *Wend.* 165.

181. That the fee of the land may be taken, even where the principal object is to procure materials for the work; and that separate and adjoining parcels may be taken from the same owner at different times,—see *Matter of Water Commissioners*, 8 *Edw.* 552.

182. When land is taken for a municipal improvement, such buildings and parts of buildings as are within the lines of the proposed improvement pass, by force of the statute and the proceedings, to the public authorities, with the land taken—the owners being thereby divested of their title; while the residue of such buildings remain to the owners, with the land upon which they stand. *N. Y. Supreme Ct.* 1863, *Bennett v. Boyle*, 40 *Barb.* 551.

For the general principles governing the power delegated to corporations to Take private property for corporate uses, see EMINENT DOMAIN.

For some Constitutional restrictions upon it, see CONSTITUTIONS.

183. When compensation must be made. One who has laid out his land in lots, and has sold such lots, or any of them, with reference to, and bounding on, streets thereon designated, thus dedicates the streets; and their owner, on their being opened, can be entitled to but nominal compensation. *N. Y. Ct. of Errors*, 1831, *Livingston v. Mayor of N. Y.* 8 *Wend.* 85; *N. Y. Supreme Ct.*

1838, *Wyman v. Mayor of N. Y.* 11 *Id.* 486; 1836, *Matter of Furman Street*, 17 *Id.* 651; 1838, *Matter of Thirty-second Street*, 19 *Id.* 128; 1841, *Matter of Twenty-ninth Street*, 1 *Hill*, 189; *Matter of Thirty-ninth Street*, *Id.* 191; S. P. 1829, *Matter of Lewis Street*, 2 *Wend.* 472. And see *Matter of Seventeenth Street*, 1 *Wend.* 262.

184. If a place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reintering their remains. *N. Y. Supreme Ct. Sp. T.* 1856, *Matter of Beekman Street*, 4 *Bradf.* 503, 532.

185. A statute (*N. Y. Laws of 1838*, 499, §§ 1, 2, 16, and *N. Y. Laws of 1838*, 119, §§ 1, 2), providing for opening streets, without providing compensation to owners of lands not taken but which might be indirectly injured,—*e. g.* by excavations causing slides and caving,—is not unconstitutional. The land so injured is not "taken for public use," within the constitutional provision. The damage is *damnum absque injuria*. *N. Y. Ct. of Appeals*, 1850, *Radcliff v. Mayor &c. of Brooklyn*, 4 *N. Y. (4 Comst.)* 195. And see *Graves v. Otis*, 2 *Hill*, 466; *Benedict v. Goit*, 8 *Barb.* 459; *Macy v. Indianapolis*, 17 *Ind.* 267.

186. Where a municipal corporation is authorized to make a particular improvement, and a mode of ascertaining and making compensation for private property taken therefor is provided, that remedy is exclusive. An action at law, for damages for the injury done in taking such property, is not maintainable. *Ohio Supreme Ct.* 1838, *Hickox v. Cleveland*, 8 *Ohio (Hamm.)* 543.

187. An agreement between landowners in a city and the municipal corporation, that if the latter will lay out a street over the land, the former will waive all claim of damages for land taken, but not other and incidental damages for removing and repairing buildings, does not waive the right of the landowners to damages to cover the expense of removing movable buildings, and the expense of replacing walls upon the new line, where a permanent building is cut by the line of the street. *Mass. Supreme Ct.* 1839, *Foster v. City of Boston*, 22 *Pick.* 38.

Upon the general subject of Compensation for private property taken by corporations under the delegated right of eminent domain, see COMPENSATION.

188. **Discontinuing proceedings for taking private property.** The common council of a municipal corporation, after the appointment of commissioners to assess the damages to be awarded to the owners of lands to be taken as a public street, and after the award has been made and confirmed by the lapse of time in which an appeal may be taken, have no authority to discontinue the proceedings. [20 *Johns.* 269; 18 *Id.* 506.] *N. Y. Supreme Ct.* 1828, *Hawkins v. Trustees of Rochester*, 1 *Wend.* 53; S. P. [citing also, 6 *Johns. Ch.* 46; 5 *Cow.* 293; 7 *Id.* 526; 2 *Rev. L.* of 1818, 408, §§ 177, 178; *Id.* 842, 408.] *N. Y. Supreme Ct. Sp. T.* 1861, *People v. Common Council of Syracuse*, 20 *How. Pr.* 491.

189. In New York, court may grant leave to discontinue, at any time before rights have become vested in the public or in individuals by the proceedings;—*i. e.* at any time before confirmation of the commissioners' report. *N. Y. Supreme Ct.* 1834, *Matter of Canal Street*, 11 *Wend.* 154. To the same effect, 1828, *People v. President of Brooklyn*, 1 *Id.* 318. Compare *Hawkins v. Trustees of Rochester*, *Id.* 53. To the contrary was *Matter of Beekman Street*, 20 *Johns.* 269.

190. Before commissioners have been appointed, and equally after appointment, if they have refused to act, the court will grant the application of the corporation for leave to discontinue. *N. Y. Supreme Ct.* 1821, *Corporation of N. Y. v. Dover Street*, 18 *Johns.* 506. And see *Corporation of N. Y. v. Mapes*, 6 *Johns. Ch.* 46.

191. Individuals acquire no vested right under street proceedings, until the final confirmation of the report of the commissioners. [6 *Johns. Ch.* 49; 6 *Cow.* 571; 1 *Wend.* 53, 318; 11 *Id.* 154.] Where a report has been confirmed, with the exception of certain particulars, and sent back for correction in those particulars only, it is not finally confirmed, and the corporation may have leave to discontinue. *N. Y. Supreme Ct.* 1839, *Matter of Anthony Street*, 20 *Wend.* 618.

192. Persons to whom an award of damages for land taken for a municipal improvement is made, by commissioners of estimate and assessment, cannot object to the discontinuance of the proceedings, unless the proceedings have so far progressed that mutual rights have vested. Thereafter their remedy is, *it seems*, in assumpsit, or an action on the case; but not by mandamus. *N. Y.*

Supreme Ct. 1828, *People v. President &c. of Brooklyn*, 1 *Wend.* 818.

193. City streets. That the power of opening, widening, and closing streets, is an exercise of the right of eminent domain, delegated by the State to the city, as to other corporations, to be used for the public good,—see *State v. Graves*, 19 *Md.* 351.

So of township roads. *Ferris v. Bramble*, 5 *Ohio St.* 109.

194. That a city corporation is not authorized to appropriate public streets to a different purpose, or to narrow or widen them, unless this power is given expressly by the charter, except such act be necessary to give effect to a power expressly granted,—see *State v. Mayor of Mobile*, 5 *Porter*, 279. Compare *Brown v. Duplessis*, 14 *La. Ann.* 842.

195. That the grant to a city of a power to “open, alter, abolish, widen, extend, establish, grade, or otherwise improve and keep in repair streets,” will not authorize an appropriation of a street to such uses as would be entirely inconsistent with its use as a street,—see *Lackland v. North Missouri R. R. Co.* 31 *Mo.* 180.

196. Where a municipal corporation are authorized to “alter and amend” streets in their discretion,—they have power to alter the grades of streets they have established, and they are the judges of the necessity of such alteration. [1 *Pick.* 418; 2 *Hill*, 466.] *N. Y. Supreme Ct.* 1850, *Waddell v. Mayor &c. of N. Y.* 8 *Barb.* 95. To the same effect, *N. Y. Chancery*, 1837, *Fish v. Mayor &c. of Rochester*, 6 *Paige*, 268. But compare *Oakley v. Trustees of Williamsburg*, *Id.* 262.

197. A power to “open and keep in repair” streets, &c,—*Held*, to carry an implied power to alter the grade or level. *U. S. Supreme Ct.* 1857, *Smith v. Corporation of Washington*, 20 *How.* 135.

198. A power to regulate the grade of streets,—*Held*, to include the power to re-grade. *Creal v. Keokuk*, 4 *Greene*, 47.

199. A general statutory power to alter and relay streets,—*Held*, to extend only to public streets, and not to apply to the alteration of any road owned by a turnpike or other private corporation. *Quinn v. City of Paterson*, 3 *Dutch.* 85.

200. A power conferred on a city to grade the streets within its limits,—*Held*, a continuing power, which the corporation might exercise from time to time. *Goszler*

v. Corporation of Georgetown, 6 *Wheat.* 598; *Matter of Furman Street*, 17 *Wend.* 649.

201. Corporations which have, by law, a right to pave the streets, may raise or lower particular parts of any street, if such raising or lowering should be necessary for performing the work in a reasonable and proper manner; and the individuals who may be injured by it have no right of action for such injury, unless expressly given by statute. *U. S. Supreme Ct.* 1857, *Smith v. Corporation of Washington*, 20 *How.* 135; *Circ. Ct. D. C.* 1802, *Hoe v. Mayor of Alexandria*, 1 *Cranch C. Ct.* 98. And see *Macy v. Indianapolis*, 17 *Ind.* 267.

202. That under a provision in a charter authorizing a city to cause its streets to be “paved, graded, or macadamized,” the city is authorized to construct a sidewalk of plank, or other material,—see *Burlington &c. R. R. Co. v. Mount Pleasant*, 12 *Iowa*, 112. But compare *People v. City of Brooklyn*, 23 *Barb. (N. Y.)* 180.

203. Laying gas pipes in them. That a municipal corporation have power to grant permission to lay down gas pipes for furnishing the citizens; the right to lay them down is not property of the corporation within restrictions upon the power of the municipal authorities to dispose of the city property,—see *Smith v. Metropolitan Gas Light Co.* 12 *How. Pr.* 187.

204. Laying new pavement. The substitution of a new and different kind of pavement from that existing on a public street, is not a repair of the street, where it does not appear that the former pavement was out of repair; and a local assessment may be laid for the expense thereof, even where the whole width of the street is not so repaved. *N. Y. Supreme Ct. Sp. T.* 1865, *Matter of Repaving Fulton Street, Brooklyn*, 29 *How. Pr.* 429.

205. Authorizing street railroads. Whether or not a municipal corporation has power, in the exercise of its general authority over the streets within the corporate jurisdiction, to authorize the construction of a railroad track and operation of the street railroad therein,—see *Drake v. Hudson River R. R. Co.* 7 *Barb. (N. Y.)* 198; *Milhau v. Sharp*, 15 *Id.* 528; *Stuyvesant v. Pearsall*, *Id.* 244; *Brown v. Duplessis*, 14 *La. Ann.* 842.

206. A city council cannot authorize a railroad company to take or injure the property of a citizen. *Ind. Supreme Ct.* 1857, *Protzman v. Indianapolis & Cincinnati R. R. Co.* 9 *I.d.* 467.

207. The common council of a municipal corporation cannot give a railroad company the right to take and use a street of a city for its tracks, without making compensation to the adjoining lot owners. *Wis. Supreme Ct.* 1868, *Pomeroy v. Milwaukee & Chicago R. R. Co.* 16 *Wis.* 640.

208. The corporation have a general power over the streets, which cannot be surrendered without authority of law. And in exercising authority conferred by law to grant permission to a railroad company to use the street, the court may in the grant impose such restrictions as it may deem proper. Granting the use of a street does not prevent them from subsequently regulating its use, and forbidding, by ordinance, resort to steam power upon it. *N. Y. Com. Pl. Sp. T.* 1858, *N. Y. & Harlem R. R. Co. v. Mayor &c. of N. Y.* 1 *Hill.* 562.

209. Municipal authorities have no power to modify or repeal a law declaring certain streets to be public highways, by consenting to the construction of a railroad thereon. The rights of the public will be protected against the municipal as well as the railroad corporation. *Pa. Supreme Ct.* 1856, *Commonwealth v. Erie & North East R. R. Co.* 27 *Pa. St.* 389.

210. A municipal corporation which has power to authorize persons or corporations to place in its streets any materials for making or repairing streets, sidewalks, buildings, &c., cannot license an individual to occupy part of a public street exclusively for his own use and benefit, by erecting and using a railroad for the transportation of stone and gravel. *Me. Supreme Ct.* 1851, *Green v. City of Portland.* 32 *Me.* 481.

211. The grant of a right to build a railroad in Broadway in New York city,—*Held*, void, because:

1. It granted a franchise, which the common council had no authority to grant.

2. By the legal import of its terms, it might be perpetual.

3. Such grant is, in judgment of law, a contract between the corporation and the grantees, and would import to restrict the corpo-

ration in the future exercise of its legislative powers.

4. It conferred upon the grantees and their associates exclusive privileges to a partial use of Broadway, which might be of perpetual duration.

5. It absolved them from an obligation imposed on them by a statute of the State. [2 *Rev. Stat.* 424, § 108.]

6. It conferred rights, and exempted the associates from consequences, in the event of the death of one of their number, repugnant to law.

7. It authorized the associates to become incorporated at any time, under the general railroad act, although the road might have been previously constructed, and whatever might be their number at the time, while the act itself does not allow an incorporation after a road shall have been built, nor of a less number than twenty-five.

8. It made a contract, which the common council had been prohibited from making, by the amended charter of the city, of 1849. *N. Y. Superior Ct.* 1854, *Attorney General v. Mayor &c. of N. Y.* 8 *Duer*, 119.

212. Constructing wharves. The authorities of a city may erect wharves at the termini of their streets, suitable for landing, but by so doing such erections become *free* to the public, as extensions of the streets, and the city has no authority to exact toll for ingress or egress. *U. S. Dist. Ct. (Mich.)* 1857, *Russell v. The Empire State*, 1 *Newb.* 542.

213. Laying out ferries. A power granted to the trustees of a town "to lay out &c., all ferries, &c., and to authorize the construction of the same, and with a view to facilitate the construction of improvements, the lands lying between high tide and ship channel are hereby granted and released to said town," confers a power to establish and regulate ferries, &c., but not necessarily an *exclusive* power. Full effect is given to the words, when the simple right to establish and regulate is conceded. [11 *Pet.* 422; 8 *How.* 569; 16 *Id.* 524.] *U. S. Supreme Ct.* 1859, *Mintum v. Larue*, 28 *How.* 485.

214. Town highways. That it is part of the corporate duties of a town to build and keep its highways in repair,—see *Haynes v. Town of Burlington*, 38 *Vt.* 350; *Abbott v. Town of Wolcott*, 38 *Vt.* 660; *Barnes v. Mayor &c. of Springfield*, 4 *Allen*, 448; In-

habitants of Orrington v. County Commissioners of Penobscot County, 51 *Me.* 570.

215. A provision in the charter of an incorporated town, that the trustees may have the footways and sidewalks paved at the expense of the abutters, and may recover the full expense in an action of debt, if the abutters refuse to pay, is constitutional and valid. *Mo. Supreme Ct.* 1857, *Inhabitants of Palmyra v. Morton*, 25 *Mo.* 598.

216. That a town has power to discontinue a way, but not a public landing place,—see *Commonwealth v. Tucker*, 2 *Pick.* 44.

217. Public buildings. The right to fit up a building for city or public purposes, and provide suitable accommodations for the transaction of the business of the city, is a necessary incident to the administration of every municipal government. *Cal. Supreme Ct.* 1858, *People v. Harris*, 4 *Cal.* 9. But compare *Vanover v. Davis*, 27 *Ga.* 354.

218. It is within the ordinary powers and duties of towns in Maine, in which no distinct and separate parish or religious society is established, to provide for religious instruction; and for this purpose they may raise and assess money to support ministers, and to build and repair meeting houses. Hence rights accruing to towns in their parochial and in their municipal capacity may properly be upheld in the same action. *Me. Supreme Ct.* 1824, *Inhabitants of Alna v. Plummer*, 3 *Me.* (3 *Greenl.*) 88. And see *Woodbury v. Hamilton*, 6 *Pick.* 101.

219. The power of the selectmen of a town to locate and build suitable school houses for districts refusing to provide for the same,—considered. *Converse v. Porter*, 45 *N. H.* 385.

220. That cities and towns have authority in their corporate capacity, to build a market house, to appropriate money therefor, and to assess the same upon the inhabitants,—see *Spaulding v. Lowell*, 23 *Pick.* 71.

As to the power to Regulate markets, see *supra*, 98.

221. Under a charter power "to establish and regulate markets," the city has power to purchase market grounds. The power to establish, in contradistinction to regulating, includes that of procuring the necessary site. *N. Y. Ct. of Appeals*, 1856, *Ketchum v. City of Buffalo*, 14 *N. Y.* (4 *Kern.*) 356.

222. The common council of a city may order land to be purchased for a market,

notwithstanding a limitation in the charter as to the yearly value of land which they may hold. *N. Y. Supreme Ct. Sp. T.* 1858, *People v. Lowber*, 7 *Abb. Pr.* 158; 28 *Barb.* 65.

223. That a power given to a municipal corporation, by a statute, to build markets, is subservient to the rights of the public in land already dedicated by the corporation as a street,—see *St. John v. Mayor &c. of N. Y.* 3 *Bow.* 488.

224. Town clock. That a town has authority to provide for the support of a public clock,—see *Willard v. Newburyport*, 12 *Pick.* 227.

225. Reservoir. That the authorities of a town or village have a right to place in a highway a reservoir for the purpose of retaining water to sprinkle the highway with,—see *West v. Bancroft*, 82 *Vt.* 867.

III. MEMBERS.

226. Membership how acquired. When one moves into a town, or, being a resident in a town, arrives at full age, he at once becomes a member of the corporate body, without its consent, or any other act on his part; and is subject to all the liabilities, and entitled to all the privileges of a member. The same consequence follows when a person removes from another place into a territorial parish, or, while resident therein, arrives at full age. *Me. Supreme Ct.* 1822, *Lord v. Chamberlain*, 2 *Me.* (3 *Greenl.*) 67.

227. Liability to taxation is a criterion of membership in a corporation; and whoever is a member of a parish has a right to vote, and the officer who refuses his vote is liable in an action. *Mass. Supreme Ct.* 1820, *Sparrow v. Wood*, 16 *Mass.* 457; 1880, *Oakes v. Hill*, 10 *Pick.* 888.

228. The inhabitants of a town are not necessarily members of a parish included within it; but those who are exempted on account of their religious scruples and opinions, though members of the town, are not members of the parish, comprehended by the same boundaries. *Mass. Supreme Ct.* 1807, *Dillingham v. Snow*, 3 *Mass.* 276; 5 *Mass.* 547.

229. — their competency as jurors, &c. The legislature of Massachusetts may constitutionally enact, that the interest which an inhabitant of a city may have in a penalty for the breach of a by-law thereof, shall not disqualify him to act as judge, juror, or witness,

in a prosecution to recover the penalty; and that such prosecution may be in the name of the commonwealth. *Mass. Supreme Ct.* 1826, *Commonwealth v. Worcester*, 3 *Pick.* 462.

230. —as witnesses. In general the inhabitants or corporators of a municipal corporation are not considered as having an interest in an action to which the corporation is a party, which disqualifies them from being examined as witnesses either for or against the corporation, under the rule that a person interested in the event of the suit is incompetent to testify in it.* If an inhabitant is not individually interested, he may testify notwithstanding the remote share he may be thought to have in the subject matter, as one inhabitant of the community to be affected. *N. Y. Chancery*, 1834, *Trustees of Watertown v. Cowen*, 4 *Paige*, 510; *N. Y. Supreme Ct.* 1844, *Hunter v. Trustees of Sandy Hill*, 6 *Hill*, 407; *Ohio Supreme Ct.* 1831, *Methodist Episcopal Church of Cincinnati v. Wood, Wright*, 12; 1833, *Stewart v. Saybrook Township*, *Id.* 874; *Pa. Supreme Ct.* 1825, *McFarland v. Commissioners of Moyamensing*, 12 *Serg. & R.* 297; 1843, *Barnet v. School Directors*, 6 *Watts & S.* 46; *Ala. Supreme Ct.* 1835, *Mayor &c. of Tuscaloosa v. Wright*, 11 *Ala. (3 Port.)* 230; *Mo. Supreme Ct.* 1844, *Barada v. Inhabitants of Carondelet*, 8 *Mo.* 644; *Miss. Ct. of Errors*, 1856, *Mann v. Yazoo City*, 31 *Miss.* 574.

As to competency of Members of associations and of Officers and Stockholders in business corporations,—see MEMBERS; OFFICERS; STOCKHOLDERS.

231. A corporator in a municipal corporation is not incompetent in an action by or against it, even though the corporation is named in the suit as the "mayor, aldermen," &c., and the witness is the mayor or an alder-

man. *N. Y. Supreme Ct.* 1836, *Van Wormer v. Mayor &c. of Albany*, 15 *Wend.* 262; *Ct. of Appeals*, 1850, *Pack v. Mayor &c. of N. Y.* 3 *N. Y. (8 Comst.)* 489.

232. The inhabitants of a corporation society, to whom property is devised for the support of a school, are competent witnesses to attest the will. *Conn. Supreme Ct.* 1802, *Cornwell v. Isham*, 1 *Day*, 35; *N. H. Supreme Ct.* 1818, *Eustis v. Parker*, 1 *N. H.* 273.

233. The interest of a member of a municipal corporation and a tax-payer is too remote to render him incompetent to testify for the corporation, in an action by the corporation to recover taxes or a penalty imposed by the corporation. [4 *Paige*, 513.] *Ill. Supreme Ct.* 1841, *Sawyer v. City of Alton*, 3 *Scam.* 127.

234. In New Jersey it has been *Held*, no objection to a witness that he is a member of a board of chosen freeholders; and that the suit is prosecuted at the instance of the board; and that the board has advanced money to carry on the suit. *N. J. Supreme Ct.* 1808, *Schank v. Stevenson*, 1 *Penning.* 387.

235. But in Massachusetts, where a town at a legal meeting voted not to defend a certain action, and the selectmen notwithstanding employed counsel,—*Held*, that they were not competent witnesses in the action; being bound to indemnify the town for the costs. *Mass. Supreme Ct.* 1832, *Emerson v. Inhabitants of Newbury*, 13 *Pick.* 377.

236. In an action for contribution, between the sureties of a collector of taxes, for money paid by one of them without suit, the town treasurer is a competent witness to prove the collector's delinquency. *Me. Supreme Ct.* 1830, *Nason v. Read*, 7 *Me. (7 Greenl.)* 22.

237. In an action on the official bond of a collector of taxes, where the point in issue was whether the money collected had been paid over to the treasurer or not,—*Held*, that the treasurer, being released by the town, was a competent witness to disprove the payment. *Me. Supreme Ct.* 1832, *Ford v. Clough*, 8 *Me. (8 Greenl.)* 334.

238. In an action by a township, in Ohio, against an ex-treasurer of the township school fund, his successor is not a competent witness for the township, to show that he received less money of him than he received for to his predecessor on settlement. *Ohio Supreme Ct.* 1844, *Monroe Township v. Williams*, 13 *Ohio*, 495.

239. And the trustees of the township

* This rule has itself been so much modified and relaxed by recent legislation on the subject of witnesses, in many of the States, that the cases upon its application to members of corporations have lost much of their interest. We give in the text cases sustaining the application of the rule in various cases, without attempting to preserve all the distinctions which they disclose. The rule finds some further confirmation from the following cases: *Hunter v. Marlboro*, 2 *Woodb. & M.* 168; *Chester v. Rockingham*, *Brayt.* 289; *Commonwealth v. Baird*, 4 *Serg. & R.* 141; *Bloodgood v. Jamaica*, 12 *Johns.* 285; *Falls v. Belknap*, 1 *Id.* 486; *Canning v. Pinkham*, 1 *N. H.* 353; *Schenck v. Corshen*, *Cove*, 189; *Orange v. Springfield*, 1 *Southard*, 136; *Roll v. Maxwell*, 2 *Id.* 493; *Jackson v. Hillsborough*, 1 *Dev. & B.* 177; *Maysville v. Shultz*, 3 *Dana*, 10; *Pond v. Sage*, 1 *Chapm.* 250; *Smith v. Baker*, 1 *Root*, 207; *Salisbury v. Harwinton*, 3 *Root*, 436; *Connecticut v. Bradish*, 14 *Mass.* 296; *Burlington v. Fennimore*, *Cove*, 190.

have no authority to release such treasurer from his liability for any portion of the school fund, in order to render him a competent witness. *Id.*

240. In a suit against a town for damages sustained for want of repairs in a bridge, the surveyor of highways for the district is not a competent witness for the town, nor will a release by a selectman, nor it seems, by the selectmen, qualify him. *Vt. Supreme Ct. 1834, Yuran v. Inhabitants of Randolph, 6 Vt. 369.*

241. Where a party seeks to establish a common right in all the inhabitants of a town, an inhabitant of such town is not a competent witness to establish the right, although it is provided by statute that the inhabitants of towns shall be competent witnesses when such towns are parties or interested in the event of the suit. *Me. Supreme Ct. 1843, Moore v. Griffin, 23 Me. (9 Shepl.) 350.* See also, *Jacobson v. Fountain, 2 Johns. 179.*

242. An inhabitant of a town is not a competent witness to prove a custom for the inhabitants to dig clams in a particular spot, either at common law or by the Massachusetts statute of 1792, ch. 32, which provides that, where a town is a party, or interested in the event of a suit, any inhabitant may be admitted as a competent witness; for a verdict for one inhabitant would be evidence for another claiming in the same right. *Mass. Supreme Ct. 1825, Lufkin v. Haskell, 3 Pick. 356.*

243. By that statute, an inhabitant of a town is rendered competent only in cases in which the town, in its corporate capacity, is a party, or interested in the suit, and not where the question in dispute is a right of the inhabitants of the town to a way, common, or other easement. *Id. 1829, Odiome v. Wade, 8 Pick. 518.*

244. In action against a town to recover damages for an injury received in consequence of a defective highway, the plaintiff is a competent witness. *Me. Supreme Ct. 1863, Stover v. Inhabitants of Bluehill, 51 Me. 489.*

IV. MEETINGS.

245. Town meetings how convened. A town meeting cannot be legally held in

Massachusetts unless it be in pursuance of a warrant under the hands of the selectmen, or of a majority of them,—see *Reynolds v. Inhabitants of New Salem, 6 Metc. 340.*

246. A meeting of the town for the choice of representatives, and for the transaction of the ordinary business of the town, may be called by one warrant, distinguishing the different classes of voters. *Mass. Supreme Ct. 1809, Craigie v. Mellen, 6 Mass. 7.*

247. Seal. It is not essential that the warrant for a town meeting should have a seal affixed to it. *Mass. Supreme Ct. 1813, Colman v. Anderson, 10 Mass. 105.* And see *Bucksport v. Spofford, 3 Fairf. 487.*

248. What is sufficient notice. Notice of town meeting, given by posting up the warrant itself, instead of a copy,—*Held*, to be sufficient. *N. H. Superior Ct. 1884, Brewster v. Hyde, 7 N. H. 206.*

249. That where the usual mode of warning town meetings was by posting up a notice on the meeting house, which was used as a town house, the meeting house having been torn down and a town house built, notice of a meeting, posted on the town house, was a sufficient warning, no other place having been agreed upon,—see *Briggs v. Murdock, 18 Pick. 305.*

250. Where a warrant for a town meeting, to be held on Monday, directed the officer to warn the inhabitants by posting up a copy of the warrant eight days, and at least over two Sundays, before the time of holding the meeting,—*Held*, that the officer's return, certifying that he posted up a copy of the warrant eight days before the time of holding the meeting was sufficient; the return having shown that the copy must have been also posted over two Sundays. *Mass. Supreme Ct. 1843, Commonwealth v. Shaw, 7 Metc. 52.*

251. Where a warrant for a meeting of the inhabitants of the town of A. is directed for service to F., constable of the town, his return of proper service is sufficient, if it be signed "F., Constable," without adding "of A." *Id.*

252. Statement of business intended. Where a warrant was issued upon sufficient application, as directed by statute, for the organization of the first parish in a

town, and contained an article "to choose a clerk and other necessary and usual parish officers," but omitted any article directly presenting the question whether the members would vote to organize themselves as a parish or not,—*Held*, that the warrant was sufficient to convene the meeting, and that the parish was legally organized. *Mass. Supreme Ct.* 1837, *Inhabitants of Ludlow v. Sikes*, 19 *Pick.* 317.

253. An article in the warrant for a town meeting, "to see what sum of money the town will vote to raise for the support of schools of the poor, repairing bridges and highways, for the payment of the just debts of the town, and for other legal purposes,"—*Held*, to state with sufficient precision the subject matter to be acted on under it. *N. H. Superior Ct.* 1834, *Tucker v. Aiken*, 7 *N. H.* 113.

254. The object of a warrant is to give previous notice to the inhabitants of the subjects to be acted on, and, if this is done substantially, it is sufficient. Under a warrant for a town meeting, "to see if the town would make an appropriation towards purchasing a fire engine,"—*Held*, that the town was authorized to pass a vote "to raise and appropriate" a sum for that object. *Mass. Supreme Ct.* 1838, *Torrey v. Inhabitants of Millbury*, 21 *Pick.* 64.

255. In order to render valid a town vote granting money for a particular purpose, the warrant need not state specifically that the inhabitants will be called to act on the question of granting money for that purpose, if the subject to be acted on is distinctly stated, and is one which will be likely to require a grant of money. *Mass. Supreme Ct.* 1829, *Blackburn v. Inhabitants of Walpole*, 9 *Pick.* 97.

256. That a town in Vermont may, at its annual March meeting, or the April adjournment thereof, act upon other business than that mentioned in the warrant,—see *Schoff v. Bloomfield*, 8 *Vt.* 472.

257. Where a statute provided that nothing done at a town meeting should be considered as good and valid in law, unless the subject matter thereof should be inserted in the warrant calling for such meeting, and the warrant under which a meeting was held made no mention of raising money as one of the purposes of the meeting,—*Held*, that a vote, at such meeting, to raise the town and

minister taxes was a mere nullity. *N. H. Superior Ct.* 1823, *Brackett v. Whidden*, 3 *N. H.* 17.

258. A warrant, calling a town meeting, which contains an article in the following words, viz: "To see what measures the town will take to provide a workhouse, or house of correction for the reception, support and employment, of the idle and indigent, and such other persons as by law be liable to be sent to such house, for the purposes aforesaid, and for the superintendence of the same," is sufficient to authorize a vote empowering the selectmen to contract with some person to support the poor for one year, such town having practised for several years the making of similar contracts, under the authority of similar articles. *Me. Supreme Ct.* 1833, *Davenport v. Hallowell*, 1 *Fairf.* 317.

259. The act of March 7, 1863, "to legalize the action of townships, &c., in raising bounties for volunteers" (*Mich. Sess. Laws* of 1863, p. 92), extends to, and renders valid, a tax voted at a meeting of the electors of a township held for the purpose of raising bounties, although such meeting was not convened in the manner required by existing statutes authorizing special township meetings. *Mich. Supreme Ct.* 1864, *Crittenden v. Robertson*, 13 *Mich.* 58.

260. Under an article, in a warrant for an annual town meeting, "to choose all such town officers as the law directs," the town may lawfully pass a vote authorizing the several school districts to choose their prudential committees. *Kingsbury v. School District in Quincy*, 12 *Metc. (Mass.)* 9.

261. Effect of insufficient notice. Unless the records of a town meeting show that the notices calling it were posted in public and conspicuous places, the proceedings are void,—see *Allen v. Archer*, 49 *Me.* 346.

262. The proceedings of a town meeting, which is irregularly convened are not binding on the town, and a subsequent treating of such meeting as valid, either by the town officers or by any portion of the inhabitants of the town, will not be sufficient to ratify the proceedings of the meeting on the part of the town. *Vt. Supreme Ct.* 1843, *Pratt v. Town of Swanton*, 15 *Vt.* 147.

263. Constable's returns. The return of a constable on a warrant for calling an annual town meeting, that he has warned the inhabitants of the town, is sufficient

evidence that the meeting was legally warned, although the return do not state in what manner he warned them. *Mass. Supreme Ct.* 1839, *Houghton v. Davenport*, 23 *Pick.* 235.

264. The return of the constable or collector, on the back of a warrant for calling a town or parish meeting, is the only proper evidence that the meeting was legally warned, and must show the manner in which the meeting was warned, or it will be bad; nor can a defect in this particular be supplied by parol evidence. *So held*, in an action against the moderator of a parish meeting, for refusing the plaintiff's vote. *Me. Supreme Ct.* 1831, *Tuttle v. Cary*, 7 *Me.* (7 *Greenl.*) 426.

265. The constable's return on a warrant for calling a town meeting was dated the day only before the meeting was holden, and did not set forth the manner in which he had notified the inhabitants. *Held*, that the validity of the meeting was not thereby affected,—see *Bucksport v. Spofford*, 12 *Me.* (8 *Fairf.*) 487.

266. Where a warrant directed a constable to warn a town meeting fourteen days before the meeting, and he returned that, pursuant to the warrant, he had warned the inhabitants to meet at the time therein named, dating his return less than fourteen days before the meeting,—*Held*, that this date did not prove that the warrant had not been served in due season. *Mass. Supreme Ct.* 1838, *Williams v. School District in Lunenburg*, 21 *Pick.* 75.

267. Where a constable, on a warrant for calling a town meeting, was to warn by posting notice, and he returned "pursuant to the warrant, I have notified," without saying how,—*Held*, to be sufficient evidence that the meeting was legally warned. *So* of a return that he had notified "as the law directs," and of a return, without date, "agreeably to the within warrant, I have notified," &c,—see *Briggs v. Murdock*, 13 *Pick.* 305.

268. Proving notice. The legality of a town or parish meeting for the choice of officers is sufficiently proved by showing that it was notified and warned, in due form, by those claiming to act as the legally qualified officers of the preceding year. *Me. Supreme Ct.* 1831, *Tuttle v. Cary*, 7 *Me.* (7 *Greenl.*) 426.

269. A vote of a town abridging the right of taking shell fish in a free and common

fishery, is void, unless the meeting at which such vote was passed, was specially warned for the purpose; and the party seeking to avail himself of it, must show it in evidence. *Conn. Supreme Ct.* 1830, *Willard v. Warden &c. of Killingworth*, 8 *Conn.* 247; *S. P.* 1824, *Hayden v. Noyes*, 5 *Conn.* 891.

270. When the warrant for a town meeting, and the return thereon, are inserted in the town records, with the proceedings of the town at the meeting, those records are evidence of the holding of the meeting, and the original warrant need not be produced. *Mass. Supreme Ct.* 1848, *Commonwealth v. Shaw*, 7 *Metc.* 52.

271. In New Hampshire, where a town meeting is warned by a warrant posted up by the selectmen, they must make a return stating the time when, and the place where, it was posted up; and such return is the only evidence which can be received of their action. *N. H. Superior Ct.* 1833, *Proprietors of Cardigan v. Page*, 6 *N. H.* 182; *Nelson v. Pierce*, *Id.* 124.

272. A record of the warning of a town meeting, and of the proceedings of the meeting held agreeably thereto, is sufficient *prima facie* evidence to show that the warning was in fact posted up as required by law. *Vt. Supreme Ct.* 1864, *Lemington v. Blodgett*, 37 *Vt.* 210.

273. If the return on a warrant for calling a town meeting does not show how the meeting was warned, it will be presumed, in the absence of other proof, that it was warned in the mode agreed upon by the town; and it is not a valid objection to such return that it bore date of the day of the meeting. *Me. Supreme Ct.* 1832, *Ford v. Clough*, 3 *Me.* (8 *Greenl.*) 334.

274. Election. The board of aldermen appointed a day for the election of a city officer; at a subsequent stated meeting of the board, the resolution was rescinded, and it was determined to go at once into the election, some of the aldermen being absent from the last meeting, and having no notice of the election. *Held*, that the election was void. *N. Y. Ct. of Appeals*, 1860, *People ex rel. Loew v. Batchelor*, 22 *N. Y.* 128.

Compare ELECTIONS.

275. A municipal charter provided that the board of aldermen and the common council, in their joint capacity, should be denominated the city council, and that a

majority of each board, including the city council, should constitute a quorum for the transaction of business. The board of aldermen and the common council separately voted to meet in convention upon a certain day for the choice of city officers, including the city marshal, but when the time arrived, only a minority of the board of aldermen appeared. The common council and these aldermen—twenty-seven persons being present, and constituting a majority of both boards—in their capacity as the city council, proceeded to elect officers, and made choice of the respondent as city marshal, by a majority of the votes present. Upon a petition for a mandamus,—*Held*, that after the board of aldermen had agreed upon a day for meeting in convention, it was not necessary that a majority of them should be present in order to make the elections by the city council legal, and the petition was dismissed. *N.H. Superior Ct. 1854, Beck v. Hanscom, 9 Post. 213.*

276. Amotion. A municipal corporation consisted of a mayor, aldermen, bailiffs, and capital citizens, who together formed the common council, and had the power of electing capital citizens; the power of amotion was in the mayor and aldermen only, or the major part of them. The common council met for the purpose of transacting the business of that assembly; and the mayor and aldermen made an order for the amotion of one P., a capital burgess, for a cause which was allowed to be legal. *Held*, that the removal was not regular, and that there ought to have been a summons for the mayor and aldermen to meet in their distinct capacity. *K. B. 1720, Rex v. Mayor &c. of Carlisle, 1 Str. 385.*

V. OFFICERS.

277. Appointment. That the exercise of a power to appoint to an office, is a purely executive act; and is in no sense a legislative one,—see *Ackley's Case, 4 Abb. Pr. 35.*

278. The power exercised by a board of supervisors in conferring title to an office is that of appointment, and not of election.*

* An appointment to office by a board of supervisors is not complete until the person appointed has received a commission or certificate of election, made out under the seal of the board, and signed by the proper officers; and before such certificate is issued, it is within the power of the board to revoke an appointment previously made. *Conger v. Gilmer, 32 Cal. 75.*

Cal. Supreme Ct. 1867, Conger v. Gilmer, 32 Cal. 75.

279. Obligation to hold election. A mandamus will lie to a corporation to proceed to a fresh election of mayor, although there is such an officer *de facto*, provided he was elected without color of right. *K. B. 1735, Case of Borough of Bossiny, 2 Str. 1003; 1741, Case of Aberystwith, Id. 1157.*

280. — to register voter. A mandamus will lie to compel a board of registration to register the name of a voter applying for such purpose. *Mich. Supreme Ct. 1866, People v. Board of Registration of Nankin, 15 Mich. 156.*

281. Failure to hold election upon the designated day, does not destroy the right to hold an election later,—see *Coles County v. Allison, 28 Ill. 437; Commissioners v. McDaniel, 7 Jones Law, 107.*

282. Jurisdiction generally. That municipal officers, in general, who attempt to interfere with the rights of individuals, must show, to acquire jurisdiction, that the very case has arisen in which they were authorized to proceed,—see *Carron v. Martin, 2 Dutch. 594.*

283. That trustees and other officers through whom a town acts, only possess the powers expressly conferred upon them by the statute, as such body and officers respectively; and perhaps where the statute is silent upon the subject, the authority, by necessary implication, which is requisite to execute the duties so imposed upon them; and that in the exercise of their powers as trustees of the township, they can take nothing by implication beyond the authority thus conferred by the statute,—see *Hopple v. Brown, 13 Ohio St. 311.*

For the law governing Officers of municipal corporations in common with those of other corporations, see OFFICERS, and titles there mentioned.*

284. Changes in common council. As a

* The appointment or election of officers of municipal corporations, their powers, duties, and compensation, and cognate subjects, are so generally regulated by statutes peculiar to single States or by particular charters or acts of incorporation that the adjudications upon them cannot be relied upon as of general application. For these topics the reader should consult works upon the local law. The question how far a city or town is bound by acts, legitimate or wrongful, of its officers, depends largely upon principles of general application. Cases upon this subject matter will be found under subdivision VII. of this chapter, which treats of the *Liabilities* of municipal corporations.

municipal corporation cannot be deemed to be in a state of interrupted existence, when one board goes out another must come in. The reasonable construction of the charter is, that the old board continues in existence until an actual change of officers takes place; and they must act, when necessary, until the new board are sworn in. *N. Y. Superior Ct.* 1843, *Elmendorf v. Ewen*, 2 *N. Y. Leg. Obs.* 85. To similar effect, see *Elmendorf v. Mayor &c. of N. Y.* 25 *Wend.* 693.

285. An ordinance of a municipal corporation, passed by one board at one session, but not passed by the other until the next session, is not duly passed, and is void. [22 *Barb.* 414; 8 *C. 3 Abb. Pr.* 262.] *N. Y. Supreme Ct. Sp. T.* 1860, *Beekman's Case*, 11 *Abb. Pr.* 164; 8 *C. sub nom. Matter of Beekman*, 19 *How Pr.* 518. See also, *supra* 284.

286. It is a general rule of practice in legislative bodies which are composed of two branches, that all business before them and unfinished at the end of a session is discontinued; and if taken up at all at a session following, it must be taken up *de novo*. This rule, *Held* applicable to the action of the common council of New York, so that an act passed by the board of assistant aldermen in 1852, and not by the board of aldermen until 1853, when a new board came into office, was void. *N. Y. Supreme Ct.* 1856, *Wetmore v. Story*, 22 *Barb.* 414; 8 *Abb. Pr.* 262.

287. A committee of a common council, to whom is referred the petition of an applicant for a lease of a slip, have power to bind the corporation by their representations in respect to the title of the corporation to the slip; where the representations are such as touch the very matter with which the committee is charged. [7 *Cow.* 485; 2 *Hill*, 451.] *N. Y. Supreme Ct.* 1863, *Sharp v. Mayor &c. of New York*, 40 *Barb.* 256.

288. Disabilities of member of common council. The charter of a city (*N. Y. Laws of 1830*, ch. 122 § 11), provided that no member of the common council should be directly or indirectly interested in any contract with the city. A member of the council became interested in a contract for supplying coals to the city, and took a note of the contractor for his share of the profits. By the arrangement with the contractor, the alderman was to aid in purchasing and supplying the coal in fulfillment of the contract, which made him the judge of the quality. *Held*,

that this arrangement was void, as being against sound morals, and a breach of official duty, and that a note founded upon it could not be sustained. [Durnf. & E. 61; 2 *Bos. & P.* 371; 3 *Barn. & Ald.* 179.] *N. Y. Superior Ct.* 1848, *Bell v. Quin*, 2 *Sandf.* 146.

289. Mayor. That the mayor of a municipal corporation cannot exercise a power or privilege conferred, by a city ordinance passed in pursuance of the charter, upon the mayor and aldermen,—see *City of Lowell v. Simpson*, 10 *Allen*, 88.

290. That a mayor, although not vested with any distinct judicial functions, may cause the arrest of and impose fines upon disorderly persons, and in so doing he but exercises the police power which in this respect has always been well distinguished from the judicial power, both here and in England,—see *Shafer v. Mumma*, 17 *Md.* 331; *Smith v. Hutchinson*, 8 *Rich.* 260.

291. A mayor of a city entrusted with the general superintending power of the corporation, may, under the authority conferred by a vote of the common council, remove an awning erected in violation of a city ordinance, although a street commissioner has been appointed, with the powers and duties of a surveyor of highways *Mass. Supreme Ct.* 1858, *Pedrick v. Bailey*, 12 *Gray*, 161.

292. Powers and duties of "corporation counsel." The official counsel to a municipal corporation is not the counsel to the two boards of the common council merely, so as to be absolutely subject to their orders, in respect to suits in which the city may be a party, but he is an agent or trustee for the whole body of citizens, and is ultimately responsible for his conduct to them; and in so far as he acts as an attorney or counsellor of the court, he is subject to all the rules and regulations of the court, and is responsible to the court in like manner as any other attorney or counsellor in like case. *N. Y. Supreme Ct. Sp. T.* 1857, *Lowber v. Mayor &c. of N. Y.* 5 *Abb. Pr.* 325.

293. Such a "counsel to the corporation" has no larger powers, as such, to bind his clients, than those connected with the ordinary relations of attorney and client. *N. Y. Supreme Ct. Sp. T.* 1860, *People v. Mayor &c. of N. Y.* 11 *Abb. Pr.* 66.

294. It is the effect of the charter and ordinances of New York city, upon that subject, to place all the law business of the cor-

poration or of its departments, including all in which the corporation should deem that it had any interest, in the charge of the counsel to the corporation, and to require that such business should be conducted by him. He is bound to render all professional services in such business which may be required, and it is not competent for either of the departments of the city government, or for any of their officers, to pass by him and employ other counsel in the law business of the corporation. No action can be maintained against the corporation by a counselor employed by a committee of the board of aldermen to conduct law business of the corporation, to recover fees for his professional services rendered under such employment. *N. Y. Supreme Ct. Sp. T. 1857, Ramson v. Mayor &c. of N. Y. 24 Barb. 226; 15 How. Pr. 145; and sub. nom. Rawson v. Mayor &c. of N. Y. 4 Abb. Pr. 842. Followed, Roberts v. Mayor &c. of N. Y. 5 Id. 41.*

295. Since the charter of the city of Brooklyn fixes the salary of the corporation counsel and that of the assistant whom he is authorized to employ, neither the common council nor the corporation counsel has power to employ associate counsel beyond the sums so allowed. *N. Y. Supreme Ct. 1861, Hyde v. Auditor of Brooklyn, 21 How. Pr. 339.*

296. A was attorney for the city of St. Louis, and had a fixed salary for his services. He was employed by the mayor to attend to certain cases in court for the city. *Held*, that if these duties were part of his official duties, they were paid for in his salary; if they were not, the mayor had no power under the charter to bind the city. *Mo. Supreme Ct. 1849, Carroll v. St. Louis, 12 Mo. 444.*

297. — of "corporation attorney." An action brought by the corporation of New York, should not be dismissed on the mere ground that the attorneys, on the record for the plaintiffs, are other than the corporation counsel, unless it is shown affirmatively that the corporation counsel has no power to delegate his authority. *N. Y. Superior Ct. Sp. T. 1859, Mayor &c. of N. Y. v. Exchange Fire Ins. Co. 9 Abb. Pr. 243, nota.*

298. Salaries generally. A person accepting an office of a municipal corporation is deemed to act with reference to the charter; and there can be no implied contract to pay

him, other than that which arises from its provisions. *N. Y. Ct. of Appeals, 1859, Baker v. City of Utica, 19 N. Y. 326. Compare City of Louisville v. Baird, 15 B. Monr. 246.*

299. That salaries of city officers should be definitely fixed by ordinance; for public officers ought to have a fixed compensation, so as not to be dependent upon councils, who are but trustees of public functions, and ought not to vote money as matter of grace or favor,—see *Smith v. Commonwealth, 41 Pa. St. 335.*

300. Under the amended charter of a municipal corporation, S. was appointed by the common council for one year to the office of city marshal, of which the term was fixed by statute at two years, and gave a bond in which his appointment for one year was recited. At the expiration of the year, the council without his consent, or in terms removing him, appointed another to the office who entered upon and performed its duties. In an action brought by S. to recover his salary as marshal for the second year;—*Held*, that by virtue of his appointment, S. was entitled to hold the office for two years, and to receive the salary for the full term; that the recital in the bond of an appointment for one year was surplusage, and the bond was valid for the full term; and that the appointment of another to the office was not equivalent to a removal of S. and did not divest him of the office. *Mich. Supreme Ct. 1865, Stadler v. City of Detroit, 18 Mich. 346.*

301. — how recovered. After a person has been duly declared and certified to be elected to an office in a municipal corporation, and has taken the oath and entered on the office, his salary is a debt against the corporation, and may be recovered by suit, like any other debt; and hence he cannot proceed by mandamus to compel payment. *N. Y. Supreme Ct. Sp. T. 1857, People v. Thompson, 25 Barb. 78.*

302. Expenses. Where the charter requires an officer of a municipal corporation to do an act which involves expense, the expense is chargeable to the corporation, and they are liable on his contract therefor. *N. Y. Supreme Ct. 1881, Tucker v. Trustees of Rochester, 7 Wend. 254.*

303. Removals. That a provision of statute authorizing a city council to remove an officer for "due cause," does not give them power to remove him at their discretion, but

only for legal cause,—see *State v. Common Council*, 9 *Wis.* 254.

See the subject of Removal of corporate officers generally, treated under AMOTION.

304. A removal of a municipal officer cannot be made without an intent to remove. *Mich. Supreme Ct.* 1865, *Stadler v. City of Detroit*, 18 *Mich.* 346.

305. Under the New Jersey statute incorporating townships (Nix. Dig. 875, § 18),—which enacts that upon the death or removal of an officer of the town, or his refusal to serve, a special town meeting shall be called to fill the vacancy; and the town neglecting for fifteen days to take proper action, then the township committee shall appoint a person to fill the vacancy until the next annual town meeting,—the power of a township committee is limited and does not authorize them to create a vacancy, by accepting the resignation of a town officer. *N. J. Supreme Ct.* 1864, *State ex. rel. Reeves v. Ferguson*, 31 *N. J. Law.* (2 *Vroom*), 107.

306. Town officers. Selectmen have no authority, by virtue of their office merely, to make a contract, in behalf of a town, for the hiring of a building in which to hold town meetings. *Mass. Supreme Ct.* 1846, *Goff v. Inhabitants of Rehoboth*, 12 *Mass.* 26.

307. That the selectmen of a town have full power, by virtue of their office, to settle an account presented by another town against the town which they represent, for supplies furnished to a pauper belonging to their town,—see *Sharon v. Salisbury*, 29 *Conn.* 113.

308. One selectman cannot bind a town. *Ma. Supreme Ct.* 1866, *Inhabitants of Richmond v. Johnson*, 53 *Ma.* 487.

309. That neither a town treasurer, nor one selectman, without authority in fact from the town, or from the majority of the selectmen, can bind the town by a loan of its money, or by a ratification of an unauthorized loan,—see *Holderness v. Baker*, 44 *N. H.* 414.

310. It is incident to the office of town clerk to receive and count the votes cast for a moderator of a town meeting,—see *Dodds v. Henry*, 9 *Mass.* 262.

311. Where a town chooses three assessors, two of whom are sworn, and the third does not refuse to accept the trust, but omits to take the oath of office, and, when called upon by the other two, declines to act, and the town does not choose another in his stead,

the other two have authority to assess taxes,—see *George v. School District in Mendon*, 6 *Mass.* 497.

VI. ORDINANCES.

1. How enacted and published.

312. Nature of the power. When the passing an ordinance is the exercise of a legislative and a judicial or a ministerial power,—see *Wiggin v. Mayor &c. of N. Y.* 9 *Paige*, 16; *Kavanagh v. City of Brooklyn*, 88 *Barb.* (N. Y.) 332; *Camden v. Muford*, 2 *Dutch.* 49.

For the nature and extent of the Power to pass ordinances, see *supra*, 80–90.

313. Mode of passing. How an ordinance of a municipal corporation should be passed,—see *State v. Jersey City*, 1 *Dutch.* 309; *State v. Hudson*, 5 *Id.* 475.

314. The signing by the mayor as president of the board of council, of the minutes of a meeting at which a resolution was passed, does not amount to a signing of the resolution by him as mayor, when such signature is necessary to give the resolution validity. *Mo. Supreme Ct.* 1862, *Graham v. Carondelet*, 33 *Mo.* 262. Compare *Kepner v. Commonwealth*, 4 *Pa. St.* 124.

315. Sufficiency in form. If a town is authorized by the legislature to pass a particular by-law, and no particular form is prescribed in which the law shall be engrossed, any form of words is sufficient to constitute such a by-law, provided enough is contained therein to signify the will of the town that the by-law exist, and to indicate its terms and the objects to which it should apply. *N. H. Superior Ct.* 1846, *Lisbon v. Clark*, 18 *N. H.* 284.

316. A by-law passed under an authority to pass such, “if found necessary,” need not recite any adjudication of such necessity; nor need the declaration in an action on such a by-law aver any such adjudication, nor that the prohibition was necessary. Their judgment of its necessity is implied in the enactment itself. *N. Y. Supreme Ct.* 1827, *Stuyvesant v. Mayor &c. of N. Y.* 7 *Cow.* 588.

317. Necessity of publishing ordinances. By a statute of Connecticut, “every town shall have power to make by-laws for restraining horses, cattle, &c., provided that such by-laws shall not be in force till published” in

one of three enumerated classes of newspapers, "as the town shall direct." *Held*, that a by-law which was published by order of the town clerk, without the direction of the town as to the newspaper, was void, notwithstanding it was published in the manner prescribed, and in one of the classes of newspapers mentioned in the statute. *Conn. Supreme Ct.* 1885, *Higley v. Bunce*, 10 *Conn.* 436, 567. Compare *Barnett v. President &c. of Newark*, 28 *Ill.* 62.

§18. Where the charter of a city provided that its ordinances made under the charter should be published and recorded, and the legislature passed a subsequent act authorizing them to incur a debt,—*Held*, that the non-publication of the ordinance for the issue of the bonds did not affect the validity of the bonds. *U. S. Supreme Ct.* 1860, *Amey v. Mayor &c. of Allegheny City*, 24 *How.* 864.

§19. In a statute erecting a borough into a city, a provision that the existing borough ordinances shall remain in force, provided that they shall be recorded within a certain time, is merely directory; and a non-compliance with it does not affect the validity of the ordinances. *Pa. Supreme Ct.* 1858, *Trustees of Erie Academy v. City of Erie*, 81 *Pa. St.* 515.

§20. Although a city charter directs the ayes and noes to be called in taking the vote on an ordinance, and directs the publication thereof, an ordinance is not rendered void by the omission to publish a statement of the ayes and noes as required. *N. Y. Superior Ct.* (1848?), *Elmendorf v. Ewen*, 2 *Leg. Obs.* 85; *N. Y. Supreme Ct.* 1844, *Striker v. Kelly*, 7 *Hill*, 9. To similar effect, see *Elmendorf v. Mayor &c. of N. Y.* 25 *Wend.* 698.

§21. Sufficiency. A city ordinance directed an election to be held, to determine the question of subscription by the corporation to stock in a railroad company, and directed the clerk to publish notice of it. The ordinance was first published in the same newspaper with the notice; and it was claimed, that as by statute the ordinance was not in force until published, the clerk had no authority to publish the notice until afterward. *Held*, that the notice was legally published. *Wis. Supreme Ct.* 1859, *Clark v. City of Janesville*, 10 *Wis.* 186.

2. *Validity and effect.*

§22. General requisites. A municipal corporation can pass no ordinances inconsistent

with the constitution and laws of the State; its ordinances must also be reasonable and not oppressive. Subject to these restrictions the power of making by-laws and enforcing them by penalties, exist in all municipal corporations. Hence, an ordinance passed by the mayor and common council of a city requiring retail liquor stores to be closed at a certain hour, is a valid police regulation within the corporate powers of the city, and enforceable. *Tenn. Supreme Ct.* 1859, *Smith v. Mayor &c. of Knoxville*, 3 *Head*, 245.

§23. Conformity to the general law. That an ordinance of a municipal corporation which is inconsistent with the general law, is inoperative,—see *Pesterfield v. Vickers*, 3 *Coldw. (Tenn.)* 205.

§24. The local ordinances of a city, which conflict with an act of Congress, must give way. The laws of Congress, made in pursuance of the constitution of the United States, are the supreme law of the land; anything in the constitution or laws of a State to the contrary notwithstanding. *U. S. Circ. Ct. (Pa.)* 1817, *United States v. Hart*, *Pet. Ct. Ct.* 390; 8 *Wheel. Cr. Cas.* 804.

§25. The ordinances of the corporation of the city of Washington cannot increase or vary the power given by the acts of Congress, nor impose any terms or conditions which can affect the validity of a sale for taxes, made within the authority conferred by the statute. *U. S. Supreme Ct.* 1859, *Thompson v. Carroll*, 22 *How.* 422.

§26. The charter of a borough authorized its council to make ordinances, rules, and regulations necessary for improving and keeping its streets in repair, &c., "and also" to assess and collect a tax for such purpose. *Held*, that general taxation was not the exclusive mode of securing the object intended by the charter, but that ordinances operating on individual property might be passed, provided they were not repugnant to the laws of the State.* *Pa. Supreme Ct.* 1866, *Borough of Greensburg v. Young*, 53 *Pa. St.* 280. Compare *State v. Ferguson*, 33 *N. H.* 424.

§27. The charter of a town authorized the board of trustees to punish any offence

* But an ordinance which simply imposes a payment upon a person or corporation, as a method of taxation is wrongful, and will not sustain an action. *N. Y. Ct. of Appeals*, 1865, *Mayor &c. of N. Y. v. Second Ave. R. R. Co.* 32 *N. Y.* 261; followed in *Same v. Third Ave. R. R. Co.* 33 *Id.* 42.

against the laws of the incorporation, as provided by law for like offences against the laws of the State,—*Held*, that this did not authorize the passage of an ordinance imposing a fine of from five to fifty dollars for an assault, &c., the minimum fine for such an offence, under the laws of the State, being three dollars. *Ill. Supreme Ct.* 1859, *Petersburg v. Metzker*, 21 *Ill.* 205.

§28. A charter of a city which confers upon its inhabitants the special franchise of making its own laws with regard to the opening and laying out of streets, is, so far as it extends, a grant of sovereignty; and such laws, when in accordance with it, must prevail, within the territorial limits of such city, to the exclusion of the general laws of the State, where they are repugnant. *N. J. Supreme Ct.* 1855, *State v. Clarke*, 1 *Dutch.* 54.

§29. — and to charter. An ordinance passed by a municipal corporation must conform strictly to the charter.* [9 *Barb.* 152; 2 *Seld.* 92.] *N. Y. Supreme Ct.* 1864, *Cowen v. Village of West Troy*, 48 *Barb.* 48.

§30. An ordinance or by-law of a municipal corporation cannot operate to cripple its powers so as to disable it from performing its legal duties. *N. Y. Supreme Ct.* 1840, *Exp. Mayor &c. of Albany*, 28 *Wend.* 277.

§31. The mayor and city council of Baltimore are but trustees of the public; the tenure of their office impresses their ordinances with liability to change. They cannot pass an irrevocable ordinance. The corporation cannot abridge its own legislative powers. *Md. Supreme Ct.* 1862, *State v. Graves*, 19 *Md.* 351.

§32. Under a charter or statute authorizing the corporation to impose penalties of not more than \$250, no more than that amount can be imposed for any one offence, or for the violation of the by-laws in any one transaction. A by-law imposing a penalty of \$125 for, every cwt. of gunpowder kept, is void; for with the same propriety the penalty might have been imposed on every grain. *N. Y. Supreme Ct.* 1815, *Mayor &c. of N. Y. v. Ordrenan*, 12 *Johns.* 122.

* Where a by-law consists of several distinct and independent parts, the fact that some of them are void, because not authorized by the charter, does not affect the validity of the other independent provisions. *Shelton v. Mobile*, 30 *Ala.* 540.

Compare *Stokes v. Corporation of N. Y.* 14 *Wend.* 87.

§33. The power to license auctioneers, and to take bonds for their good behavior, not being one of the incidents to a corporation, must be conferred by an act of the legislature; and in executing it, the corporate body must conform to the act. The legislature of Virginia conferred this power on the mayor, aldermen, and commonalty of the several corporate towns within that commonwealth, of which Alexandria was one,—but provided that no such license should be granted until the person or persons requesting the same should enter into bond, with one or more sufficient sureties, payable to the mayor, aldermen, and commonalty of such corporation. *Held*, that this was a limitation of the power. *U. S. Supreme Ct.* 1830, *Fowle v. Common Council of Alexandria*, 3 *Pet.* 399. As to Licenses and markets, see *Supra*, 98–102.

§34. A statutory power to regulate butchers and the places and manner of selling meats, and to prevent unlicensed persons from acting as butchers, authorizes an ordinance regulating the killing and bleeding of meats, and imposing a penalty for infringement. Such ordinances cannot be considered void as being in restraint of trade. *N. Y. Supreme Ct.* 1843, *City of Brooklyn v. Cleves*, *Hill & D. Supp.* 281.

§35. But a power to regulate vending of meats and the measuring of any commodity will not authorize an ordinance forbidding the sale of unwholesome meats or other provisions so as to sustain a penalty for selling putrid eggs. *N. Y. Supreme Ct.* 1848, *Mayor &c. of Rochester v. Rood*, *Hill & D. Supp.* 146.

§36. Reasonableness. That ordinances of a municipal corporation, to be valid, must be reasonable,—see *Commissioners &c. v. Gas Co.* 12 *Pa. St.* 318; *Mayor &c. of Hudson v. Thorne*, 7 *Paige*, 261.

§37. The fact that a municipal regulation is made with special reference to a particular person, does not affect its validity. See *Commonwealth v. Goodrich*, 18 *Allen*, 545.

§38. That they cannot be made to operate retrospectively,*—see *Howard v. Corporation of Savannah*, *Charlt.* 178.

* But where a corporation of a city had a right under their charter to establish, by ordinance, a tribunal before whom

839. That a by-law which operates as an unreasonable restraint upon trade, is void,*—see *St. Paul v. Laidler*, 2 *Min.* 190.

840. Although a city may prohibit a business which has a dangerous tendency to promoting fires, yet, since all by-laws must be reasonable, they cannot prohibit the erection of new wooden buildings for carrying on such business, while they permit such business to be carried on in buildings already erected. *N. Y. Chancery*, 1838, *Mayor &c. of Hudson v. Thorne*, 7 *Paige*, 261.

841. An ordinance directing the arrest and fining of all free negroes who may be found out after ten o'clock within the limits of a city,—*Held* oppressive and void. *Mayor &c. of Memphis v. Winfield*, 8 *Humph.* 707.

842. A by-law of a town, prohibiting all persons except its own inhabitants from taking shell fish in a navigable river within its limits,—*Held* void, as against common right. *Hayden v. Noyes*, 5 *Conn.* 391.

843. That towns may regulate the cutting of ice in large ponds within their limits by reasonable by-laws,—see *West Roxbury v. Stoddard*, 7 *Allen*, 158.

844. Instances of ordinances sustained as being not unconstitutional, unreasonable, oppressive, contrary to charter, &c., but within the legitimate police powers of cities:

Requiring owners of lots to make or pay for sidewalks, &c. *Paxton v. Sweet*, 1 *Me.* (1 *Greenl.*) 196; *City of Lowell v. Hadley*, 8 *Metc. (Mass.)* 180; *Borough of Greensburg v. Young*, 53 *Pa. St.* 280.

Prohibiting public exhibition of stud horses. *Nolen v. Mayor &c.* 4 *Yerg.* 168.

Establishing fire limits, and forbidding the rebuilding or repairing of wooden buildings within them. *Brady v. Northwestern Ins. Co.* 11 *Mich.* 425.

Requiring hoistways, in stores and other

buildings, to be enclosed by a railing, and to be fastened at night. *Mayor &c. of N. Y. v. Williams*, 15 *N. Y.* 502.

Providing that no person shall maintain an awning before his house without the consent of the mayor and alderman. *Pedrick v. Bailey*, 12 *Gray*, 161.

Prohibiting restaurants to be kept open after ten o'clock at night. *State v. Freeman*, 38 *N. H.* 426.

Prohibiting, under a penalty, "all hawking and peddling about the streets of the city, of meat, game, or poultry." *Shelton v. Mobile*, 30 *Ala. N. S.* 540.

Prohibiting persons selling the produce of their own farms, &c., from occupying stands for the purpose of such sales, in certain streets constituted by the by-law a part of the market. *Nightingale's Case*, 11 *Pick.* 168; *Buffalo v. Webster*, 10 *Wend.* 99.

Prohibiting sales at auction, upon the streets, alleys, sidewalks, and public grounds of the city. *White v. Kent*, 11 *Ohio*, 550.

Prohibiting any person not licensed therefor, from removing house dirt and offal from the city. *Vandine's Case*, 6 *Pick.* 187.

Prohibiting dealings of unlicensed butchers. *City of Brooklyn v. Cleves*, *Hill & D. Supp.* 281.

Requiring coal to be weighed by city weighers, under a penalty. *Stokes v. Corporation of N. Y.* 14 *Wend.* 87.

Imposing a fine for mutilating or destroying any ornamental tree planted within the corporate limits. *State v. Merrill*, 37 *Me.* 329.

Providing that any person neglecting for ten days after notice thereof, to pay an assessment for laying water pipe, should be charged with interest. *Northern Liberties v. St. John's Church*, 13 *Pa. St.* 104.

Giving police officers a fixed salary, and requiring them to pay over to the city all fees received by them. *Worcester v. Walker*, 9 *Gray*, 78.

As to ordinances relative to streets, wharves, markets, licenses, nuisances, public health, burials, &c.,—see *supra*, 89–117.

845. *Uncertainty.* An ordinance of the city of Perth Amboy, altering the grades of streets, but not referring to any plan of grades, or establishing new grades, was *Held* illegal. *N. J. Chancery*, 1854, *Kearney v. Andrews*, 3 *Stockt.* 70.

846. A by-law of a municipal corporation, not void for uncertainty, because the amount

contested elections should be tried, and provide the forms of such trial. *Held*, that such ordinance might be passed, after an election had taken place, and that the tribunal could take cognizance of the previous election. *State v. Johnson*, 17 *Ark.* 407.

* In England by-laws of municipal corporations which operate in restraint of trade and to the oppression of the subject, are void. *Clark v. Le Creu*, 9 *Barn. & C.* 53; *Talors of Ipswich Case*, 11 *Co.* 53; 1 *Roll.* 4; *Parry v. Berry*, 1 *Comyns*, 269; *Chamberlain of London v. Compton*, 7 *Dowl. & R.* 597; *Rex v. Coopers' Company*, 7 *Durnf. & E.* 548; *Clothworkers of Ipswich Case*, *Godb.* 253; *Mayor of Bedford v. Fox*, 1 *Luth.* 568.

Unless supported by special custom. *K. R.* 1884, *Shaw v. Poynter*, 2 *Adol. & E.* 312.

of the penalty imposed for its violation is left discretionary within fixed limits, with the municipal court. See *Huntsville v. Phelps*, 27 *Ala. N. S.* 55.

847. A town ordinance providing that certain offenders should pay a penalty of not less than one, nor more than twenty dollars, void for vagueness and uncertainty. See *Commissioners v. Harris*, 7 *Jones Law*, 281.

848. Interpretation. The construction of by-laws of a town, as they are usually more inartificially expressed than other laws, should be reasonable, and such as to give effect to every part.* *Conn. Supreme Ct.* 1857, *Whitlock v. West*, 26 *Conn.* 406.

849. That where the language of a city ordinance is susceptible of two different significations, one of which is against law, the court will ascertain and give effect to the intent of the ordinance, provided the same be not contrary to law,—see *Merriam v. New Orleans*, 14 *La. Ann.* 318.

850. Instances. A provision in an ordinance, that work under a contract shall be done under such directions as shall be given by certain officers, confers no authority upon them, or either of them, to change or modify, in any essential particular, the provisions of the contract made and entered into for the performance of the work.† *N. Y. Ct. of Appeals*, 1860, *Bonesteel v. Mayor &c.* of *N. Y.* 22 *N. Y.* 162; 20 *How. Pr.* 237.

851. Elevating and enlarging of a wooden

building, so as materially to alter its character,—*Held*, within the prohibition of an ordinance forbidding "the erection of wooden buildings," &c. *Douglass v. Commonwealth*, 2 *Rawle*, 262.

852. A building partly of wood and partly of brick, not within the prohibition of an ordinance against wooden buildings. See *Stewart v. Commonwealth*, 10 *Watts*, 307.

853. An ordinance that no person should sell liquors without a license, &c,—*Held*, not to apply to sales by manufacturers, but to retail dealers. See *St. Paul v. Troyer*, 3 *Minn.* 291.

854. Construction of an ordinance of a municipal corporation requiring lumbers sold or purchased to be surveyed, marked, and numbered,—determined. *Howe v. Norris*, 12 *Allen*, 82.

855. A butcher who has a farm, as a convenient appendage to his business, to fatten sheep upon, not "a farmer" within the exception of an ordinance forbidding persons to sell meat without a license, except farmers selling the produce of their farms. See *Trustees of Rochester v. Pettinger*, 17 *Wend.* 265.

856. A town by-law declaring that hogs should be kept up,—*Held*, to refer only to the highway. *Shepherd v. Hees*, 12 *Johns.* 433.

857. An ordinance forbidding "all disorderly shouting, dancing, and all disorderly and tumultuous assemblies, on the part of slaves and free negroes, in the streets, markets, and other public places" in a town,—*Held*, not limited to violations of pre-existing laws. *Washington v. Frank*, 1 *Jones Law*, 436.

For principles governing the passage, validity, and interpretation of ordinances of municipal corporations in common with By-laws of other corporations, see BY-LAWS.

3. How enforced.

858. Forfeiture cannot be imposed. A corporation cannot exercise the power of creating forfeitures, unless that right is specifically granted.* It cannot be implied

* The words "it shall and may be lawful," when found in a by-law of a corporation,—*Held*, not obligatory upon the corporation. *Bex v. Balliffs &c. of Eye*, 1 *Barn. & C.* 85.

† In the case cited in the text, the corporation of New York city advertised for estimates and proposals for grading and forming a street, according to certain specifications. The plaintiff made a proposition referring to and adopting the specifications, one of which required the stone excavated in the street to be deposited in the Hudson river in continuation of the street. Upon examination of the proposals, the contract was awarded to the plaintiff by the street commissioner.

The street commissioner entered into a written contract with the plaintiff, departing from the specifications in two respects: first, in requiring rock to be excavated two feet below the curbstone grade instead of one foot; and, second, in substituting for the regulation that the rock excavated should be deposited in the river, a provision that it should belong to the contractor upon his furnishing an equal quantity of earth to be deposited upon the street.

The award of the contract to the plaintiff was confirmed by the common council.

Held, that the plaintiff's proposal and the specifications formed the only basis of any contract to be made for the work, or from which any request to the plaintiff to perform work could be implied; and that the modifications made by the street commissioner were unauthorized.

* Where a city ordinance made it the duty of the marshal to take up all hogs found running at large in the city, and, under certain conditions to sell them, and, after paying a fine and costs, to pay the balance of the money to the owner:—*Held*, that the provision could be sustained as a method of abating a nuisance and paying the charges, but not as a mode of enforcing a fine, which requires a civil action. *Gosselink v. Campbell*, 4 *Iowa*, 296.

from the words in the charter giving power "to impose reasonable fines" and to cause "all such fines and all such forfeitures and penalties as may be incurred under the laws and ordinances of the corporation to be assessed levied, and collected." The latter words are not appropriate to the enforcement of forfeitures. *Ohio Supreme Ct.* 1832, *Cotter v. Doty*, 5 *Ohio (Hamm.)* 395. And see *Phillips v. Allen*, 41 *Pa. St.* 481; *White v. Tallman*, 2 *Dutch.* 67.

359. Time of suing. A penalty incurred under a by-law may be enforced after the expiration of the period it was intended to regulate. *N. H. Superior Ct.* 1833, *Stevens v. Dimond*, 6 *N. H.* 330.

As to Actions generally, see *SUTTS*.

360. Penalty recoverable in debt. A fine or penalty, incurred by the breach of a by-law, is a debt, and recoverable as such. *Circ. Ct. D. C.* 1835, *Exp. Reed*, 4 *Cranah C. Ct.* 582.

361. Demand when necessary. Where a by-law of a company after imposing the penalty, declares that if the offender, "deny, refuse, or neglect," to pay the penalty, it shall be recoverable in an action of debt, it is not necessary to prove a previous demand in order to sustain such action, although averred in the declaration. *C. P.* 1803, *Butchers Company v. Bullock*, 3 *Bos. & P.* 434.

362. Necessity of pleading the by-law. The by-laws of all corporate bodies, including all, municipal corporations, must be set forth in pleading, when they are sought to be enforced by an action, or set up as a protection. *N. Y. Supreme Ct.* 1837, *Harker v. Mayor &c. of N. Y.* 17 *Wend.* 199.

363. The courts are bound to take judicial notice of the charter of a municipal corporation, and of its power to make by-laws; but not of the by-laws made by it. Therefore in a proceeding for the violation of a municipal ordinance, the complaint must set forth the by-law, its breach, and the plaintiff's right to sue for the penalty. *Ala. Supreme Ct.* 1857, *Case v. Mobile*, 30 *Ala. N. S.* 538.

364. The ordinances of the common council of the city of New York are not public acts, and they must be specially set forth in pleading. *N. Y. Supreme Ct. Sp. T.* 1851, *People v. Mayor &c. of N. Y.* 7 *How. Pr.* 81.

365. A statute which renders it unnecessary, in prosecutions on the by-laws of a city, to set forth the by-law at large, does not con-

flict with the constitution of Massachusetts.* See *Commonwealth v. Worcester*, 3 *Pick.* 462.

366. Charging the offence. In an action for the recovery of the penalty of a by-law, the declaration must allege that the offence was committed, as well against the form of the statute, as against the form of the by-law, in such case made and provided. *Mass. Supreme Ct.* 1826, *Commonwealth v. Worcester*, 3 *Pick.* 462; 1827, *Commonwealth v. Gay*, 5 *Pick.* 44; *N. H. Superior Ct.* 1833, *Stevens v. Dimond*, 6 *N. H.* 330.

367. The proof requisite. To sustain an action for a penalty for violating an ordinance of a municipal corporation, the plaintiffs (the corporation) must show that the ordinance which they seek to enforce is one within their authority in legislation, and that it is a regulation of police and internal government, and not a mere imposition of a duty for purposes of revenue. *N. Y. Ct. of Appeals*, 1865, *Mayor &c. of New York v. Second Avenue R. R. Co.* 32 *N. Y.* 261; followed in *Mayor &c. of New York v. Third Avenue R. R. Co.* 33 *Id.* 42.

368. That it is not necessary, in an action to recover a penalty imposed by a city ordinance, to prove the promulgation of the ordinance,—see *City Council v. Chur*, 2 *Bailey*, 164.

369. That in a prosecution on a by-law prohibiting fast driving of horses in the streets of a city, it is not necessary to prove that any person was endangered by such driving,—see *Commonwealth v. Worcester*, 3 *Pick.* 462.

370. Defences. In a suit for the violation of a town ordinance, irregularity in the organization of the corporation is no defence. See *Decorah v. Gillis*, 10 *Iowa*, 234.

371. That an owner cannot protect himself from the penalties of the fire laws, by showing that an illegal building was erected with the consent and approval of one of the fire wardens,—see *Fire Department v. Buffum*, 2 *E. D. Smith*, 511.

* After a complaint had been issued against a person for the violation of an ordinance of the city of Boston, in which complaint the charter of the city and the ordinance were not set forth, the legislature passed an act, declaring it sufficient to set forth the substance of complaints before the police court, without setting forth the special acts of the legislature, or the ordinances or by-laws of the city, on which they were founded. *Held*, that the act did not operate as an *ex post facto* law, but only affected the form of proceeding. *Commonwealth v. Bean*, *Thack.* 85. Compare *City Council v. Chur*, 2 *Bailey*, 164.

872. **Warrant.** What the warrant of a justice of the peace, for the violation of a municipal by-law, must set forth. See *White v. Corporation of Washington*, 2 *Cranch Ct.* 337; *Boothe v. Corporation of Georgetown*, *Id.* 356; *Delany v. Corporation of Washington*, *Id.* 459; *Corporation of Washington v. Cooley*, 4 *Id.* 103; *Exp. Reed*, *Id.* 582.

VII. LIABILITIES.

873. **Want of power.** A town, in its corporate capacity, will not be bound, even by the express vote of the majority, to the performance of contracts, or other legal duties not coming within the scope of the objects and purposes for which it was incorporated. *Mass. Supreme Ct.* 1816, *Stetson v. Kempton*, 13, *Mass.* 272; 1819, *Norton v. Mansfield*, 16 *Mass.* 48; 1831, *Parsons v. Goshen*, 11 *Pick.* 396; 1840, *Anthony v. Adams*, 1 *Metc.* 284.

874. That a town has no authority to appropriate money for the payment of expenses incurred by individuals, prior to its corporate existence as a town, in procuring the passage of its charter,—see *Frost v. Belmont*, 6 *Allen*, 152.

875. A town will not be bound by its corporate vote to pay the expenses of a field driver in defending a suit brought for taking up and impounding cattle running at large, contrary to law, such agreement not being within the scope of a town's corporate powers. See *Vincent v. Nantucket*, 12 *Cush.* 103.

876. A town cannot properly vote to pay money to its selectmen, or those who have acted in that capacity, for costs and damages sustained by them in resisting criminal prosecutions brought against them for refusing to insert names upon the check list. *N. H. Supreme Ct.* 1863, *Merrill v. Plainfield*, 45 *N. H.* 126. See also, *Gove v. Epping*, 41 *N. H.* 539.

877. That a town may appropriate money to indemnify its school committee for expenses incurred in defending an action for an alleged libel contained in a report made by them in good faith, and in which judgment has been rendered in their favor,—see *Fuller v. Groton*, 11 *Gray*, 340.

878. A municipal corporation has no power, as a party, to make a contract, the effect of which would be to control or embarrass their legislative powers and duties. *N. Y. Supreme Ct.* 1826, *Brick Presbyterian Church v. Mayor*

&c. of N. Y. 5 *Cotw.* 538; followed, 1827, *Stuyvesant v. Mayor &c. of N. Y.* 7 *Id.* 588. Compare *Attorney General v. Mayor &c. of N. Y.* 3 *Duer*, 119, 131, 147; *Davis v. The Same*, 14 *N. Y. (4 Kern.)* 506; *Costar v. Brush*, 25 *Wend.* 628; *N. Y. & Harlem R. R. Co. v. Mayor &c. of N. Y.* 1 *Hilt.* 562, 588.

879. A resolution of a common council, authorizing private persons to construct and operate a railroad in the streets of the city upon certain conditions, without limitation as to time, or reserving a power of revocation, cannot be sustained as a license or an act of municipal legislation merely. It forms a contract which, if valid, the corporation could not abrogate. And, considered as a contract it is void, because it would deprive the corporation of their power to control and regulate the use of the streets. *N. Y. Ct. of Appeals*, 1863, *Milhau v. Sharp*, 27 *N. Y.* 611.

Compare *supra*, 40-42; 205-211.

880. **When defect of power is no defence.** A town corporation that has borrowed money for the use of the town, is bound to repay the loan, though no express power be given in the charter to borrow money. As a general principle, no corporation can exercise powers not granted in its act of incorporation. This act is its constitution, and whenever it oversteps the limits therein prescribed, its act so far becomes void. But where certain powers are specifically granted, these carry with them such others as incidental thereto, as are necessary to carry those specified into effect. It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are in these days granted. [2 *Kent's Com.* 2 ed. 298; 2 *Cranch*, 127; 4 *Wheat.* 686; 4 *Pet.* 152; 6 *How.* 322; *Ang. & A. on Corp. ch.* 8, § 6; *Id. ch.* 8, § 12.] But a different rule of construction ought to prevail where a corporation is endeavoring to extend its power to the injury of others, and where it sets up by way of defence to an action brought against it, that it has itself been guilty of usurpation of power. *Ohio Supreme Ct.* 1836, *Bank of Chillicothe v. Town of Chillicothe*, 7 *Ohio (Hamm.)* 354.

881. Where a municipal corporation, being empowered to effect a loan for the purpose of paying a subscription made by it to the stock of a railroad company, which was payable in installments, issues its bonds to the railroad company for the amount of the subscription in full, and receives the stock, it can-

not evade its liability on such bonds by objecting that this was a departure from its authority, nor that its agents made the annual interest to which they were limited, payable semi-annually. *Conn. Supreme Ct.* 1848, *City of Bridgeport v. Housatonic R. R. Co.* 15 *Conn.* 475; *S. P. Ky. Ct. of Appeals*, 1852, *Slack v. Maysville & Lexington R. R. Co.* 13 *B. Monr.* 9.

882. A municipal corporation may incur liabilities otherwise than by ordinance. Under some circumstances it may become liable by implication. It cannot avail itself of the property or labor of a party and screen itself from responsibility under the plea that it never passed an ordinance on the subject. The implication of a promise existing in such case against individuals, extends equally to corporations. *Cal. Supreme Ct.* 1858, *San Francisco Gas Co. v. City of San Francisco*, 9 *Cal.* 453.

883. That the qualifications of the members of the city council cannot be inquired into in a suit to enforce a contract made by the mayor under a resolution of that body authorizing it,—see *Schwartz v. Flatboats*, 14 *La. Ann.* 243.

884. Although a municipal corporation is forbidden by law to make any additional allowance beyond the legal claim under any contract with them, yet they may waive a forfeiture incurred by a contractor by not completing performance by the day named in the contract. *N. Y. Supreme Ct. Sp. T.* 1864, *People ex. rel. Cunningham v. Brennan*, 18 *Abb. Pr.* 100.

885. Ratification. Since the common council of the city of New York, having the general power to build markets, is authorized to employ an architect to prepare plans, specifications, &c., for their construction,—if such services, though rendered without authority, are accepted by the common council, the city is bound to pay for them. The doctrine of ratification of the acts of an agent is applicable to corporations as well as individuals. *N. Y. Ct. of Appeals*, 1858, *Peterson v. Mayor &c. of N. Y.* 17 *N. Y.* 449. And see *People v. Flagg*, 17 *N. Y.* 584; 16 *How. Pr.* 36; *McCracken v. San Francisco*, 16 *Cal.* 591.

886. Resolutions of a common council, upon a survey made at their instance, and directing their counsel to defend their lessee in his possession,—*Held*, a ratification of the representations of their title, made by their

committee to the lessee. *Sharp v. Mayor &c. of New York*, 40 *Barb. N. Y.* 256.

887. Where a common council, by resolution, directed that an amount which by arbitration had been ascertained to be due for extra work to a contractor for a local improvement, be added to the assessment, and the contractor assented to this being done,—*Held*, that the claim thereby became, if it were not before, valid against the corporation, and that the corporation could not rescind their resolution without the contractor's assent. *N. Y. Supreme Ct.* 1847, *Brady v. Mayor &c. of Brooklyn*, 1 *Barb.* 584.

888. A committee of a town does not bind the town by a contract, unless a majority concur; but a contract made by a minority may be ratified by the majority; and when so ratified, it has the same force to bind the town, as it would have had, if the majority had originally concurred in making it. Compensation for labor performed under such a contract before it was ratified, may be recovered of the town. *Me. Supreme Ct.* 1853, *Hanson v. Dexter*, 36 *Me.* 516.

889. A municipal corporation is one of limited powers; and if its officers assume to incur an obligation which it is not authorized to do, it is not made liable by the fact that it has received the consideration for the obligation. A corporation cannot, by subsequent ratification, make good an act of an agent which it could not have directly empowered. *N. Y. Supreme Ct.* 1846, *Hodges v. City of Buffalo*, 2 *Den.* 110. To similar effect, *Ct. of Appeals*, 1850, *Halstead v. Mayor &c. of N. Y.* 8 *N. Y.* (8 *Comst.*) 430; *Supreme Ct.* 1848, *Boom v. City of Utica*, 2 *Barb.* 104. Compare *Peterson v. Mayor &c. of N. Y.* 17 *N. Y.* 449; *Grogan v. San Francisco*, 18 *Cal.* 590.

890. Estoppel. Where the officers of a municipal corporation, without authority, assess against a person, for taxation, land belonging to the corporation, and collect taxes thereon, and return the same as delinquent for non-payment of taxes, buy the same at the tax sale and convey the same upon redemption, the corporation will not be estopped by these acts of their officers and agents, to claim the property as their own. *Mo. Supreme Ct.* 1860, *City of St. Louis v. Gorman*, 29 *Mo.* 593.

891. That if goods are legally purchased by the town agent, assuming the right to pledge the town's credit for the price, and

the town afterward receives them with a knowledge of the way they were purchased, and applies them to its use, this will be a ratification of the agent's authority, and the town will be bound,—see *Backman v. Charlestown*, 42 *N. H.* 125.

892. Where the contract under which work is done for a municipal corporation is void, because entered into in violation of the charter, the contractor cannot recover for the work in any form;—neither under the contract, nor as upon a *quantum meruit*. And a subsequent ratification of the contract by the common council, whether before or after the work is done, does not make it binding on the corporation. *N. Y. Superior Ct.* 1857, *Brady v. Mayor &c. of N. Y.** *2 Bosw.* 173; 7 *Abb. Pr.* 234; 16 *Hov. Pr.* 432.

893. Instances. Contracts by municipal corporations have been sustained for the following purposes; as being within the corporate powers:

Contracts for building roads and bridges. *Royalton v. R. & W. Turnp. Co.* 14 *Vt.* 311.

For grading streets. *Sturtevant v. City of Alton*, 3 *McLean*, 393.

For building a "breakwater" to protect the streets of the city from being flooded by an adjoining lake. *Miller v. Milwaukee*, 14 *Wis.* 642.

For building waterworks. *Rome v. Cabot*, 28 *Ga.* 50; *Hale v. Houghton*, 8 *Mich.* 458.

For repairing engine houses. *Robinson v. St. Louis*, 28 *Mo.* 438.

894. Implied power to borrow money. A municipal corporation has the implied power to borrow money for objects expressly authorized by its charter, for the execution of which money would be a necessary means,—as building markets, providing fire engines, &c.;—and it is not obliged to wait until the money can be collected by taxation. The fact that such power is frequently granted by the legislature, specifically does not show that the grant is not to be implied. *Wis. Supreme Ct.* 1860, *Mills v. Gleason*, 11 *Wis.* 470.

895. A municipal corporation having a power to purchase, has an implied power to incur an indebtedness for the purchase money, and to provide for the payment of the indebtedness, unless that power is so restricted as that it cannot be exercised unless there be

sufficient funds in hand to pay for the property. Where no such restriction exists, if the corporation has no funds applicable, it may purchase on credit, and may issue its obligations to pay the indebtedness at a future time, and make subsequent provision for the payment of them.* *N. Y. Supreme Ct.* 1863, *People v. Brennan*, 39 *Barb.* 522.

896. City bonds may be issued for the purchase of cemetery grounds, there being no provision in the charter expressly restraining the city council from so doing. *Wis. Supreme Ct.* 1859, *State v. Common Council of Madison*, 7 *Vt.* 688.

897. And a prohibition, in the charter of a municipal corporation, from borrowing money, does not prevent it from issuing bonds in payment for property purchased by it. *N. Y. Supreme Ct.* 1863, *People v. Brennan*, 39 *Barb.* 522.

898. Express power. A provision in the charter of a city corporation, authorizing it to borrow money for any public purpose, whenever in the opinion of the city council it shall be expedient to exercise it, is a valid power. *U. S. Supreme Ct.* 1865, *Rogers v. Burlington*, 8 *Wall.* 654; 1866, *Mitchell v. Burlington*, 4 *Id.* 270; *Larned v. Burlington*, *Id.* 275; 1862, *Gilman v. City of Sheboygan*, 2 *Black.* 510.

899. Power "to borrow money for any public purpose" gives authority to a municipal corporation to borrow money to aid a railroad company making its road as a way for public travel and transportation; and, as a means of borrowing money to accomplish this object, such municipal corporation may issue its bonds, to be sold by the railway company to raise the money.† *U. S. Su-*

* A municipal corporation having power to borrow money may make the principal and interest payable where it pleases. *U. S. Supreme Ct.* 1863, *Meyer v. City of Muscatine*, 1 *Wall.* 884.

Municipal corporations have no power, in the absence of legislative authority to the contrary, to discharge indebtedness elsewhere than at their treasuries. *Ill. Supreme Ct.* 1859, *People v. County of Tazewell*, 23 *Ill.* 147; 1860, *Johnson v. Stark*, 24 *Ill.* 75; *Pekin v. Reynolds*, 31 *Ill.* 529.

† An act of a State legislature authorizing a city to issue its bond in aid of railroad companies incorporated and organized, does not extend to companies subsequently incorporated. *U. S. Dist. Ct. (Wis.)* 1860? *Smith v. Milwaukee R. R. Co.* 9 *Am. Law Reg.* 655.

And where a city issues its bonds in aid of a railroad company without authority of law, receiving securities collateral to the company's bonds, a judgment creditor of the company cannot, by bill in equity, require the city to surrender these securities until its rights are determined by judicial proceedings on the part of the bondholders. [4 *John. Ch.* 329; 2 *Id.* 561; 1 *Vern.* 190; 2 *Rawle*, 229.] *Id.*

* The judgment was affirmed by the Court of Appeals, 1859, 20 *N. Y.* 312.

preme Ct. 1865, *Rogers v. Burlington*, 8 *Wall.* 654.

400. Money borrowed by a municipal corporation to construct a plank road, if the road leads from, extends to, or passes through, the limits of the corporation, is borrowed for a public purpose, within the meaning of a provision in its charter authorizing it to borrow money "for any public purpose." *U. S. Supreme Ct.* 1866, *Mitchell v. Burlington*, 2 *Wall.* 270. And see *Larned v. Burlington*, *Id.* 275.

401. An authority given by act of legislature to a city corporation to subscribe for stock in a railway company, "as fully as any individual," authorizes also the issue by the city of its negotiable bonds in payment of the stock. *U. S. Supreme Ct.* 1868, *Seybert v. City of Pittsburg*, 1 *Wall.* 272. And see *Meyer v. City of Muscatine*, *Id.* 384; *Von Hoffman v. City of Quincy*, 4 *Id.* 435.

For the law governing Subscriptions by municipal corporations to railroad and other improvement corporations, see SUBSCRIPTIONS.

402. Violation of law. A municipal corporation cannot be held liable under a contract made by the municipal officers in violation of law. *La. Supreme Ct.* 1857, *Fox v. City of New Orleans*, 12 *La. Ann.* 154; *S. P. Seibrecht v. City of New Orleans*, *Id.* 496.

403. Irregularity of proceedings. A city corporation cannot be bound for any contract made without its authorization expressed by a resolution of the common council. *La. Supreme Ct.* 1857, *Seibrecht v. City of New Orleans*, 12 *La. Ann.* 496.

404. A contract made by individual members of the common council of a municipal corporation, in a manner not authorized by charter, and in disregard of the forms therein directed to be observed in the making of its contracts, is not the ground of any claim against the corporation; and where a contract required by the municipal charter to be made by the common council, was made by a special committee of that body,—*Held*, that not only was this contract primarily invalid, but that not even any subsequent action of the common council could afterward confer upon it validity. *Cal. Supreme Ct.* 1862, *Lottman v. City of San Francisco*, 20 *Cal.* 96; *Kan. Supreme Ct.* 1864, *City of Leavenworth v. Rankin*, 2 *Kan.* 357.

405. Want of consideration. Where a

resident of a town advanced money and put in a substitute without any promise, express or implied, from the town that he should be reimbursed, and for the sole purpose of exempting himself from any future draft, if any should be made;—*Held*, that a subsequent vote of the town, authorizing its officers to draw an order in his favor for a like sum, was a mere gratuity; and that the town, no liability having been imposed by the legislature, was not liable. *Conn. Supreme Ct.* 1866, *Usher v. Town of Colchester*, 38 *Conn.* 567.

406. The fiscal officer of a municipal corporation cannot refuse to pay for property purchased by the corporation, and ordered by it to be paid for, on the mere ground that the title of the seller was voidable by the corporation. He has not the right to raise that objection. *N. Y. Supreme Ct.* 1863, *People v. Brennan*, 39 *Barb.* 522.

407. Recovering back consideration. A public sale of land for a term of years was made by a municipal corporation, in pursuance of the provisions of its charter, to pay assessments for street improvements, and a declaration of sale devoid of words of grant was delivered to the purchaser. The ordinance under which the sale was made, was subsequently declared illegal and void. *Held*, that the purchase money could be recovered back in an action of assumpsit. *N. J. Supreme Ct.* 1864, *Phillips v. Mayor &c. of Hudson*, 31 *N. J. Law* (2 *Vroom*), 143.

408. Want of seal. That a contract made by commissioners, appointed by trustees of a town, to contract for the grading and paving of the streets may be binding on the town although without the corporate seal,—see *Guffield v. Bowling Green*, 6 *B. Monr.* 224.

409. Rescinding contract. A municipal corporation has no more power to rescind a contract once legally made, than an individual has. Therefore where a vendor has delivered a deed of land to the agents of the town, and a vote to accept it has been passed at town meeting, the town becomes liable for the price, and a vote to reconsider passed on a subsequent day, cannot relieve them. *N. H. Superior Ct.* 1834, *Jewett v. Town of Alton*, 7 *N. H.* 257. And see *Nelson v. Milford*, 7 *Pick.* 18; *Western Saving Fund Society v. Philadelphia*, 31 *Pa. St.*

175; *Schwartz v. Flatboats*, 14 *La. Ann.* 248.

410. That, in general, a provision made by a State or corporation to meet its debts or engagements is not a contract, and may be altered or repealed at pleasure,—see *San Francisco v. Beideman*, 17 *Cal.* 448.

411. If a town authorize a committee to bind them by a contract, and the committee enter into a sealed contract, for the benefit of the town, which binds only themselves, the town, by subsequently revoking the authority of the committee and prohibiting and preventing the execution of the contract, do not render themselves liable in damages to the individual with whom the contract was made. *Mass. Supreme Ct.* 1864, *Fullam v. Inhabitants of West Brookfield*, 9 *Allen*, 1.

412. *Drafts on treasury.* A provision of a municipal charter, requiring an order and warrant of the common council for drawing money from the treasury, is satisfied by a draft authorized by a vote according to the usual course of corporate business. "Order" means only *direction*; which may be express or implied. *N. Y. Supreme Ct.* 1843, *Kelley v. Mayor &c. of Brooklyn*, 4 *Hill*, 263.

413. A statement, in the written warrant of a municipal corporation for the payment of a sum certain at a fixed time to E. S. or order, that the same is payable "out of any funds belonging to the city not before specially appropriated," and "chargeable to general city fund," does not deprive the instrument of the character of a negotiable promissory note. Such words do not give any color to the idea that the liability of the corporation to pay was in any way to depend on the condition of the city treasury. *N. Y. Ct. of Appeals*, 1861, *Bull v. Sims*, 23 *N. Y.* 570.

414. That orders for money, made payable to bearer, drawn by the selectmen of a town and accepted by the town treasurer, without express authority of the town, will not render the town liable to an action in the name of any one other than the person to whom they were issued,—see *Smith v. Cheshire*, 13 *Gray*, 318.

415. An order drawn by a committee of a board of supervisors, upon a county treasurer, is not negotiable; for want of any power in a board of supervisors, or any committee representing such board, to draw a negotiable bill of exchange. [5 *Den.* 517.] One who takes such an order, takes it subject to equi-

ties. *N. Y. Supreme Ct.* 1861, *Supervisors of Rensselaer County v. Weed*, 35 *Barb.* 186.

416. *Contracts for support of poor.* That a town has the legal power of making a contract for the support of its poor, prospective in its terms. *Davenport v. Hallowell*, 1 *Fairf.* 317.

417. A municipal corporation charged by charter with the duty of supporting its paupers, cannot generally be made responsible to an individual for relief granted to a pauper, until an opportunity has been afforded the corporation to make the necessary provision. A corporation must first be put in default before liability will accrue against it upon an implied contract. *Ill. Supreme Ct.* 1851, *Seagraves v. City of Alton*, 13 *Ill.* 366.

418. Under a vote of a town "that the selectmen receive sealed proposals for the maintenance of the poor for one year," "and that they contract with some suitable person for that period, and report at the adjournment of the meeting," a contract made by the selectmen is binding on the town, though it provide for the relief of paupers belonging to other towns, falling into distress and needing relief in the contracting town, and though it make provision for the payment of the expenses of litigation respecting paupers. And a formal acceptance on the part of the town of a contract so made, is not essential. *Ma. Supreme Ct.* 1833, *Davenport v. Hallowell*, 10 *Ma.* (1 *Fairf.*) 317.

419. *Promise to settle account.* Certain paupers, whose settlement was in the town of P., were found in the town of N., under circumstances requiring relief. The defendant, overseer of P., having being duly notified by the plaintiff, overseer of N., to provide for them, requested the plaintiff to support them, and promised, as overseer, to settle the account. *Held*, that the defendant, by making such a promise, could not change the mode which the statute provides for the auditing, collecting, and paying over the money. The overseers of P., on receiving the notice, could either contest the allegation of settlement in their town by a proceeding before the superintendents; or they might take the paupers home to their own town and provide for them. If they did neither, the paupers should be supported where they were, and the expense authorized and collected out of the town to which it was chargeable, by the board of supervisors. The undertaking

of the defendant in no way affected the liability of the town; nor did it authorize the plaintiff's town to pass by the agencies which the law provided for ascertaining the amount of the expenses, and sue the town or its representatives. *Ct. of Appeals*, 1857, *Overseers of Norwich v. Overseers of Pharsalia*, 15 *N. Y.* 841.

420. A certificate given by a municipal corporation, that there would be due to A. B. or order from the city, on a specified contract for grading, \$2,000, payable on the surrender of the certificate when the assessment for said improvement should be collected and paid into the city treasury,—is not a contract to advance a part of the money before the completion of the work. *N. Y. Supreme Ct.* 1860, *Richardson v. City of Brooklyn*, 31 *Barb.* 153.

421. Contracts for work and supplies. That where the charter of a municipal corporation limits the power of the corporate officers in contracts for work or supplies, to contracts formed in a certain way, or under certain formalities, no obligation is created against the corporation by a contract formed without substantial compliance with the statute formalities,*—see *Butler v. Charlestown*, 7 *Gray*, 12; *Appleby v. Mayor &c. of N. Y.* 15 *How. Pr.* 428; *Baltimore v. Eschbach*, 18 *Md.* 276; *White v. New Orleans*, 15 *La. Ann.* 667. Compare *Nash v. St. Paul*, 8 *Minn.* 173.

422. A contract made by officers for the performance of work before the time specified in the statute for public notice had elapsed,—*Held*, void, and that work done

under it did not entitle the contractor to any compensation. *N. Y. Supreme Ct.* 1864, *Cowen v. Village of West Troy*, 43 *Barb.* 48.

423. That a person contracting with the city council for labor on a street is bound to take notice of the powers of the council in the premises, as conferred by charter, and to inform himself whether the preliminaries necessary to enable them to contract have been complied with; he cannot have relief on his contract when he has failed to do this,—see *Johnson v. Common Council*, 16 *Ind.* 227.

424. Under the charter and ordinances of the city of New York,—which require that all contracts to be entered into on the part of the corporation must be authorized by the common council, and, when so authorized, must be made by the department under whose direction the work is to be performed, and they must be made according to the regulations established by the ordinances,—the corporation cannot make a contract without advertising proposals for estimates; which must be done after and not before the common council have authorized it. And such a contract must be made through the head of one of the departments; and an advertisement, published in pursuance of a resolution of the board of aldermen only, is not sufficient. *N. Y. Supreme Ct.* 1852, *Christopher v. Mayor &c. of N. Y.* 13 *Barb.* 567. Followed, 1853, *De Baun v. Mayor &c. of N. Y.* 16 *Id.* 392.

425. A contract entered into by the city officers in violation of the provisions above mentioned, is illegal and void, and imposes no obligation upon the city. And the officers of the corporation cannot bind the corporation by accepting work done under it. *N. Y. Ct. of Appeals* 1859, *Brady v. Mayor &c. of N. Y.* 20 *N. Y.* 312; 18 *How. Pr.* 848.

426. And under charter provisions requiring all work for a corporation to be employed by contract and given to the lowest bidder, it is a violation of law which avoids the contract for the head of the department to test the bids made for the work by a comparison which omits a substantial part of the work to be contracted for. Thus where the street commissioner advertised for bids for grading a street, and his advertisement did not give any estimate of the quantity of rock which might require to be removed,

* A city whose charter and ordinances provide that no contract shall be binding on the city, unless made by some authorized agent, and within some appropriation for the purpose, is not liable for legal services, beneficial to the city performed by counsel retained by a majority of the members of the board of aldermen, without any official action of the city council or of either branch thereof; although the usage of the city has been to pay such bills, approved by a committee of either board, without any formal vote. *Butler v. Charlestown*, 7 *Gray*, 12.

But a municipal corporation in an action against it to recover the price agreed to be paid for the boring of an artesian well, cannot interpose, as a defence, that, although having authority to contract for procuring a supply of water on the public square of the town, they ought to have adopted some less expensive means of procuring it. *Intendant &c. of Livingston v. Pippen*, 31 *Ala. N. S.* 542.

And it is no defence to a suit against the city, by a laborer for his wages, that the city officer by whom the laborer was hired disobeyed the lawful orders of the city government by which he was directed to suspend the work. *Chicago v. Roth*, 26 *Ill.* 456.

although it required bidders to state the price for removing rock if any should be found.—*Held*, that a contract awarded upon such estimates, was void, even as against the city, in an action to recover the price after performance. It was not possible, under the advertisement, to determine the lowest bidder. It was the duty of the contracting officer to state some estimate of the amount of rock excavation anticipated. He had no power to lay out of view that part of the work, and to compare the bids by the price named for other parts. *Id.*

427. What is included under "work and supplies." Charter provisions requiring that work required to be done for a municipal corporation shall be employed by contract founded on bids and proposals upon public notice does not apply to a contract for carriage hire of aldermen or councilmen while engaged in public duties. *N. Y. Com. Pl.* 1861, *Smith v. Mayor &c. of N. Y.* 31 *How. Pr.* 1.

428. It does not apply to professional services;—*e. g.* those of a surveyor in preparing a map. Where professional services are to be employed, the common council have a power of selection, with reference to securing the requisite skill, and no advertisement is required. *N. Y. Supreme Ct. Sp. T.* 1857, *People v. Flagg*,* 5 *Abb. Pr.* 232.

429. So a provision requiring all contracts for "supplies" to be given to the lowest bidder, does not apply to the hiring of a pier for the purpose of removing offal. *N. Y. Superior Ct.* 1859, *Farmers' Loan & Trust Co. v. Mayor &c. of N. Y.* 4 *Boro.* 80.

430. Rights of lowest bidder. On the rights acquired under such provision by him who proves the lowest bidder, and whether he has any title to enforce the awarding of a contract, pursuant to his bid,—see *Smith v. Mayor &c. of N. Y.* 10 *N. Y. (6 Seld.)* 604; *People v. Smith*, 12 *Abb. Pr.* 133; *People v. Croton Aqueduct Board*, 6 *Abb. Pr.* 42; 26 *Barb.* 240; *Altemus v. Mayor &c. of N. Y.* 6 *Duer*, 446.

431. Where a contract for street improvements is awarded in favor of a bid made in answer to duly advertised proposals therefor, a contract is thereby created, and as against

the city, after it has accepted the work, it matters not that the contract is not reduced to writing and signed by the contractor and the street commissioner. *Cal. Supreme Ct.* 1860, *Argenti v. City of San Francisco* 16 *Cal.* 255.

432. Neglect to assess. Where a contractor for grading, &c., has performed his part of the contract with reasonable fidelity and dispatch, and the common council negligently omits to make an assessment for the cost of the work, an action will lie against the corporation in favor of the contractor. In making contracts with others, in execution of the powers bestowed upon it, no liability will be created, so long as it acts within the scope of its authority, and with usual and reasonable diligence. But it cannot with impunity enter into contracts with individuals by which they are induced to expend labor on works of public improvement, and then refuse or negligently omit to use the means to recompense and reimburse them. *N. Y. Supreme Ct.* 1860, *Beard v. City of Brooklyn*, 31 *Barb.* 142.

433. Effect of acceptance of work or supplies. In the absence of proof of fraud, the acceptance by a municipal corporation of work which it was authorized to contract for, is *prima facie* evidence against a landholder sued for a paving assessment, so far as relates to its completion and the manner in which it was done. *La. Supreme Ct.* 1859, *Pigrau v. Guillotte*, 14 *La. Ann.* 297.

434. A municipal corporation employed the plaintiff to pave a street, and to furnish sand for that purpose, under a contract by which the city was to grade the street, and the paving, &c., was to be performed under the direction of its street commissioner. The city so excavated the street as that a quantity of sand beyond that specified in the contract was necessary to bring up the paving to the grade established, and the plaintiff, by direction of the street commissioner, furnished the excess required. *Held*, that he was entitled to compensation therefor by the city. An assent on the part of the corporation was to be implied from its having, by its own act, rendered the extra material necessary to conform the work to the conditions of the contract. *N. Y. Ct. of Appeals*, 1860, *Messenger v. City of Buffalo*, 21 *N. Y.* 196.

435. Where work is performed by one, the benefit of which is received by another, in order that the doctrine of liability upon an

* The decision was affirmed at general term, but was reversed on another point by the Court of Appeals, 17 *N. Y.* 564; 16 *How. Pr.* 36.

implied contract may be applied, there must not only be no restrictions imposed by the law upon the party sought to be charged against making in direct terms a similar contract to that which is implied; but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The mere retention and use of the benefit resulting from the work, where no such power of freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment. *Id.*

436. Contractors with a municipal corporation to build a fence, obeying a subsequent order of a special committee, which was however invalid under the city charter, went to extra expense in painting and in using stone instead of wood, neither of which matters had been provided for in the original contract. *Held*, that the fact that the city retained and took the benefit of such work, which they could not very well help doing, did not enable the contractors to hold the city to payment therefor, on the ground of an implied contract. *Cal. Supreme Ct.* 1862, *Zottman v. City &c. of San Francisco*, 20 *Cal.* 96.

2. *For wrongs.*

437. Responsibility for the exercise of discretionary functions. A public municipal corporation, in the exercise of those legislative powers which it holds for public purposes and as part of the government of the country, enjoys the exemption of the government from responsibility for its own acts, and for the acts of those who are independent corporate officers, deriving their rights and duties from the sovereign power. *Md. Ct. of Appeals*, 1863, *Commissioners v. Duckett*, 20 *Md.* 468. And see *Weightman v. Corporation of Washington*, 1 *Black*, 39.

438. No action can be maintained against a municipal corporation, when exercising judicial functions merely, for error of judgment, where no fraud or malice is imputed. *Ga. Supreme Ct.* 1856, *Duke v. Mayor &c. of Rome*, 20 *Ga.* 635.

439. A municipal corporation is liable in

damages to any person who may sustain injury from an improper exercise of its legitimate powers, when those powers become ministerial, though it is otherwise where they are judicial or discretionary. Every corporation, in the exercise of its powers over its own property, is as much bound so to manage and use its property as not to produce injury to others, as an individual owner. Thus, though the question whether it shall undertake a local improvement may be discretionary; if it does undertake such work, it is bound to exercise care in its execution. *N. Y. Superior Ct.* 1854, *Lacour v. Mayor &c. of N. Y.* 3 *Duer*, 406.

440. Where a municipal corporation has power by its charter "to cause common sewers, drains, &c., to be made in any part of the city," although passing an ordinance for the construction of such a work is a judicial act for which they are not liable; yet the doing of the work, in carrying it out, is ministerial, and it is their duty to see that it is carefully and skillfully done. If, by the want of care or skill in its agents, a culvert be constructed of insufficient capacity to carry off the water in a freshet, the city will be liable to individuals for the damages thereby occasioned. *N. Y. Ct. of Appeals*, 1850, *Rochester White Lead Co. v. City of Rochester*, 3 *N. Y.* (8 *Comst.*) 463; *S. P.* 1851, *Lloyd v. Mayor &c. of N. Y.* 5 *N. Y.* (1 *Seld.*) 369; *N. Y. Superior Ct.* 1848, *Delmonico v. Mayor &c. of N. Y.* 1 *Sandf.* 222. Compare *Radcliff v. Mayor &c. of Brooklyn*, 4 *N. Y.* (4 *Comst.*) 195; also *infra*.

441. — of private franchisees. Municipal corporations, in the exercise of their political, discretionary, and legislative authority, are not liable for the misconduct, negligence, or omissions of the agents employed by them. But in the discharge of ministerial or specified duties, assumed in consideration of the privileges conferred by their charter, they are responsible for the misconduct, negligence, or omissions of their servants; and this is true whether there is an absence of special rewards or advantages, it being considered that such gratuitous function is to be regarded as a burden accepted under the charter in consideration of its privileges. *Va. Ct. of Appeals*, 1867, *City of Richmond v. Long*, 17 *Gratt.* 875.

442. The principle that where individuals or corporations assume obligations or duties for a consideration received from the public,

they are liable for a neglect of those duties to any individual injured, is applicable to the case of municipal corporations. The charters of such corporations being franchises of value, the grantees are to be held to strict performance. [Reviewing many cases.] *N. Y. Supreme Ct. Sp. T. Weet v. Trustees of Brockport*, 16 *N. Y.* 161, *note*.

Approved and followed in the case of a mere omission of duty. *N. Y. Ct. of Appeals*, 1856, *Hickok v. Trustees of Plattsburgh, Id.*; *S. P.* 1857, *Conrad v. Trustees of Ithaca, Id.* 158. To similar effect, see *Morey v. Town of Newfane*, 8 *Barb.* 645; *Storrs v. City of Utica*, 17 *N. Y.* 104; *St. Louis v. Gurno*, 12 *Mo.* 414. Compare, however, *Lorillard v. Town of Monroe*, 11 *N. Y.* (1 *Kern.*) 892.

443. The principle of exemption of public officers from responsibility for the defaults of their employees is not extended in its application to municipal corporations where the authority, though for the accomplishment of objects of a public nature and for the benefit of the public, is one from the exercise of which the corporation derives a profit, or where the duty, though of a public nature and for the public good, may be presumed to have been enjoined upon the corporation in consideration of privileges granted. *Va. Ct. of Appeals*, 1867, *Sawyer v. Corse*, 17 *Gratt.* 230.

444. Municipal corporations, acting under a power conferred upon them by the legislature, in the exercise of a special franchise granted to them,—*e. g.* the establishment of a lottery,—are responsible for the acts and contracts of their agents, duly appointed and authorized, within the scope of the authority of such agents. *U. S. Supreme Ct.* 1827, *Clark v. Mayor &c. of Washington*, 12 *Wheat.* 40.

445. Wrongful acts of authorized officers. A municipal corporation is liable in an action of tort for the irregular and illegal exercise, by its authorized agents, of a power which the corporation possesses. *N. Y. Ct. of Appeals*, 1857, *Howell v. City of Buffalo*, 15 *N. Y.* 512. And see *Wilde v. New Orleans*, 12 *La. Ann.* 15; *Soulard v. City of St. Louis*, 36, *Mo.* 546; *Hildreth v. Lowell*, 11 *Gray*, 345; *Wallace v. Muscatine*, 4 *Greene*, 373; *McCombs v. Town Council of Akron*, 15 *Ohio*, 474.

446. The fact that a municipal corporation has employed competent officers to per-

form a duty specifically enjoined upon the corporation as such, does not exonerate them, but they are liable where such duty is wholly neglected by such agents. *N. Y. Supreme Ct.* 1842, *Mayor &c. of N. Y. v. Furze*, 3 *Hill*, 612.

447. — of officer not qualified. That a city or town is not liable for the wrongful acts of one acting as pound keeper, but who has never qualified by giving bonds as required, by law,—see *Rounds v. Bangor*, 46 *Me.* 541.

448. Acts beyond officer's authority. A municipal corporation is not necessarily responsible for unauthorized and unlawful acts of its officers, though done *colore officii*. To create such a liability, it must either appear that the officers were expressly authorized to do the act, or that it was done *bona fide* in pursuance of a general authority in relation to the subject of it, or that the act was adopted or ratified by the corporation. *Mass. Supreme Ct.* 1837, *Thayer v. City of Boston*, 19 *Pick.* 511. Compare *Mayor &c. of Mobile*, 31 *Ala. N. S.* 469; *Pesterfield v. Vickers*, 3 *Caldw.* 205.

449. An incorporated district is not liable in trespass for the illegal seizure of the plaintiff's horse by one of the officers of the district, for an alleged violation of its ordinances, when in fact no such violation took place, unless the corporation previously authorized or subsequently ratified the seizure. *Pa. Supreme Ct.* 1841, *Fox v. Northern Liberties*, 3 *Watts & S.* 103.

450. Where the health officers of a town took possession of a vessel for hospital purposes, *with the consent of her owner*, and in the process of fumigation under their direction, the vessel was negligently set on fire and injured,—*Held*, that, no authority having been conferred upon the health officers to take the vessel, the town was not liable. *Ms. Supreme Ct.* 1860, *Mitchell v. City of Rockland*, 52 *Ms.* 118.

451. A municipal corporation, which directs its agents to remove obstructions in a particular street, is not responsible to third persons for the acts of such agents in removing obstructions elsewhere, without other authority. *N. Y. Supreme Ct.* 1861, *Hanvey v. City of Rochester*, 35 *Barb.* 177.

452. Acts beyond the corporate powers. A municipal corporation cannot confer authority upon its servants to commit a positive trespass, and cannot therefore be liable

to third persons for such trespass, even though committed under color and belief of authority. Such acts are *ultra vires*. *N. Y. Supreme Ct.* 1861, *Hanvey v. City of Rochester*, 85 *Barb.* 177. Compare, however, *Leman v. Mayor &c. of N. Y.* 5 *Bow.* 414.

453. The plaintiff passing through a city park at the time that a public meeting was being held at the call of the corporation to consider national affairs, was injured by the discharge of a cannon fired by some persons there. *Held*, that the corporation were not liable for the injury.

1. Calling public meetings of the citizens, for political or philanthropic purposes, is no part of the business of the corporation, and they are not liable for an injury that may flow from it.

2. If it were otherwise, the ones who fired the gun must be shown to have done so as the agents of the corporation. *N. Y. Superior Ct.* 1847, *Boylard v. Mayor &c. of N. Y.* 1 *Sandf.* 27.

454. Agency the ground of the liability. A municipal corporation is not liable for a nonfeasance or misfeasance committed by an independent corporate officer,—*s. g.* for the omission of a duty specifically imposed by statute on one of its officers. In this respect the officers are *quasi* civil officers of the government, though appointed by the corporation. The relation of master and servant does not exist between the corporation and officers. The rule is otherwise of such omissions where the duty is absolute and due from the corporation. *N. Y. Supreme Ct.* 1841, *Martin v. Mayor &c. of Brooklyn*, 1 *Hill*, 545. And see *Prather v. Lexington*, 18 *B. Monr.* 559.

455. A city is not liable for an assault and battery committed by its police officers, even though it was done in an attempt to enforce an ordinance of the city. Police officers, although for convenience, sake appointed by cities or towns, are not to be regarded as agents or servants thereof. *Mass. Supreme Ct.* 1861, *Buttrick v. Lowell*, 1 *Allen*, 172.

456. Towns, being mere political divisions, and having no corporate capacity except in respect to holding certain property, making necessary contracts, and sustaining necessary suits, &c., are not liable in an action for the wrongful acts of town officers—*s. g.* assessors, in assessing property not taxable. Such officers, though chosen by towns

throughout the State, are independent public officers, and not the mere agents of their towns. *N. Y. Ct. of Appeals*, 1854, *Lorillard v. Town of Monroe*, 11 *N. Y.* (1 *Kern.*) 392. Followed, *People v. Supervisors of Chenango*, 11 *N. Y.* (1 *Kern.*) 563; *S. P. N. Y. Supreme Ct. Sp. T.* 1850, *Morey v. Town of Newfane*, 8 *Barb.* 645; *Cal. Supreme Ct.* 1862, *Sherbourne v. Yuba Co.* 21 *Cal.* 118; *Mass. Supreme Ct.* 1861 *Walcott v. Swampscott*, 1 *Allen*, 101.

457. The city of Philadelphia is not responsible to a lot owner for damages resulting from negligence on the part of a district surveyor, in locating the line of his lots so that, after a partial construction of a house, he was compelled to rebuild it; because that officer being elected directly by the people, under the authority of a statute, the corporation has no control over him, and is not bound by any of his acts. *Pa. Supreme Ct.* 1863, *Alcorn v. City of Philadelphia*, 44 *Pa. St.* 348.

458. A and B separately contracted with the school officers in the city of New York, with the approval of the board of education, to build a school house—A to do the carpenter's work and B the mason's work. By the unskillful manner in which the mason's work was done, the wall fell in before the building was completed, injuring A's work. *Held*, that although the city corporation were the owners of the school house, they did not employ, nor had they a right under the school laws to employ B, and they were not therefore responsible for his negligence. Moreover, the principle of *respondent superior* is not applicable in such a case. *N. Y. Com. Pl.* 1861, *Treadwell v. Mayor &c. of N. Y.* 1 *Daly*, 128.

459. The corporation of the city of New York are not, as owners of the Croton aqueduct, liable for injuries which arise from defects in the lateral service pipes inserted by consumers of water in the main street pipes of the aqueduct. They are bound to furnish water to all who desire to use it, under proper regulations, but they are not bound to supervise the insertion of service pipes, or superintend their fabrication, fitting, and preservation, except to prevent injury to their works. The water drawn through private service pipes becomes as much private property as though it had been sold, and the subsequent ill use of it by negligence

or otherwise, to the injury of another, cannot make the corporation liable. *N. Y. Superior Ct.* 1861, *Terry v. Mayor &c. of New York*, 8 *Bow.* 594. See, to nearly same effect, *Borough of West Chester v. Apple*, 35 *Pa. St.* 284.

460. Where a municipal corporation is empowered by statute to prosecute a work, such as the construction of works for the supply of the city with water, though the statute reserves to the State the appointment of commissioners to supervise and direct its prosecution, the acceptance of the statute by the corporation makes the commissioners the agents of the corporation; and the corporation is liable for injuries caused by the negligence of the commissioners in the management of the work. Such works being the property of the corporation, it is bound to see that the same are not permitted to injure other persons. A municipal corporation, though not liable for acts requiring the exercise of discretion, when those acts are for the benefit of the public, or for the acts of independent officers whom it is obliged to appoint, and whose duties are specifically prescribed by law, yet is liable for the acts of the agents it voluntarily employs to do business for its own private benefit, the same as any other corporation or individual. Moreover, the owner of real property is liable for the acts of those he employs, directly or indirectly, to improve his property for his own benefit, and particularly if done at his expense; and the State, which merely selects the agents or makes the contract, but is not owner, and does not pay for nor personally superintend the work, is not liable. *N. Y. Ct. of Errors*, 1845, *Mayor &c. of N. Y. v. Bailey*, 2 *Den.* 483.

461. A municipal corporation, in the exercise of those private franchises which belong to it, as a creature of the law, is responsible for the acts of those who are in law its agents, though they may not be appointed by itself. *Md. Ct. of Appeals*, 1868, *Commissioners &c. v. Dutcher*, 20 *Md.* 468.

462. A municipal corporation is not liable for injuries to third persons, occasioned by the negligence of workmen engaged, under the direction of a person who has entered into a contract with the corporation to perform work in conformity to a plan referred to in the contract, for a specified sum to be paid by the corporation. The contractor in such

case is not the servant of the corporation. The fact that there is a clause in the contract by which he engages to conform the work to such further directions as may be given by the corporation or its officers, makes no difference. Such a reservation relates merely to the kind of work to be done, and not to the manner of doing it. *N. Y. Ct. of Appeals*, 1853, *Pack v. Mayor &c. of N. Y.* 8 *N. Y.* (4 *Seld.*) 222. Followed, 1854, *Gent v. Mayor &c. of N. Y.* *Seld. Notes*, No. 6, 68; *S. P.* 1851, *Blake v. Ferris*, 5 *N. Y.* (1 *Seld.*) 48. And see *Storrs v. City of Utica*, 17 *N. Y.* 104; *Gourdier v. Cormack*, 2 *E. D. Smith*, 254; *St. Paul v. Seitz*, 3 *Minn.* 297; *Barry v. St. Louis*, 17 *Mo.* 121; *Walcott v. Swampscott*, 1 *Allen*, 101.

463. No liability for prudent exercise of power to make improvements. A municipal corporation is not liable for damage done to private property, unless the act which caused the damage was done without the authority of law, or being authorized by law, was improperly or wantonly executed. *La. Supreme Ct.* 1829, *Bennett v. City of New Orleans*, 14 *La. Ann.* 120.

464. That when it is alleged that a municipal corporation has exercised a lawful power in an injurious and malicious manner, the presumption will be in favor of the propriety and good faith of the acts of the corporation, and a complainant must make out a clear case of willful oppression to obtain relief from the courts,—see *Reynolds v. Shreveport*, 13 *La. Ann.* 426.

Upon the exercise of their Powers by corporations generally, see *Powers*.

465. A municipal corporation making an improvement for the benefit of the public solely, under authority granted by the legislature, is not answerable for consequential damages produced by the work to property in the vicinity of such improvement, of which no portion is taken or used therefor, provided the work is done in a careful manner. Otherwise in respect to private corporations. *Wis. Supreme Ct.* 1862, *Alexander v. City of Milwaukee*, 16 *Wis.* 247.

466. Municipal corporations are not liable in damages for any injury or inconvenience to the owners of property upon the streets of the village or city, resulting from the improvement of the streets, such as grading, paving, laying curb and gutter stones, sidewalks, &c., by authority of law, when there

is no negligence or unskillfulness in conducting the work of improvement.* *N. Y. Supreme Ct.* 1845, *Wilson v. Mayor &c. of N. Y.* 1 *Den.* 595; 1862, *Kavanagh v. City of Brooklyn*, 38 *Barb.* 232.

467. A municipal corporation, as owner of real property, is not liable for injuries caused by negligence in the construction of a public work thereon, if such work was done under a contract duly executed by its proper authorities, unless it affirmatively appears that in making the contract for its execution some improper act was required to be done, or some ordinary or proper precaution was improperly omitted. *N. Y. Supreme Ct.* 1865, *Van Wert v. City of Brooklyn*, 28 *How. Pr.* 451.

468. A municipal corporation, in grading one of their streets, as they were authorized to do, removed a high bank in the street, which constituted a natural support to the premises of an adjoining owner, so that a portion of his land fell. *Held*, that as there was no allegation of malice, or want of care or skill, that such owner could not maintain an action for the damages sustained by him. *It seems*, that this is *damnum absque injuria*; and if not, still it is settled that persons acting under legislative authority to improve highways, if they exercise proper care and skill, are not answerable for consequential damages sustained by adjoining owners. [4 *Durnf. & E.* 794; 2 *Barn. & C.* 708; 2 *Hill*, 466; 1 *Den.* 595; 8 *Barb.* 459; 9 *Watts*, 382; 8 *Watts & S.* 85; 6 *Wheat.* 593; 17 *Wend.* 667.] *N. Y. Ct. of Appeals*, 1850, *Radcliff v. Mayor &c. of Brooklyn*, 4 *N. Y. (4 Comst.)* 195. Compare *Waddell v. Mayor &c. of N. Y.* 8 *Barb.* 95.

469. That an action will not lie against a city for obstructing a stream to the injury of a mill, by the erection of a bridge, if the bridge is suitably constructed so as to let the water pass off with reasonable freedom, at all times, except in case of extraordinary freshets not occurring annually,—see *Sprague v. Worcester*, 13 *Gray*, 193.

470. Liability for negligence in improve-

ments. But a municipal corporation is bound to construct its public works in a proper manner, and to keep them in repair; and is liable to any one specially injured by its neglect to do so. *N. Y. Supreme Ct.* 1861, *Barton v. City of Syracuse*, 37 *Barb.* 292.

471. Municipal corporations are liable for injuries to third persons, resulting from the negligence of subordinate officers or agents, acting under their authority and direction, in the construction of public improvements belonging to such corporations.* *Ohio Supreme Ct.* 1854, *City of Dayton v. Pease*, 4 *Ohio St.* 80; *N. Y. Superior Ct.* 1848, *Delmonico v. Mayor &c. of N. Y.* 1 *Sandf.* 222; *Wis. Supreme Ct.* 1864, *Smith v. City of Milwaukee*, 18 *Wis.* 63.

472. Municipal corporations are responsible to the same extent and in the same manner as natural persons, for injuries occasioned by the negligence or unskillfulness of their agents, in the construction of works for the benefit of the cities or towns under their government. [15 *Ohio*, 474; 2 *Den.* 483.] *Ind. Supreme Ct.* 1848, *Ross v. City of Madison*, 1 *Smith*, 98; *Ind. Supreme Ct.* 1848, *Ross v. Madison*, 1 *Carter*, 281; *Iowa Supreme Ct.* 1859, *Cotes v. Davenport*, 9 *Iowa*, 227; 1862, *Templin v. Iowa City*, 14 *Iowa*, 59.

473. Though in general, municipal corporations are not responsible for injuries to third persons arising from the negligence, want of skill, or carelessness of contractors, or those employed under them, while engaged in the prosecution of repairs upon the streets of the city, it is otherwise where the injury is occasioned, not by any fault of the contractor or his servants, but is the result of an act which the corporation, by the contract, direct to be done. In such a case, the principle of *respondet superior* applies. Where the contractor has merely done what he was required to do by the contract, he is not the party to be made responsible; but those who directed him to do the act must answer for the damage occasioned thereby. *N. Y. Com. Pl.* 1858, *Lockwood v. Mayor &c. of N. Y.* 2 *Hilt.* 66.

474. Where a municipal corporation give

* See this principle applied in the following cases: *O'Connor v. Pittsburg*, 18 *Pa. St.* 187; *Roberts v. Chicago*, 26 *Ill.* 249; *Humes v. Mayor &c. of Knoxville*, 1 *Humph.* 408; *Cole v. Muscatine*, 14 *Iowa*, 296; *Clark v. Wilmington*, 5 *Harring.* 248; *Murphy v. Chicago*, 29 *Ill.* 379; *St. Louis v. Gurno*, 12 *Mo.* 414; *Lambar v. St. Louis*, 15 *Mo.* 610; *White v. Yazoo*, 27 *Miss.* 357. But compare *Wendell v. Mayor &c. of Troy*, 30 *Barb.* 339.

* For applications of this principle see *Mayor &c. of Memphis v. Lasser*, 9 *Humph.* 757; *City of Detroit v. Carey*, 9 *Mich.* 165; *City of Dayton v. Pease*, 4 *Ohio St.* 80; *City of Cincinnati v. Stone*, 5 *Ohio St.* 88; *Meares v. Commissioners of Wilmington*, 9 *Ired.* 72. But compare to the contrary, *Palmer v. Mayor &c. of Pittsburg*, 46 *Pa. St.* 213; *Eastman v. Meredith*, 26 *N. H.* 284.

to an individual permission to construct works in or under a highway,—such as a drain—for his own benefit, the corporation is liable for injuries resulting to third persons, from the negligent construction of the work, or, indeed, from any defect in the street caused by the structure. The corporation should not authorize such diversions of the highway to private uses; and doing so without securing safety, is negligence. [Citing many authorities.] *N. Y. Supreme Ct.* 1862, *Wendell v. Mayor &c. of Troy*, 39 *Barb.* 329.

475. Whether a municipal corporation voluntarily assuming to construct a public improvement with which it is not legally chargeable, is liable for defect or negligence in its construction,—see *Mayor &c. of Albany v. Cunliff*, 2 *N. Y. (2 Comst.)* 165; *Hildreth v. Lowell*, 11 *Gray*, 345; *Pekin v. Newell*, 26 *Ill.* 320; *Munn v. Pittsburgh*, 40 *Pa. St.* 364; also *infra*, 482.

476. Liability for defective highways. Municipal corporations are required to keep their streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect to do this they will be held liable for all injuries which are sustained by reason of their negligence, and they cannot avoid this responsibility by arrangements with other parties.* *Mo. Supreme Ct.* 1867, *Blake v. City of St Louis*, 40 *Mo.* 569.

477. Where a corporation owns its streets, and has power to raise funds to repair them and its sewers, &c.; if it permits them to be out of repair, it is liable for an injury thereby sustained by an individual without any negligence of his own. *N. Y. Ct. of Appeals*, 1853, *Hutson v. Mayor &c. of N. Y.* 9 *N. Y. (5 Seld.)* 163; *Griffin v. Mayor &c. of N. Y.* 9 *N. Y. (5 Seld.)* 456. To the same effect, 1851, *Lloyd v. Mayor &c. of N. Y.* 5 *N. Y.*

(1 *Seld.*) 369; *N. Y. Supreme Ct.* 1842, *Mayor &c. of N. Y. v. Furze*, 3 *Hill*, 612.

478. Where municipal corporations or individuals are charged, as in the case of streets or highways, with the duty of keeping them in repair, and exercising a general oversight in regard to their position and safety, they, or the body they represent, are liable for all injuries happening by reason of their negligence. [3 *Hill*, 612; 16 *N. Y.* 163, n.; 11 *Wend.* 539; 3 *N. Y.* 463; 5 *N. Y.* 369.] *U. S. Supreme Ct.* 1862, *Chicago City v. Robbins*, 2 *Black*, 418; *Nebraska City v. Campbell*, *Id.* 590; *N. Y. Supreme Ct.* 1862, *Wendell v. Mayor &c. of Troy*, 39 *Barb.* 329; *S. P.* 1863, *Hyatt v. Trustees of Rondout*, 44 *Id.* 385; *N. Y. Superior Ct.* 1862, *Davenport v. Ruckman*, 10 *Bow.* 20; *S. C.* 16 *Abb. Pr.* 341.

479. But where a mere power is conferred upon a municipal corporation to pave streets and sidewalks, but it is not positively required to do so by law, it is not bound so to do; and is not, therefore, liable to a person who suffers an injury by reason of a defect in the paving of such streets. [27 *Barb.* 218.] *N. Y. Supreme Ct.* 1860, *Peck v. Village of Batavia*, 32 *Barb.* 684.

480. Town liable for an injury sustained to an elephant while being led through a defective highway. See *Gregory v. Inhabitants of Adams*, 14 *Gray*, 242.

481. When a corporation is liable for damages caused by obstructions placed in its highways by individuals or by the elements,—see *Frost v. Inhabitants of Portland*, 11 *Me. (2 Fairf.)* 271; *Griffin v. Sanbornston*, 44 *N. H.* 246; *Willard v. City of Cambridge*, 3 *Allen*, 574.

482. If the authorities of a city or town have treated a place as a public street, taking charge of it, and regulating it as they do other streets, they cannot, when sued for an injury growing out of their negligence in care of the street, defend themselves by alleging want of authority in establishing the street originally, or that the formalities of the statute were not pursued in establishing the street originally. *U. S. Supreme Ct.* 1866, *Mayor v. Sheffield*, 4 *Wall* 189. Compare *supra*, 475.

483. If there are two efficient, independent, proximate causes of an injury sustained by a traveler upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in such highway, the injury cannot be

* Upon the grounds and extent of the liability of towns or cities for defects in highways, and the application of the general rule to particular facts,—see *Sparhawk v. City of Salem*, 1 *Allen*, 30; *Winn v. City of Lowell*, *Id.* 177; *Alger v. City of Lowell*, 3 *Id.* 402; *City of Worcester v. Keith*, 5 *Id.* 17; *Commonwealth v. Inhabitants of Deerfield*, 6 *Id.* 449; *Stanton v. City of Springfield*, 13 *Id.* 566; *Nichols v. City of Salem*, 14 *Gray*, 490; *State v. Hampton*, 3 *N. H.* 23; *Willard v. Town of Newbury*, 23 *Vt.* 456; *State v. Leicester*, 33 *Vt.* 653; *Morey v. Town of Newfane*, 3 *Barb. (N. Y.)* 645; *Hickok v. Trustees of Plattsburgh*, 15 *Id.* 437; 16 *N. Y.* 161, note; *Town of Galen v. Clyde & Rose Plank Road Co.* 27 *Barb. (N. Y.)* 543; *Wendell v. Mayor &c. of Troy*, 39 *Id.* 329; *Minhinnah v. Haines*, 5 *Dutch.* 333; *Durant v. Palmer*, 5 *Dutch.* 544; *Town of Lewiston v. Proctor*, 27 *Id.* 414.

said to have been received "through such defect," and the town is not liable therefor, although the traveler himself was in no fault. *Me. Supreme Ct.* 1862, *Moulton v. Inhabitants of Sandford*, 51 *Me.* 127. Compare *infra*, 518.

484. In New Hampshire, towns are liable for damage occasioned through defects in highways, but only where the damage results directly from the want of repairs, and there has been no fault on the part of him who has sustained the damage. *N. H. Superior Ct.* 1821, *Farnum v. Town of Concord*, 2 *N. H.* 392.

485. A town having a traveled track sufficiently wide and suitable for all purposes of travel, and in repair, is not liable for injuries received in consequence of a defective footpath in the highway fifteen or twenty feet from the traveled track, which the town had never worked or repaired, though the public foot travel had passed over it for thirty years. *Vt. Supreme Ct.* 1865, *Whitney v. Essex*, 38 *Vt.* 270.

486. In an action against a town for an injury sustained by reason of a defective highway, the defendants are liable for the increased damages, if any, arising from the unskillful treatment of the plaintiff, without any fault on his part, by a surgeon of ordinary professional skill and knowledge. *Me. Supreme Ct.* 1863, *Stover v. Inhabitants of Bluehill*, 51 *Me.* 489.

487. Sidewalks. That a general statute requiring "towns" to keep highways, &c., in repair, &c., applies to the sidewalks of cities, and to obstructions occasioned by snow and ice thereon,—see *City of Providence v. Clapp*, 17 *How.* 161.

488. In the city of New York, sidewalks are part of the public streets for the use of those who travel on foot, and notwithstanding the burden in regard to them imposed upon owners, the corporation is itself liable, if they suffer a sidewalk to remain out of repair in so exposed and dangerous a state, that a passer-by is injured by falling, without any negligence on his part. The fact that the corporation have, by ordinance, imposed the duty of repairing sidewalks upon the adjoining owners, does not relieve the corporation from responsibility. *N. Y. Com. Pl.* 1859, *Wallace v. Mayor &c. of N. Y.* 2 *Hill*. 440; 9 *Abb. Pr.* 40; 18 *How. Pr.* 169. See also *Manchester v. City of Hartford*, 30 *Conn.* 118.

489. No distinction exists between side-

walks and carriage ways in the city of New York, in respect to the duty of the corporation to keep them in safe condition. *N. Y. Superior Ct.* 1862, *Davenport v. Ruckman*, 10 *Bono.* 20; 16 *Abb. Pr.* 341.

490. The absolute authority over the roadway, conferred upon the common council by the charter of the city of Brooklyn, is not possessed by them over the sidewalks, and the same responsibility cannot be imposed for the condition of the sidewalks as for that of the roadway. *N. Y. Supreme Ct.* 1862, *Hart v. City of Brooklyn*, 36 *Barb.* 226.

491. That a city is not liable for any injury caused to a foot passenger on a sidewalk which the city is bound to keep in repair, by the falling of an overhanging mass of snow and ice from the roof of a building not owned by the city, although it has so overhung the highway for more than twenty-four hours before the accident,—see *Hixon v. Lowell*, 13 *Gray*, 59.

492. Liability of a city for injuries sustained through the falling of an awning upon a person passing along a sidewalk. See *Drake v. Lowell*, 13 *Meta.* 292; *Day v. Inhabitants of Milford*, 5 *Allen*, 98.

493. — or railroad crossings. Although the charter of a railroad corporation requires the company to construct its crossings in such a manner as not to render the highways unsafe, yet towns are not thereby absolved from their obligations to see that they are so constructed. For negligence in this respect they are liable, the same as if they alone were obliged to keep the crossings in repair. *Me. Supreme Ct.* 1862, *Wellcome v. Inhabitants of Leeda*, 51 *Me.* 313; *Vt. Supreme Ct.* 1850, *Willard v. Town of Newbury*, 22 *Vt.* 458. And see *Barber v. Essex*, 1 *Williams*, 62; *Davis v. Inhabitants of Leominster*, 7 *Allen*, 182; also *infra*, 542 544.

494. A railroad corporation located their road, in pursuance of their charter, across a public highway, and in the process of constructing their road made an excavation at that place. Both the corporation and the town took some measures to prevent travelers from passing over the highway, while it was thus unsafe; but the jury having found a want of ordinary care and diligence on the part of the town, in this respect,—*Held*, that a traveler, who, without fault on his part, suffered injury in consequence of the obstruction of the highway by the corporation, was

entitled to recover damages of the town therefor. *Vt. Supreme Ct.* 1850, *Willard v. Town of Newbury*, 22 *Vt.* 458.

495. It is the duty of a town during the temporary obstruction of its highway by the construction of a railroad to provide a suitable by-way for the public, and use all proper and reasonable precautions, to prevent travelers from passing upon the highway, while it remains unsafe. *Id.*

496. A municipal corporation is the overseer of a public county road passing through its territory and used in common by the public and the inhabitants, within the town limits, and, as such, is within the meaning of a statute providing that overseers of public roads shall erect signs at railroad crossings. A corporation is bound to keep its streets in repair; the obligation to do so existing at common law. *Tenn. Supreme Ct.* 1859, *State v. Mayor &c. of Loudon*, 8 *Head*, 268.

497. — or bridges. When a municipal corporation is required by its charter to keep a bridge in repair, if the duty was imposed in consideration of privileges granted, and if the means to perform it are within the control of the corporation, such corporation is liable to the public for an unreasonable neglect to comply with the requirement.* *U. S. Supreme Ct.* 1861, *Weightman v. Corporation of Washington*, 1 *Black*, 39.

498. When all the foregoing conditions concur, a corporation is also liable for injuries to the persons or property of individuals sustained through failure to perform the corporate duty. And this liability extends both to injuries arising from neglect of the duty enjoined, and to those resulting from negligence and unskillfulness in its perform-

ance. *Id.* See also *Inhabitants of Waterbury v. Clark*, 4 *Day*, 198; *Lewis v. Litchfield*, 2 *Root*, 486; *State v. Campton*, 2 *N. H.* 518.

499. The duty of keeping a bridge or highway in repair extends to proper guards or railings on the side, when such are necessary. [2 *Cush.* 600; 7 *Gray*, 338; 35 *N. H.* 271.] *N. Y. Supreme Ct.* 1863, *Hyatt v. Trustees of Rondout*, 44 *Barb.* 385.

500. What facts are evidence, from which the possession of funds to repair may be inferred,—see *Id.*

501. Liability for excavations. A municipal corporation, owing to the public the duty of keeping its streets in a safe condition for travel, is liable to persons receiving injury from the neglect to keep proper lights and guards at night around an excavation which it has caused to be made in the street, whether it has or has not contracted for such precautions with the persons executing the work. [16 *N. Y.* 161.] *N. Y. Ct. of Appeals*, 1858, *Storrs v. City of Utica*, 17 *N. Y.* 104.

502. A municipal corporation cannot recover from a contractor damages which it had been compelled to pay to a person who was injured by falling into a public sewer in course of construction by the contractor, and by him left unguarded, unless the contract imposed upon the contractor the duty of putting up barriers, &c., and protecting passengers against injury by accident. Otherwise it is the duty of the city to do this, and it is their neglect that it was not done. *N. Y. Ct. of Appeals*, 1852, *City of Buffalo v. Holloway*, 7 *N. Y.* (3 *Seld.*) 493.

503. Where water commissioners who were agents of a city corporation, in opening a sewer in a street, threw the earth upon the sidewalk usually travelled by foot passengers, and left it there during the night, without any signal light or barrier, or protection to warn or turn passengers away from the danger; and the plaintiff, while passing along the sidewalk at night, in consequence of the obstruction fell into a hole and was injured, *Held*, that the corporation was chargeable with negligence to which the plaintiff had not contributed, and was liable for the injury occasioned thereby. *N. Y. Supreme Ct.* 1864, *Grant v. City of Brooklyn*, 41 *Barb.* 381.

504. A town, which had assumed the duties of school districts.—*Held*, not liable

* Village streets were dedicated to public use by being laid out as such by the owners of the ground; and before they were made highways by the act of the highway officers, a canal company, being authorized to take the necessary lands for constructing their canal through the village, built their canal, crossing several of such streets, but erected no bridges thereon. Subsequently, by act of the legislature, the same streets were declared to be public highways.

Held, that the canal company were not liable for the obstruction to those streets caused by their canal, nor was it their duty to build bridges. If the construction and maintenance of the canal deprived any of the proprietors of the lands of their easement in the land derived from its dedication, it was a proper subject of appraisal when the lands were taken. As toward the village, the canal was to be regarded, so far as respects the burden of building bridges across it, as if it had been a natural stream. *N. Y. Ct. of Appeals*, 1852, *City of Oswego v. Oswego Canal Co.* 6 *N. Y.* (3 *Seld.*) 257.

for an injury sustained by a scholar attending the public school, from a dangerous excavation in the school house yard, owing to the negligence of the town officers. *Bigelow v. Randolph*, 14 *Gray*, 541.

505. As to liability of a municipal corporation for a dangerous excavation in land adjoining one of its streets,—see *City of Norwich v. Breed*, 30 *Conn.* 535.

506. Although a statute makes it the duty of a municipal corporation to make all needful drains, &c., so that they may be indictable for a willful neglect to do so; they have a discretion, as against individuals, and are not liable for injuries caused by their refusing to construct such a work. *N. Y. Supreme Ct.* 1845, *Wilson v. Mayor &c. of N. Y.* 1 *Den.* 595. Followed, *Supreme Ct.* 1858, *Cole v. Trustees of Medina*, 27 *Barb.* 218.

507. *Insufficient drainage.* A private action does not lie against a city corporation for the injury which the plaintiffs have sustained by insufficient drainage. The duty of the corporation is one of a judicial or discretionary nature. *N. Y. Ct. of Appeals*, 1865, *Mills v. City of Brooklyn*, 32 *N. Y.* 489. And see *Flagg v. Worcester*, 13 *Gray*, 601; *Munn v. Pittsburgh*, 40 *Pa. St.* 364. But compare *Parker v. Lowell*, 11 *Gray*, 353; *Stein v. Burden*, 24 *Ala.* 180.

508. Where a municipal corporation was sued for an act of omission or nonfeasance, in not repairing a draining machine erected for public utility, by which neglect plaintiff's premises were overflowed and his property damaged,—*Held*, that as the act complained of involved the disbursement of the corporate revenues, it was a matter of discretion with the corporate authorities, and that if plaintiff was damaged, it was *damnum absque injuria*, and he was consequently without sufficient cause of action; and that the corporation could avail itself of this exemption from suit, under the plea of the general issue. *La. Supreme Ct.* 1859, *Bennett v. City of New Orleans*, 14 *La. Ann.* 120.

509. *Sewers.* Liability of a city for defective sewers. *Barton v. City of Syracuse*, 37 *Barb.* 292; *Child v. City of Boston*, 4 *Allen* 41; *Dermont v. City of Detroit*, 4 *Mich.* 435.

510. *Necessity of showing notice of the defect.* Before a municipal corporation can be held liable for an injury occasioned by a defect in a public highway, it must be shown

that they knew of the existence of the cause of injury, or had received notice of it, either actual, or implied from circumstances. *U. S. Supreme Ct.* 1866, *Mayor v. Sheffield*, 4 *Wall.* 189.

511. To enable a traveler to recover damages from a town for injuries sustained by reason of a defective highway, it must be shown that the town had actual "reasonable notice of the defect." Such notice may be inferred by the jury, in any case, from the circumstances proved. *Me. Supreme Ct.* 1863, *Bragg v. City of Bangor*, 51 *Me.* 532.

512. A municipal corporation is not liable in damages, for injuries caused by a defective covering or insufficient protection of an opening in a sidewalk made by an owner of the soil or the adjacent land, unless the corporation have notice of such insufficiency or defect, and neglect to cause it to be remedied. The public authorities cannot be presumed to have such notice, but it must be express, or the defect notorious. *N. Y. Supreme Ct.* 1862, *Hart v. City of Brooklyn*, 36 *Barb.* 226.

513. In an action for such injuries it is not enough to prove that the covering was insecurely fastened, and that by reason thereof, and without fault on his part, the plaintiff was injured. Notice to the corporation of the defect, or negligence of duty in not ascertaining and remedying it, must be shown. *N. Y. Superior Ct. Sp. T.* 1856, *McGinity v. Mayor &c. of N. Y.* 5 *Duer*, 674.

514. In an action against a municipal corporation, for negligence in keeping a pier out of repair, the plaintiff must prove that the proper officers of the corporation had notice of the defect, or that it was obvious to every one. *N. Y. Superior Ct.* 1859, *Garrison v. Mayor &c. of N. Y.* 5 *Bow.* 497. But compare *Morrill v. Deering*, 3 *N. H.* 53.

515. Where a person puts an incumbrance or obstacle in a street, the corporation is not liable for an injury occasioned thereby, unless notice of the obstruction is brought home to them. The primary duty of its removal is with him who placed it there. *N. Y. Ct. of Appeals*, 1853, *Griffin v. Mayor &c. of N. Y.* 9 *N. Y.* (5 *Seld.*) 456.

516. A municipal corporation will not be liable in damages for injuries occasioned by nuisances in its streets, such as snow and ice upon its sidewalks, of which it had no notice express or implied. *Cincinnati Superior Ct.*

1857, *Vandyke v. City of Cincinnati*, 1 *Disney*, 532.

517. The payment of a bill by a municipal corporation to one employed by its health officers is no evidence that the corporation had knowledge that the services for which the payment is made, were so negligently performed as to injure others; or that the negligent acts of such employee were approved or ratified. *Me. Supreme Ct.* 1860, *Mitchell v. City of Rockland*, 52 *Me.* 118.

518. Effect of concurring negligence. That if negligence of the plaintiff has concurred with neglect of duty on the part of the city, in causing the injury sustained through a defective highway, &c., the plaintiff cannot recover,—see *Fallon v. City of Boston*, 8 *Allen*, 88; *Baltimore v. Brennan*, 14 *Md.* 227. Compare *supra*, 483.

519. The plaintiff received an injury by the springing of a bridge occasioned by driving at a trot, when by the statute he had no right to drive faster than a walk. The bridge was good and sufficient except in the matter of its springing when driven upon on a trot. *Held*, that the town was under no legal obligation to provide a bridge sufficient for such use. *Vt. Supreme Ct.* 1866, *Abbott v. Town of Wolcott*, 88 *Vt.* 666; *S. P. Mass. Supreme Ct.* 1862, *Heland v. City of Lowell*, 8 *Allen*, 407.

520. That a town is not liable in damages to one, who, while stopping in the highway for the purpose of conversation, leans against a defective railing, and is injured by reason of its insufficiency,—see *Stickney v. Salem*, 8 *Allen*, 374.

521. In an action against a town to recover damages sustained by reason of a defective highway, by a citizen of the town who lived in the neighborhood of the defect and had knowledge of its existence, the plaintiff has no ground of exception to a ruling that he may nevertheless recover if he used due care, but that his residence and knowledge are evidence tending to show carelessness on his part. *Mass. Supreme Ct.* 1866, *Frost v. Inhabitants of Waltham*, 12 *Allen*, 85.

522. If, while a street is being graded, an embankment is thrown up which leaves a space sufficient, though slightly inconvenient, for travellers to pass along the usual road, and the embankment is not made for a path, a traveler who uses it for that purpose is

guilty of negligence, and cannot recover damages for any injury which he incurs by reason of the embankment giving way beneath him. *N. Y. Superior Ct.* 1860, *Carolus v. Mayor &c. of N. Y.* 6 *Bow.* 15.

523. A person of impaired sight, who still has enough power of sight to go with reasonable assurance of safety through the streets, if they were kept as it is the duty of the corporation to keep them, may recover for injuries sustained by reason of an excavation in the street which a person of good sight might have avoided. *N. Y. Superior Ct.* 1862, *Davenport v. Ruckman*, 10 *Bow.* 20; 16 *Abb. Pr.* 841.

524. That driving in a violent storm through the streets of a city with which the driver is unacquainted, is not, of itself, negligence which will prevent him from recovering for injury received through defects in the highway,—see *Milwaukee v. Davis*, 6 *Wis.* 377.

525. Remedy over, in behalf of corporations. A municipal corporation has a remedy over against a private party who has so used its streets as to produce an injury for which it has been charged. If, however, it appears that there was fault both on the part of the corporation and such private party, the former cannot recover of the latter, for the reason that one of two joint wrongdoers cannot have contribution from the other.* *U. S. Supreme Ct.* 1862, *Chicago City v. Robbins*, 2 *Black.* 418.

526. Express notice of pendency of suit against a municipal corporation, to recover for an injury by reason of an obstruction in a highway, placed there by a third party, is not necessary to give such corporation a right of recovery over against such third party. *Id.*

527. Where work done on a public highway necessarily causes an obstruction or defect in it, it is no defence to a claim against the person causing such work to be done, by a municipal corporation which has had to pay damages for injuries done to a passer-by from such obstruction or defect, that the defect was caused by an independent contractor. *U. S. Supreme Ct.* 1866, *Robbins v. Chicago City*, 4 *Wall.* 657.

528. A verdict and judgment against a

* See also, *Lowell v. Boston & Lowell R. R. Co.* 28 *Pick.* 24; *Newbury v. Conn. &c. R. R. Co.* 36 *Vt.* 751; *Hayden v. Cabot*, 17 *Mass.* 169.

city, in action for injuries occasioned by a defect within the limits of a highway, conclusive evidence in subsequent action by the city against a tenant of the land,—see *City of Boston v. Worthington*, 10 *Gray*, 496.

529. The plaintiffs agreed with a town to build piers for a bridge, to be completed before a certain time. They failed to complete the work within the time agreed, by reason of which individual inhabitants of the town who had occasion to use the bridge were subjected to considerable private expense and inconvenience. *Held*, that in a suit brought against the town for the price of the work, the defendants could not recoup the damages sustained by these individuals. *Conn. Supreme Ct.* 1864, *Kinne v. Town of New Haven*, 82 *Conn.* 210.

530. That if a municipal corporation pay the amount of an award against them for damages resulting from an act for which they were not liable in law, they can have no recourse over against the actual wrongdoers, although notice was given to the latter to appear and take defence in the original action,—see *Borough of Westchester v. Apple*, 85 *Pa. St.* 284.

531. *Liability for violation of ordinance.* A municipal corporation is not liable for an injury resulting from a breach of its police regulations,—e. g. for damage done by swine going at large in violation of its ordinance. *N. Y. Superior Ct.* 1848, *Levy v. Mayor &c.* of N. Y. 1 *Sandf.* 465.

532. That a municipal corporation cannot be held responsible for the acts of individuals merely upon the ground that a more sagacious and efficient police, might have prevented them,—see *Howe v. New Orleans*, 12 *La. Ann.* 481.

533. — for nuisances. That nuisances may exist in the city without rendering the same liable for the consequences,—see *Id.*

534. That a municipal corporation which creates a private nuisance is *prima facie* liable for its continuance,—see *Pennoyer v. Saginaw*, 8 *Mich.* 584.

535. — for injuries by mob. That in the absence of a statute a municipal corporation is not liable for injuries to property committed by a mob within its limits,—see *Prather v. Lexington*, 18 *B. Monr.* 559.

536. Nor for injuries caused by the failure of its officers to repress a mob,—see *Id.*

537. Under a statute giving a right of

action against a city or county, to a person whose property shall be destroyed or injured “in consequence of any mob or riot” therein, for the damages sustained, an action lies to recover the value of property appropriated and carried away by persons composing the mob, as well as of that which was destroyed. *N. Y. Supreme Ct.* 1866, *Charles v. Mayor &c.* of N. Y. 47 *Barb.* 447.

538. — for property destroyed to stay conflagration. A municipal corporation is not liable for the destruction of a building, in pursuance of the directions of its officers, in order to stop the progress of a fire, where no statute exists creating such liability. *Cal. Supreme Ct.* 1850, *Dunbar v. The Alcalde &c.* of San Francisco, 1 *Cal.* 355; 1851, *Correas v. City of San Francisco*, 1 *Cal.* 452.

539. A statute authorizing municipal officers to direct the destruction of property to prevent spread of conflagration without providing for compensation, is not unconstitutional; it is only a regulation of the right of necessity and self-preservation, and not an authority to take private property for public use under the right of eminent domain. *N. J. Ct. of Errors*, 1851, *American Print Works v. Lawrence*, 3 *Zabr.* 590.

540. A civil action does not lie against a city to recover compensation for personal property lost by the destruction of a building pursuant to such a statute. *N. Y. Ct. of Errors*, 1845, *Russell v. Mayor &c.* of N. Y. 2 *Den.* 461.

8. To indictment.

541. For omitting to repair highways. A municipal corporation may be indicted and fined for permitting the streets to remain out of repair; but the officers of the corporation are not individually responsible for such nonfeasance. *Tenn. Supreme Ct.* 1844, *State v. Mayor &c.* of Barksdale, 5 *Humph.* 154. And see *Hammar v. Covington*, 3 *Metc. (Ky.)* 494; *Bragg v. City of Bangor*, 51 *Me.* 532.

542. Under the statutes of New Hampshire a town is liable upon indictment for neglect in not keeping a highway in good and suitable repair, although the defect complained of is caused by the wrongful obstruction of the highway by a bridge erected by a railroad corporation. *N. H. Supreme Ct.* 1866, *State v. Dover*, 46 *N. H.* 452.

543. No arrangement between a town

and a railroad corporation can bar the right of the State to require of the town a performance of its statutory duty in keeping its highways in suitable repair. *Id.*

544. — or bridges. Where a statute provided that railroad companies should maintain and keep in repair all bridges, with their abutments, which they should construct for the purpose of enabling their road to pass over, or under, any road, canal, highway, or other way, and the company omitted to perform the duty, in the manner required for the public safety;—*Held*, that the town, within which the road lay, were liable to indictment, for not keeping it in safe repair, but that they might compel the railroad company, to make all such repairs as should be necessary, by writ of mandamus; or if they had been obliged to make expenditures therein, might reimburse themselves by an action on the case against the company. *Ms. Supreme Ct.* 1858, *State v. Inhabitants of Gorham*, 37 *Me.* 451.

545. — or to remove nuisances. That an indictment may be maintained against a municipal corporation, which has, under its charter, power to enact ordinances necessary to preserve the public health and remove nuisances, for its wrongful neglect to cause a slaughter house, kept to the detriment of the public health, on land of an inhabitant within the corporation limits, to be abated as a nuisance,—see *State v. Shelbyville*, 4 *Sneed*, 176.

546. Although a municipal corporation is indictable for neglecting to remove a public nuisance which it is empowered to abate, it has not, as such, authority to destroy a bulkhead authorized by law, merely on the ground that its destruction is necessary for the preservation of public health; and is not indictable for neglecting to remove such an obstruction, though it is the cause of a nuisance. *N. Y. Supreme Ct.* 1884, *People v. Corporation of Albany*, 11 *Wend.* 539.

VIII. REMEDIES.

547. Actions generally. An action lies against the corporation of the city of New York, when they receive money from any source of revenue which they are bound to apply to a special purpose, to compel them to pay it to the purpose contemplated. And

they are also liable to an action, when, being authorized to raise money by tax for a special purpose, they neglect to provide for such claim. *N. Y. Com. Pl. Sp. T.* 1857, *Green v. Mayor &c. of N. Y.* 5 *Abb. Pr.* 508.

548. An action lies against the corporation of the city of New York to compel them to pay an expense incurred pursuant to statute,—*a. g.* the salary of a district court justice,—although they have no fund appropriated by law to that purpose, if they have funds, or means of raising funds, appropriated generally to "such expenses as they may be put to by law." *N. Y. Com. Pl.* 1858, *Green v. Mayor &c. of N. Y.* 8 *Abb. Pr.* 25.

549. But the corporation are not liable to an action for an increase of salary given to an officer—*a. g.* a justice of one of the district courts of the city—by act of the legislature, where the legislature have neglected to give the corporation authority to raise money for its payment. *N. Y. Com. Pl. Sp. T.* 1857, *Green v. Mayor &c. of N. Y.* 5 *Abb. Pr.* 508. But compare *Davenport &c. Co. v. Davenport*, 18 *Iowa*, 229.

550. Action to enjoin corporations. Since corporations may sue and be sued in all courts, in like cases as natural persons, a court of equity has power to restrain a municipal corporation from an illegal, corrupt, fraudulent, or oppressive exercise of a discretionary or legislative power. *N. Y. Superior Ct.* 1858, *Davis v. Mayor &c. of N. Y.* 1 *Duer*, 451; 9 *N. Y.* (5 *Seld.*) 268.

551. Though a court of equity has no right to interfere with or control the exercise of a discretionary power, by substituting its own judgment for that of the party in whom the discretion is vested, it is bound to interfere whenever it has grounds for believing that its interference is necessary to prevent abuse, injustice, or oppression, the violation of a trust, or the consummation of a fraud. Hence, if a city corporation has no power to grant to any person the privilege of establishing a railway in any of the public streets of the city; or if such railway, if established, would operate as an injurious monopoly; or would be a public nuisance; or if there are reasons for believing that the grant is about to be made from corrupt motives, the issuing of an injunction to forbid the grant is not an interference with a legal discretion, but a proper and necessary exercise of jurisdiction. *Id.*; *S. P. N. Y. Sup.*

rior Ct. 1854, Attorney General *v.* Mayor &c. of N. Y. 8 *Duer*, 119.

552. A clear violation of law, or a clear misuse or abuse of its corporate powers by a municipal corporation, is an appropriate ground for an injunction, especially where the threatened act—*a. g.* the granting of ferry leases—is one of serious consequence to the public, would confer rights of property to last for years, and would thus present embarrassments in the way of its subsequently being set aside; but a court should not interfere by injunction to restrain a corporation from disposing of a ferry privilege upon the mere ground that it proposes to allow its lessees to charge too high a rate. The remedy for such overcharge is with the legislature. *N. Y. Supreme Ct. Sp. T.* 1860, *People v. Mayor &c. of N. Y.* 32 *Barb.* 102.

553. Where the authority which a municipal corporation are attempting to exercise is of a public nature, and for the interests of the public, and lawful in its character, all private rights and interests are to a certain extent subordinate to it, and an individual cannot enjoin them from its exercise. [1 *Den.* 595; 4 *N. Y.* (4 *Comst.*) 195; 2 *Hill*, 466; 2 *Barn. & C.* 703; 4 *Durnf. & E.* 794.] *N. Y. Supreme Ct.* 1857, *Ely v. City of Rochester*, 26 *Barb.* 133.

554. — against illegal acts generally. It is only where a threatened illegal or unconstitutional act of a municipal corporation—*a. g.* unlawfully filling up plaintiff's lots, or levying an illegal tax or assessment—will be productive of irreparable injury, or must lead to a multiplicity of suits, that an injunction will lie to restrain it. [26 *Wend.* 132; 15 *Barb.* 375.] *N. Y. Supreme Ct.* 1857, *Blake v. City of Brooklyn*, 26 *Barb.* 301. To the same effect, *Sp. T.* 1857, *Mace v. Trustees of Newburgh*, 15 *How. Pr.* 161.

555. An equitable action may be maintained to restrain a municipal corporation from taking land under an award of commissioners:

1. Whenever the proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions.

2. Where they lead in their execution to the commission of irreparable injury to the freehold.

3. Where the claim to the land is valid on the face of the proceedings, and extrinsic

facts must be proved to show its illegality. [14 *N. Y.* 534; 26 *Wend.* 132.] *N. Y. Supreme Ct.* 1859, *Baldwin v. City of Buffalo*, 29 *Barb.* 396.

556. When a lease, to be made by a municipal corporation, pursuant to a sale for an unpaid assessment, is by law evidence of the regularity of the sale, the court, in a case of substantial irregularity, will restrain the making of such lease. *N. Y. Supreme Ct. Sp. T.* 1862, *Matthews v. Mayor &c. of N. Y.* 14 *Abb. Pr.* 209.

557. — against illegal resolutions. The passage of a resolution by the common council of a municipal corporation is a legislative act, and cannot be enjoined; but its being carried into effect, after it is passed, may be enjoined. *N. Y. Supreme Ct. Sp. T.* 1859, *People v. Mayor &c. of N. Y.* 32 *Barb.* 85; 10 *Abb. Pr.* 144; 19 *How. Pr.* 155; *People v. Mayor &c. of N. Y.* 9 *Abb. Pr.* 253.

558. The court ought not to interfere at the suit of a citizen to enjoin a municipal corporation from passing an ordinance or resolution—at least, not unless it is shown that the mere voting on and formal passage of the proposed resolution or ordinance would instantly, without any action or attempt to enforce any right or privilege under it, effect an irremediable private injury. *N. Y. Supreme Ct. Sp. T.* 1858, *Whitney v. Mayor &c. of N. Y.* 28 *Barb.* 233. To nearly same effect, *Brooklyn City Ct.* 1857, *Lewis v. Oliver*, 4 *Abb. Pr.* 121. To the contrary, *Sp. T.* 1848, *Lawrence v. Mayor &c. of N. Y.* 2 *Id.* 577. And see *Thompson v. Commissioners of Canal Fund*, 2 *Abb. Pr.* 248.

559. To authorize the issuing of a preliminary injunction to restrain the official action of a common council, some particular act of fraud, or *prima facie* evidence of corruption on the part of the members of the corporation who voted for the ordinance, must be shown. *N. Y. Chancery* 1832, *Champlin v. Mayor &c. of N. Y.* 3 *Paige*, 573.

560. — against collecting assessments. Chancery has no power to enjoin a municipal corporation from collecting an assessment imposed for a street improvement which they were authorized to make. *N. Y. V. Chan. Ct.* 1840, *Merrill v. Mayor of Brooklyn*, 3 *Edw.* 421.

561. Where a municipal corporation sold the plaintiff's land under a pretended assessment which had never been laid, and gave

the purchaser a certificate of sale, and were about to execute to him a conveyance reciting the pretended ordinance laying the assessment, which, by the charter of the corporation would be *prima facie* evidence that such ordinance existed;—*Held*, that the owner could maintain an action to have the sale declared void, the certificate canceled, and the corporation enjoined from executing the proposed deed. *N. Y. Ct. of Appeals*, 1856, *Scott v. Onderdonk*, 14 *N. Y. (4 Kern.)* 9.

562. — enforcing illegal ordinances. To protect the plaintiff against unlawful imprisonment and the injury of his business, to the detriment of the livelihood of his family, a municipal corporation may be enjoined from enforcing an illegal ordinance against him. *N. Y. Supreme Ct. Sp. T.* 1852, *Wood v. City of Brooklyn*, 14 *Barb.* 425.

563. — disturbing complainant in his property. A court of competent jurisdiction can enjoin a municipal corporation, as well as any private owner, from such a use of their property as wrongfully interferes with the enjoyment of their estates by adjacent proprietors. *N. Y. Supreme Ct. Sp. T.* 1848, *Brower v. Mayor &c. of N. Y.* 3 *Barb.* 254. But compare *McMahan v. Council Bluffs*, 12 *Iowa*, 268.

564. An injunction lies against a municipal corporation to prevent them from pulling down the plaintiff's dam under an unfounded claim of a right to abate it as a nuisance. *N. Y. Supreme Ct.* 1852, *Clark v. Mayor &c. of Syracuse*, 13 *Barb.* 82.

565. The fact that a contractor, employed by a municipal corporation to make improvements,—*e. g.* to pave a street,—is proceeding in violation of his contract, does not entitle an owner of real property affected by the improvement, to an injunction to restrain the contractor from proceeding unless in accordance with the contract. He must seek relief by an injunction restraining the corporation from paying the defendant, or restraining them from assessing plaintiff's property for the work. *N. Y. Supreme Ct. Sp. T.* 1856, *McCafferty v. McCabe*, 4 *Abb. Pr.* 57; 13 *How. Pr.* 275.

566. Where land is conveyed to a municipal corporation, in trust to be kept open as a public street, one who owns a lot upon it, and has been assessed for opening it, can enforce the execution of the trust; and, if the corporation permit the adjoining owners to inclose portions of it for courtyards, he may

have an injunction against their so doing. *N. Y. Supreme Ct. Sp. T.* 1848, *Lawrence v. Mayor &c. of N. Y.* 2 *Barb.* 577.

567. — against improper disposal of funds. That an injunction will lie to restrain a municipal corporation from paying over money which the corporate authorities have illegally appropriated,—see *Webster v. Town of Harwinton*, 32 *Conn.* 181; *Adrianse v. Mayor &c. of N. Y.* 1 *Barb.* 19; *New London v. Brainard*, 23 *Conn.* 552.

568. In a suit to restrain a municipal corporation from paying money out of the treasury under a resolution claimed to be illegal, the court will not review the propriety of the resolution as passed. To sustain an injunction, it must be made to appear that the appropriation was beyond the power of the corporate authorities by whom it was passed. *N. Y. Supreme Ct. Sp. T.* 1857, *Roberts v. Mayor &c. of N. Y.* 5 *Abb. Pr.* 41.

569. Where moneys are appropriated by vote of the legislative body of a municipal corporation for two purposes, one of which is lawful, and the other unlawful, the courts will, if it is practicable so to do, distinguish between the two objects, so as to sustain the appropriation, so far as it is for a lawful purpose, and to enjoin only the expenditure for that which is unlawful. But where the appropriation made is of one sum in gross, in such a way that the court cannot determine how much was intended for the lawful object, how much for the other, the entire appropriation will be held void. *Id.*

570. Tax payer's right to sue. By the law of New York, an individual resident and taxpayer of a municipal corporation, or creditor holding their stock, payment of which is not yet due, cannot maintain an action against the corporation and their grantee to avoid an illegal or improvident transfer of real property. One person cannot sustain a civil action for an injury of a public nature, when the damage he sustains is no greater than that sustained by every other member of the community. The fact that the act of administration complained is likely to produce taxation, does not render it, within this rule, a matter of private or individual concern. It is an affair altogether public; and the only remedial process against an abuse of administrative power tending to taxation which one can have is furnished by the elective franchise, or a proceeding in behalf

of the State, or in the case of an act without jurisdiction, in treating the attempt to enforce the illegal tax as a matter of trespass. There is no distinction in this respect between counties or towns and cities.* *N. Y. Ct. of Appeals*, 1861, *Roosevelt v. Draper*, 23 *N. Y.* 318; see also 7 *Abb. Pr.* 108; 16 *How. Pr.* 137; S. P. 1858, *Doolittle v. Supervisors of Broome*, 18 *N. Y.* 155; *N. Y. Supreme Ct.* 1856, *Wetmore v. Story*, 22 *Barb.* 414; 8 *Abb. Pr.* 262; 1860, *Kelsey v. King*, 32 *Barb.* 410; 11 *Abb. Pr.* 180; *Sp. T.* 1858, *Korff v. Green*, 7 *Abb. Pr.* 108, note; 16 *How. Pr.* 140; *N. Y. Superior Ct. Sp. T.* 1858, *Davis v. Mayor &c. of N. Y.* 2 *Duer*, 668. And see *Ketchum v. City of Buffalo*, 14 *N. Y.* (4 *Kern.*) 856; *Arkenburgh v. Wood*, 23 *Barb.* 360; *Gillespie v. Broas*, *Id.* 370; *People v. Lowber*, 7 *Abb. Pr.* 158; 28 *Barb.* 65.

571. In New Hampshire, where a town has undertaken to appropriate money in a manner unauthorized by law, any person, who is a taxpayer in such town, and liable to be assessed for any part of such sum, may interfere by injunction to prevent its payment and misapplication. *N. H. Supreme Ct.* 1863, *Merrill v. Plainfield*, 45 *N. H.* 126. And see *Chaffee v. Granger*, 6 *Mich.* 51.

572. Injunction in behalf of corporation. A municipal corporation are not entitled, as such, by virtue of their charter, to maintain an action to enjoin the construction of a public work which will obstruct a highway. Such a power does not attach to them in their corporate character, upon any principle of the law in relation to corporations. They must, as in the case of private persons, to maintain their position in a court of equity for relief against a public nuisance, aver and prove that they were the owners of property liable to be affected by the nuisance, and that, in point of fact, they were so affected, so that they thereby have suffered a special damage. Nor is the difficulty obviated by associating with them the citizens of the place, as persons in whose behalf they sue. If the citizens were even parties on the record, the objection would equally lie against them,

* Several previous cases in New York, sustaining such actions by individual taxpayers,—e. g. *Christopher v. Mayor &c. of N. Y.* 13 *Barb.* 567; *Stuyvesant v. Pearsall*, 15 *Id.* 244; *De Baun v. Mayor &c. of N. Y.* 16 *Barb.* 892; *Wood v. Draper*, 24 *Barb.* 187; 4 *Abb. Pr.* 323; *Shepard v. Wood*, 18 *How. Pr.* 47; *McCafferty v. McCabe*, *Id.* 275; are overruled or superseded by the above decisions of the Court of Appeals.

unless they could show a special damage as a ground to stand upon. *U. S. Supreme Ct.* 1838, *Mayor &c. of Georgetown v. Alexandria Canal Co.* 12 *Pet.* 91. Compare *Pennsylvania v. Wheeling & Belmont Bridge Co.* 13 *How.* 518; *Mayor &c. of Rochester v. Curtis, Clarke (N. Y.)* 836.

For the power of municipal corporations to sue and be sued, so far as they hold it in common with other corporations, see *SUTTA*.

For rules governing various Remedies, in their application to controversies affecting municipal corporations as well as others, see their titles; such as, *INDICTMENT*; *INJUNCTION*; *MANDAMUS*; *QUO WARRANTO*.

NAME.

1. How acquired. A corporation may acquire a name by usage or reputation. *Ala. Supreme Ct.* 1857, *Smith v. Plank Road Co.* 80 *Ala. N. S.* 650. And see *Dutch West India Co. v. Moses*, 1 *Str.* 614.

2. That it may be implied from general provisions of a charter:—so that a grant to the inhabitants of D. of power to choose a mayor, may operate as an incorporation by the name of "The mayor and commonalty of D."—see *Anonymous, Salk.* 191. Compare *Pitts v. James*, *Hob.* 124; *Ayray's Case*, 11 *Co.* 19.

3. Where a general law for incorporation of municipal corporations authorized any existing town or city to adopt its provisions as their charter, but gave no direction as to the name,—*Hebl*, that a town or city adopting the act were authorized to retain their former name, and would be presumed to have done so. *Ind. Supreme Ct.* 1861, *Johnson v. Common Council of Indianapolis*, 16 *Ind.* 227.

4. What constitutes a good description of a corporation,—see *Burdine v. Grand Lodge of Alabama*, 37 *Ala. N. S.* 478; *Bridgeport v. Hall*, 18 *La. Ann.* 211.

5. That a corporation should be constituted of some place,—see *Potter v. Bank of Ithaca*, 7 *Hill*, 580.

6. What it implies. That a corporate name implies, *prima facie*, a corporate existence,—see *Jones v. Cincinnati Type Foundry Co.* 14 *Ind.* 89; *Hubbard v. Chappel*, *Id.* 601.

7. Two names. That by virtue of usage, a corporation may have more than one corporate name,—see *All Saints Church v. Lovett*,

1 *Hall*, 191; *Dutchess Cotton Manuf. Co. v. Davis*, 14 *Johns*, 238; *Middlesex Husbandmen &c. v. Davis*, 8 *Metc.* 133.

8. That a corporation by prescription, may have several names; but one constituted by charter can have but one name, at the same time, and for the same purpose,—see *Knight v. Mayor &c. of Wells*, 1 *Ld. Raym.* 80; 1 *Lutw.* 408, 519; *Anonymous*, 3 *Salk.* 102.

9. That a corporation may be incorporated by one name, and have power given them to sue and purchase lands by another,—see *Butler v. President of College of Physicians, Cro. Car.* 256; *Jones*, 261.

10. A school society divided itself into five districts, and prescribed the limits of each, designating them as the "Eastern," "Middle," "Southern," "Western," and "Northern." *Held*, that these terms were used as descriptive of the several districts, and not for the purpose of fixing their names; and that evidence that one of such districts had been known and called by the name of the "South" district was admissible. *Conn. Supreme Ct.* 1839, *South School District v. Blakeslee*, 18 *Conn.* 227.

11. An objection that the promise sued on was to the "New York Central College," while the true name of the corporation was the "New York Central College Association,"—*Held*, obviated by proof that the college was known by both names. [*Ang. & A. on Corp.* § 234.]* *N. Y. Supreme Ct.* 1865, *Hammond v. Shepard*, 29 *How. Pr.* 188.

12. Exclusive right. Where one company assumed a name somewhat similar to the name of another company, but it did not appear that the first company was likely to suffer any injury thereby,—*Held*, that an in-

junction would not lie at the suit of the first established company to restrain the use of the similar names; the plaintiffs having a remedy at law. *V. Chan. Ct.* 1847, *London & Provincial Law Ass. Soc. v. London Provincial Joint Stock Life Ins. Co.* 11 *Jur.* 988.

13. Power to change the corporate name. After a company has been incorporated by a name set forth in the act of incorporation, such incorporated company has not the right to change its name. The identity of name is the principal means for effecting that perpetuity of succession with members frequently changing, which is an important purpose of incorporation; and the corporate name can be changed only by the same power by which the corporate body has been created.* *Q. B.* 1847, *Regina v. Registrar of Joint Stock Companies*, 10 *Q. B.* 839. Compare *Episcopal Charitable Society v. Episcopal Church*, 1 *Pick.* 372.

14 — how pleaded. Where a plaintiff claims title to a note sued on by virtue of his appointment as a receiver of an insurance company, the note being payable to a company bearing a name different from that of the company of which he is receiver, it is necessary that he should, by proper averments, show that the note is a part of the assets of the company of which he has been appointed receiver. If the change of name was by a reorganization of the company under the general act, a general averment of the fact of reorganization is enough. *N. Y. Supreme Ct. Sp. T.* 1857, *Hyatt v. McMahon*, 25 *Barb.* 457.

15. Effect of change. Mere change of the name of a corporation by the legislature without altering its powers, does not affect third persons, provided the identity of the corporate body be shown [7 *Blackf.* 36]. *Ind. Supreme Ct.* 1858, *Rosenthal v. Madison & Indianapolis Plank Road Co.* 10 *Ind.* 353.

16. A church to which a grant has been

* A promissory note made payable to "The Branch of the Bank of the State of Arkansas, at Arkansas," may be declared on as payable to the Bank of the State of Arkansas, that being the true name of the bank. And, if such note does not of itself import a promise to the Bank of the State of Arkansas, it may, by express averment, be shown that it was made payable to that bank by the name contained in the instrument. *Ark. Supreme Ct.* 1843, *Bower v. State Bank*, 5 *Ark.* 234.

It, in the assessment of damages to a corporation, there is a variance from the corporate name, but enough appears to show clearly what corporation is intended, and there is no difficulty in the payment and discharge of the damages, it is sufficient. *N. H. Superior Ct.* 1869, *Pelroe v. Somersworth*, 10 *N. H.* 349.

A statute which desired a certain bond to be given to the "People of the State of California,"—*Held*, to be satisfied by a bond given to the "State of California." *Cal. Supreme Ct.* 1862, *People v. Love*, 19 *Cal.* 676.

* Under sections 10, 11, and 14 of the New York general act of 1849, for the incorporation of insurance companies, —providing that the charter prepared and filed by a marine insurance company, may fix the manner in which the corporate powers are to be exercised,—a pre-existing corporation, on reorganizing under the act, may change their name, if the charter with such change is approved by the proper officers. [10 *Ad. & E. N. S.* 889; 59 *Eng. C. L.*] *N. Y. Supreme Ct. Sp. T.* 1857, *Hyatt v. McMahon*, 25 *Barb.* 457.

The name of a voluntary ecclesiastical corporation, formed under the laws of Connecticut, without a special legislative act of incorporation, and without any established designation, is arbitrary, and a change or alteration in its name does not affect its identity. *Conn. Supreme Ct.* 1862, *Wardens &c. of Trinity Church in Portland v. Hall*, 22 *Conn.* 125.

made by a particular name, does not, by a subsequent change of name lose its identity or the benefit of the grant; provided the association remains in point of fact unchanged. *Ky. Ct. of Appeals*, 1847, *Cahill v. Bigger*, 8 *B. Monr.* 211.

For the effect of errors in the designation of a corporation, see *MISNOMER*.

NATIONAL BANKS.

BANKS.

NAVIGATION COMPANIES.

1. Charter powers. Under a charter requiring the company to improve a river to make it suitable for steamboat navigation, and to build a canal or railroad around certain falls on the route,—*Held*, that the construction of a dam to enable vessels to pass a part of the falls, was authorized, and that a railroad or canal around the other part of the falls would be a sufficient compliance with that condition. *Ma. Supreme Ct.* 1849, *Moor v. Veazie*, 31 *Ms.* 360.

2. The charter of a corporation conferred upon them authority to improve the navigation of the Penobscot, above a certain point, and the exclusive right of navigating it by steamboats "for twenty years after the completion of the improvement," on conditions that they should: 1, improve the navigation of certain parts of the river; 2, and run a steamboat over the route; 3, build a canal or railroad around certain falls, within seven years.

Held, 1. That as the act prescribed no mode for determining when the conditions had been complied with, and as steam navigation was the principal object of the grant, the actual running of the steamboat over the route prescribed should be considered the best proof of the performance of the conditions.

2. The question whether such steamboats were of sufficient size or power, could not be raised in a suit by an individual.

3. That the term of twenty years should be deemed to begin after the river had been so far improved as to be navigated by steam power, and the required railroad had been

finished and used. It was not essential to show that everything required by the charter has been fully completed. The whole statute should be taken into consideration, and the legislature could not have intended the company to be subject to competition when feeble, nor to be able by delaying the completion to extend their exclusive right to a future time. *Id.*

3. Under a charter authorizing a navigation company to collect tolls after the governor of the State has certified to their right to do so, it is not essential to the right of the company to collect toll that they should give public notice of the certificate unless this is required by the statute; nor need they make personal demand of the toll before suit. *Ala. Supreme Ct.* 1849, *Duke v. Cahawba Nav. Co.* 16 *Ala. N. S.* 372.

4. Under a charter of a navigation company providing for the appointment of a commissioner to certify to the governor when the river on which the tolls were collectable is out of order, whereupon their right to tolls should be suspended, no other evidence than the commissioner's certificate is admissible to show that the river was out of repair as a defence to an action for tolls. *Id.*

5. Liability for property carried. In the provision of the charter of a steamboat company, granting a right to run a steamboat "for the transportation of merchandise," the term "merchandise" does not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value, in bulk, weight, or measure, and which are bought and sold. In order to render the company liable for money entrusted to the master and lost by him, it must be clearly proved, that they have held themselves out to the public as common carriers of money for hire; and have authorized the master to contract on their account. [6 *Wend.* 335.] *U. S. Cir. Ct. (Mass.)* 1841, *Citizens' Bank v. Nantucket Steamboat Co.* 2 *Story C. Ct.* 16.

6. Where the usual course of a transportation company's business is to forward goods beyond its route by sailing vessels, it is not liable for not forwarding a particular article by steam vessel, unless the direction to do so be clear and unambiguous. *Mass. Supreme Ct.* 1853, *Simkins v. Norwich & New London Steamboat Co.* 11 *Cush.* 102.

NOTICE.

1. To a branch. A notice of an act of bankruptcy given to the Bank of England, in London, in time for communication to be made to the branch banks, is sufficient to bind the bank, in respect of transactions with the bankrupt, at any of the branch banks of that establishment. *K. B.* 1885, *Willis v. Bank of England*, 4 *Adol. & E.* 21; 1 *Harr. & W.* 620; 5 *Nev. & M.* 478.

2. To the board of directors. Notice to the directors of a corporation, which assembled as a board, is notice to their successors, and to the corporation, although notice to an individual director who has no duty to perform in relation to the subject of the notice, is not a good constructive notice to the corporation. *N. Y. Chancery*, 1833, *Fulton Bank v. N. Y. and Sharon Canal Co.* 4 *Paige*, 127.

3. Notice to the board of directors of a bank is notice to the bank. And no subsequent change in the persons composing the board will prevent the bank from being affected by such notice. *U. S. Supreme Ct.* 1828, *Mechanics' Bank of Alexandria v. Seton*, 1 *Pet.* 299.

4. Knowledge of a material fact communicated by a bank director to the board, at a regular meeting, is notice to the bank. *Pa. Supreme Ct.* 1840, *Bank of Pittsburg v. Whitehead*, 10 *Watts*, 397.

5. Upon a question whether the acts of a president of a corporation were permitted or ratified by the corporation, evidence of what took place at meetings of the board of managers, when engaged in the business of the company, in regard to the doings of the president, is undoubtedly admissible; as showing notice to the corporation of the powers which its officer was exercising. Notice to the board would be notice to the corporation. *N. Y. Ct. of Appeals*, 1863, *Olcott v. Tioga R. R. Co.* 27 *N. Y.* 546.

6. But evidence of conversations had with individual members of the board would be inadmissible. *Id.*

7. As a general rule, what the directors of a corporation know regarding matters affecting the interests of the corporation, the corporation will be held to know. And knowledge on the part of the directors may be inferred from circumstances, and it is not always necessary to show it by direct proof.

Conn. Supreme Ct. 1862, *Toll Bridge Co. v. Betsworth*, 30 *Conn.* 380.

8. To an individual director. Notice which a director of an insurance company receives privately, or by public rumor, and does not communicate to the board, is not binding on the company. *Md. Ct. of Appeals*, 1857, *General Ins. Co. of Maryland v. United States Ins. Co. of Baltimore*, 10 *Md.* 517; *Md. Chancery*, 1851, *United States Ins. Co. v. Shriver*, 3 *Md. Ch. Dec.* 381.

9. Funds of a corporation were by the directors placed under the control of a finance committee. B., one member of this committee, was president of the corporation and a director of the F. bank; and C., another member of the committee, was also president of the bank. The finance committee, B. and C. being present, authorized the fund to be deposited in the F. bank, subject to be drawn out only by the finance committee. B. made the deposit, entering his own name in the books of the bank, as the one in which checks would be drawn; and he afterward drew out the money for his own use, and became insolvent.

Held, 1. That notice to an individual director, having no duty in relation to the notice, is not notice to the corporation. Therefore the knowledge which B. and C. acquired at the meeting of the finance committee that the fund was only to be drawn by the finance committee, was not, of itself, notice to the bank that B. was not authorized to draw the money.

2. That if C. had had personal knowledge that B. had left his individual signature on the book, it would have been his duty as president of the bank to have notified the teller of the facts known to him as member of the finance committee, and to have forbidden them from paying individual checks of B., and his failure to do so, would have made the bank liable to pay the fund again.

3. That there being no proof that C. had such knowledge, the bank was protected in its payment of B.'s check. *N. Y. Chancery*, 1833, *Fulton Bank v. New York & Sharon Canal Co.* 4 *Paige*, 127.

10. The publication of notice of a copartnership dissolution in a newspaper, though it reaches a director of the bank, is not in itself actual notice to the bank. To charge the corporation, it should be shown that the director was agent of the bank in respect to

the transaction, or that the notice was given to him as director that he might communicate it. *N. Y. Supreme Ct.* 1841, *National Bank v. Norton*, 1 *Hill*, 572.

11. The rule should be the same even though he had actual notice. *N. Y. Supreme Ct.* 1842, *Bank of U. S. v. Davis*, 2 *Id.* 451.

12. Although notice to one of a board of directors, in the same transaction, or express notice, is, in general, notice to the company, yet, the fact, that one of a firm is a director in a banking company, but takes no active part in the business of the bank, is no notice to such bank of the dissolution of such partnership, or the retiring of one of its partners. *C. P.* 1846, *Powles v. Page*, 8 *C. B.* 16.

13. — when not acting for the corporation. Where a director is not engaged in the business of the bank, notice to him will not be deemed notice to the bank. Thus, where one of the directors of a bank, who were authorized, when money was abundant, to solicit and procure notes for discount, obtained a note, under pretence of getting it discounted for the maker, at a time when money was scarce, and pledged it to the bank for a loan to himself, and the maker knew that the director was authorized by the bank to procure notes for discount only when money was abundant,—*Held*, that the director had exceeded his authority in the transaction, and that the bank was not bound by his fraudulent conduct; and that, as he did not act in his capacity of director in procuring the discount, the bank was not affected by his knowledge of the circumstances under which he received the note, and might recover of the maker. *Mass. Supreme Ct.* 1839, *Washington Bank v. Lewis*, 22 *Pick.* 24; *S. P. Conn. Supreme Ct.* 1857, *Farmers & Citizens' Bank v. Payne*, 25 *Conn.* 444; *Farrell Foundry Co. v. Dart*, 26 *Conn.* 376; *Md. Ct. of Appeals*, 1857, *General Ins. Co. v. U. S. Ins. Co.* 10 *Md.* 517.

14. The circumstance, that the indorser of a discounted note, was a director in the bank by which it was discounted, will not be deemed constructive notice to the bank that the note was made for his accommodation. *Mass. Supreme Ct.* 1837, *Commercial Bank v. Cunningham*, 24 *Pick.* 270.

15. A executed a note in blank, and handed it to B, a bank director, to be filled up with the sum of about \$500, and used in

the renewal of a note of A of corresponding amount, held by the bank. B, in violation of the trust reposed in him by A, filled up the note for a much larger sum, and offered it to the bank to be discounted for his own use. The note was discounted by the bank, B sitting as one of the board of directors when the note was taken by the bank; but he did not communicate any of the facts here stated to any other director;—*Held*, that A was liable to the bank on the note. *Ala. Supreme Ct.* 1847, *Terrell v. Branch Bank at Mobile*, 12 *Ala. N. S.* 509.

16. In order to affect a corporation by the knowledge of a fact on the part of one of its directors, it is necessary that he should have such knowledge while acting officially in the business of the corporation, unless he is acting at the time under some special authority conferred on him, other than what he would possess as merely one of its directors. Therefore, where a defective deed had been recorded, purporting to convey certain land, and one of the directors of a corporation which had acquired an equity of redemption in the premises, not acting as agent of the corporation, and having no management of its business otherwise than as a director, went to the town records for the purpose of ascertaining the situation of the land, and there saw the record of the deed, but did not inform the corporation or any of its agents thereof,—*Held*, that the corporation was not, by reason of these facts, chargeable with any knowledge of the deed. *Conn. Supreme Ct.* 1857, *Farrell Foundry Co. v. Dart*, 26 *Conn.* 376.

17. A corporation taking mortgages subsequent in date to an unrecorded deed of the mortgaged premises, are not charged with constructive notice of such deed by the fact that the grantor and mortgagor was, at the date of the deed, and at the time of executing the mortgages, a director in the corporation, where he did not act in the transaction as their agent. *N. Y. Supreme Ct. Sp. T.* 1858, *La Farge Fire Ins. Co. v. Bell*, 22 *Barb.* 54.

18. — when acting for them. If a bank director act in behalf of the bank in a transaction for its benefit, notice to him at the time, of any fact material to such transaction is notice to the bank. *Vt. Supreme Ct.* 1859, *Smith v. South Royalton Bank*, 33 *Vt.* 341.

19. Notice to one of the directors of a

bank, while engaged in its business, is notice to the bank. Thus, where one of the directors, a note being sent to him as such, for the benefit of a third person, procured its discount by the board as his own, and appropriated the proceeds,—*Held*, that the bank had notice of the fraud, and could not recover. *N. Y. Supreme Ct.* 1842, *Bank of U. S. v. Davis*, 2 *Hill*, 451. And see *North River Bank v. Aymar*, 8 *Id.* 262; *Fulton Bank v. Benedict*, 1 *Hall*, 480; *United States Ins. Co. v. Shriver*, 8 *Md. Ch. Dec.* 381.

20. — when acting in fraud of the company. A director having purchased lands from a corporation, united with others in forming a new corporation, he subscribing for almost all of the stock therein, and becoming one of its officers and directors, and on the next day, in pursuance of one entire plan, conveyed the same lands to the new company in payment of his subscription for such stock. *Held*, that the new company was affected with notice of the circumstances impairing the title of the party so conveying the lands to it, and could not claim to be a *bona fide* purchaser without notice. *Md. Ct. of Appeals*, 1860, *Hoffman & Co. v. Cumberland & Co.* 16 *Md.* 456.

21. The directors of a bank, in order to continue themselves in office, purchased stock sufficient to insure them the control, and transferred it in trust for the bank, paying the premium with proceeds of their individual notes discounted by the bank. *Held*, that the guilty knowledge of the directors was not notice to the bank of the illegal withdrawal of the capital stock, so as to preclude the bank from recovering on the notes. *N. Y. Superior Ct.* 1828, *City Bank of N. Y. v. Barnard*, 1 *Hall*, 70.

22. To officers generally. Knowledge acquired by officers of corporation in discharge of official duties, knowledge of the the corporation,—see *Mechanics' Bank v. Schaumburg*, 38 *Mo.* 228.

23. Where notice was required to be given by the insured to an insurance company of a loss by fire, and it appeared that the president and a director of the company visited the place where the fire was,—*Held*, that this constituted a sufficient notice to bind the company, and that the assured might well be excused from giving further notice. *N. J. Supreme Ct.* 1832, *Roumagne v. Mechanics' Fire Ins. Co.* 1 *Green*, 110.

24. Where a trust deed executed by a moneyed corporation, transferring assets to secure their bonds, recited that the provisions of the statute relative to such transfers had been fully complied with; and the purchasers of the bonds, to whom a counterpart of it had been furnished, were assured that the recital was true,—*Held*, that there was no actual notice of non-compliance, and that the mere omission to inquire whether the statute had not been violated, did not make them chargeable with notice; but that an officer of the corporation, whose duty as such it was to have known the facts, was chargeable with notice. *N. Y. Superior Ct.* 1849, *Palmer v. Yates*, 8 *Sandf.* 137, 154.

25. If a person employed by a railroad company at the time of an accident alleged to have been caused by his negligence, was an habitual drunkard, evidence that he was generally reputed to be such in the place where he lived is competent, not for the purpose of showing the fact that he was intemperate, but for the purpose of showing that his intemperate habits ought to have been known to the officers of the corporation. *Mass. Supreme Ct.* 1866, *Gilman v. Eastern R. R. Co.* 13 *Allen*, 433.

26. To president. Notice to the president of a banking corporation, that stock standing upon the books of the bank in the name of one person, is held by him in trust for another, should be considered as notice to the corporation. And it is not necessary, in order to affect the corporation with notice of such trust, that there should have been a full communication of all the circumstances connected with it; it is enough, in such case, if the party be put upon inquiry. *Vt. Supreme Ct.* 1847, *Porter v. Bank of Rutland*, 19 *Vt.* 410.

27. In an action against a bank, a letter written to the plaintiff by the president of the bank, although signed by a third person, is evidence for the plaintiff to prove a knowledge in the bank of the facts stated in the letter. *Pa. Supreme Ct.* 1844, *Commercial Bank v. Wood*, 7 *Watts & S.* 89.

28. — when not acting for the corporation. Neither the acts nor knowledge of the officer of a corporation will bind it in a matter in which he acts for himself, dealing with the corporation as if he had no official relations with it. Thus where the president of a corporation executed to some of its di-

rectors, in trust for it, a mortgage of land to which his wife had an equitable title by unrecorded deed, the same having been paid for out of her separate estate,—*Held*, that the mortgagor's knowledge of his wife's equities would not, on account of his official position, be considered as knowledge of the corporation, and could not affect its rights unless shown to have been communicated to its managing agents. *Md. Ct. of Appeals*, 1853, *Winchester v. Baltimore & Susquehanna R. R. Co.* 4 *Md.* 281.

29. Information given to A. in dealing with him as a member of his firm of A. & B. is not notice to a corporation of which he is president. *N. Y. Supreme Ct.* 1857, *Miller v. Illinois Central R. R. Co.* 24 *Barb.* 312.

30. To cashier. Notice to a cashier is notice to the bank. *N. J. Ct. of Chancery*, 1838, *Trenton Banking Co. v. Woodruff*, 1 *Green Ch.* 117. And see *Branch Bank at Huntsville v. Steele*, 10 *Ala. N. S.* 915.

31. Information communicated to a cashier may be presumed to have been communicated by him to the managers. *N. Y. Ct. of Appeals*, 1849, *New Hope & Delaware Bridge Co. v. Phoenix Bank*, 3 *N. Y. (8 Comst.)* 156.

32. To secretary of insurance company. The charter of an insurance company provided that if any other insurance should be obtained on any property insured in the company, notice thereof should be given to the secretary, and the consent of the directors obtained, otherwise the policy issued by this company should be void. The evidence showed that the secretary knew of and suggested the second insurance, and that two of the directors actually consented to the same, and the others stood by and saw what was going on. *Held*, that the evidence was competent to show both notice and consent within the requirements of the charter. *N. H. Superior Ct.* 1852, *Goodall v. New England Mut. Fire Ins. Co.* 5 *Post.* 169.

33. Where notice of a loss by fire was received at the office of the company four days after the occurrence, and the secretary making no objection to its sufficiency, informed the insured that steps toward adjustment would be taken, but the company based their refusal to pay the loss exclusively on other grounds,—*Held*, that all objection to the notice was thereby waived. *N. J. Supreme Ct.* 1854, *Schenck v. Mercer County Mut. &c. Ins. Co.* 4 *Zabr.* 447.

34. To agents. The rule that notice to the agent is notice to the principal, where it is the duty of the agent to act upon such notice, or to communicate it to his principal in the proper discharge of his duty as agent, applies to the agents of corporations as well as others.* *N. Y. Chancery*, 1833, *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 *Paige*, 127.

35. When several agents are employed by a bank with distinct and separate duties, the knowledge of one of those agents of the residence of an indorser, who was not the proper agent to give notice, is not the knowledge of the bank, and therefore cannot be set up to charge negligence in giving notice. *Miss. Ct. of Errors*, 1849, *Goodloe v. Godley*, 18 *Smad. & M.* 238.

36. That persons appointed on behalf of the company, to do only particular work, are the proper persons to whom notice that the work is done to the injury of others, should be given, in order to charge the corporation,—see *Black v. Camden & Amboy R. R. Co.* 45 *Barb. (N. Y.)* 40; *Naahville & Chattanooga R. R. Co. v. Elliott*, 1 *Coldw.* 611.

37. To engineer. Notice to the engineer of a bridge company, who was appointed to supervise and direct the work of the construction of the bridge, of an alteration in the structure, supposed by the builder to be an improvement, is notice to the company. *Pa. Supreme Ct.* 1850, *Danville Bridge Co. v. Pomroy*, 15 *Pa. St.* 151.

38. To stockholders. Knowledge of facts by a mere stockholder in an incorporated manufacturing company, turnpike, canal company, or bank, is not notice to the corporation of the existence of those facts.† *Mass.*

* For the application of this general rule to corporations, see also, *Bank v. Whitehead*, 10 *Watts*, 397; *Boggs v. Lancaster Bank*, 7 *Watts & S.* 386; *Danville Bridge Co. v. Pomroy*, 15 *Pa. St.* 151; *McEwen v. Montgomery County Mut. Ins. Co.* 5 *Hill*, 101; *Conro v. Fort Henry Iron Co.* 13 *Barb. (N. Y.)* 27; *Cumberland Coal Co. v. Sherman*, 30 *Id.* 538, 580; *Trenton Banking Co. v. Woodruff*, 1 *Green (N. J.)* 117; *Wing v. Harvey*, 5 *De G. M. & G.* 265; 37 *Eng. L. & Eq.* 140.

† The rule, that notice to one partner in an ordinary trading partnership is notice to all the partners, does not apply to an English joint stock company. *V. Ch. Ct.* 1862, *Re Crew's Estate Act*, 31 *Beas.* 39.

Where, therefore, D., one of the partners of a firm which was a customer of a joint stock banking company, was also one of the directors of the company, but his being director gave him no management of the banking accounts, which were conducted by the manager with the concurrence of three managing directors, of whom D. was not one, and the firm dissolved partnership,—*Held*, that D.'s knowledge of such dissolution did not operate as notice thereof to the banking

Supreme Ct. 1840, *Housatonic Bank v. Martin*, 1 *Metc.* 294; *Pa. Supreme Ct.* 1840, *Bank of Pittsburgh v. Whitehead*, 10 *Watts*, 397; 1842, *Union Canal Co. v. Loyd*, 4 *Watts & S.* 393.

39. The knowledge of stockholders in a corporation, who were the former owners of the corporate property, will not affect the corporation with notice of a lien attaching to the property, when there are other persons who became stockholders in ignorance of the claim. *U. S. Dist. Ct. (Mass.)* 1854? *The Admiral*, 8 *Law Rep. N. S.* 91.

40. A notice to a stockholder, or to a party, who subsequently becomes an officer of the corporation, is not notice to the company, and the fact of his subsequent elevation to office will not make it obligatory upon him to transmit that notice, previously received, to the company. *Id.*

41. To a member. Notice to a corporator is not notice to the corporation, unless he is constituted, by the charter or by-laws, an organ of communication between the corporation and those who deal with it. *Pa. Supreme Ct.* 1840, *Bank of Pittsburgh v. Whitehead*, 10 *Watts*, 397; 1848, *Custer v. Tompkins County Bank*, 9 *Pa. St.* 27.

As to the application of the law of *Estoppel*, and *Ratification*, to the dealings of corporations, see those titles.

OFFICERS.

[This chapter embraces matters relative to corporate officers in general. It treats of how officers are constituted, except that *Elections* is a separate title,—of the title of a corporate officer to his office, and how it may be questioned and tried,—the powers of officers considered, as distinguished from the powers of the corporation,—their rights, including compensation,—their liability to the corporation or to persons interested in or dealing with the corporation, or to criminal punishment for their official acts,—and the determination of office. But the liability of an officer upon a contract which he has made for the corporation, but upon which they cannot be charged, is under *Contracts*, and his liability in place of the corporation for debts which they are unable to pay is under *Individual Liability*. The interpretation, effect, and enforcement of bonds given by officers to the corporation is under *Securities*. And the chapter is confined to matters relating to corporate officers generally. Cases bearing upon a single office having a familiar title, are under such title;—e. g. *Director*; *President*. And matters applicable to officers of a single class of corporations, are under the title of that class.]

company. *O. P.* 1846, *Powles v. Page*, 15 *Law J. N. S.* 217; 10 *Jur.* 536.

I. HOW CONSTITUTED.

II. THE TITLE TO OFFICE.

1. *How questioned and tried.*
2. *Officers de facto.*

III. POWERS AND DUTIES.

1. *In general.*
2. *Particular powers.*

IV. RIGHTS.

V. LIABILITIES.

VI. DETERMINATION OF OFFICE.

1. *Resignation.*
2. *Expiration.*
3. *Removal. Restoration.*

I. HOW CONSTITUTED.

1. *Nature of their function.* That the officers of a private corporation have no franchise in their offices, but are the mere ministerial agents of the corporation, to conduct its business for the benefit and under the authority of the corporation; and hence they may be appointed or removed by the stockholders at any general meeting, whenever the welfare of the corporation requires it,—see *Burr v. McDonald*, 8 *Gratt.* 215.

2. That the office of treasurer of a municipal corporation is not a civil office within a constitutional provision that no clergyman shall be capable of holding any civil office within the State,—*State v. Wilmington City Council*, 3 *Harring.* 294.

For the distinction between *Agents*, *Officers* and *Servants*, and the law of *AGENTS* and *SERVANTS*, see those titles.

3. *Who is a corporate officer.* That a professor is not properly an officer of the college corporation, but a person in its employment,—see *Union County v. James*, 21 *Pa. St.* 525. Compare *Exp. Bailey*, 27 *Eng. L. & Eq.* 190.

4. *Who is an annual officer.* The mere fact that an agent is, in some respects, the deputy of annual officers, by no means proves that he is an annual officer himself; for it may be that his appointment was made to remedy the inconvenience of annual officers, and the deficiency of service which may result from the casual interruption of an election. See *Curling v. Chalklen*, 8 *Mauie & S.* 502.

5. Where, by the charter of a bank, the directors are to be chosen annually, and they, "for the time being, have power to appoint a cashier, and such other officers under them, as may be necessary for executing the business of said corporation," a cashier appointed

by them is an officer of the corporation, the duration of whose office, in the absence of an express limitation, is limited only by the duration of the charter. But he is liable to be removed by the directors as occasion may require, and is not necessarily an annual officer. *Md. Ct. of Appeals*, 1827, *Union Bank of Maryland v. Ridgely*, 1 *Harr. & G.* 324, 431; *S. P. Dedham Bank v. Chickering*, 3 *Pick.* 335; *Exeter Bank v. Rogers*, 7 *N. H.* 21; *Thompson v. Young*, 2 *Ohio*, 334.

6. Eligibility. A by-law which enlarges the number of those who, by the charter of the corporation, are eligible to office, is contradictory to the charter and therefore void. *K. B.* 1741, *Rex v. Mayor of Weymouth*, 7 *Mod.* 373.

7. That a by-law which would render a class of persons eligible to office who, by the charter, are ineligible, is bad,—see *Rex v. Bumstead*, 2 *Barn. & Ad.* 699; *Rex v. Spencer*, 8 *Burr.* 1827.

8. That courts will not add by construction to the causes specified in a statute as rendering a person ineligible to office in a municipal corporation,—see *Rex v. Chitty*, 5 *Ad. & E.* 609; 2 *Har. & W.* 399; 1 *Nov. & P.* 78.

See ELECTIONS.

9. Appointment. Authority may be conferred upon a corporate officer to act in a class of cases, by a single resolution of the directors, as well as by a separate resolution for each case. *N. Y. Supreme Ct.* 1861, *Elwell v. Dodge*, 33 *Barb.* 336.

10. That two persons may be appointed to be treasurers under a power reserved in articles of association to appoint a treasurer,—see *Sharp v. Warren*, 6 *Price*, 131.

11. Where an officer of a corporation is appointed at a corporate meeting held at the time and place specified in the by-laws, and enters upon, and discharges the duties of his office, so long as he voluntarily remains its incumbent, to the satisfaction of all parties concerned, the fact that the records of the corporation do not show that such meeting was called, or that a majority of the stock was there represented according to the requirements of the by-laws, is an apparent defect only, in his appointment, and cannot be set up by the corporation to defeat a recovery of just compensation for the services rendered by him in this business, and of which they had the benefit. *Vt. Su-*

preme Ct. 1863, *Waite v. Windham County Mining Co.* 36 *Vt.* 18.

12. Acceptance. The acceptance of office by the members of one of the faculties of an old, under a new corporation, does not in law amount to a resignation of their offices under the former, nor to a dissolution or suspension of its franchises. *Md. Ct. of Appeals*, 1838, *Regents of University of Maryland v. Williams*, 9 *Gill & J.* 365.

13. Refusal. The neglect to be sworn into an office for a great length of time, *e. g.* above twenty years after the party is elected, may be deemed a waiver or refusal to accept the election by the party elected. *K. B.* 1736, *Rex v. Jordan*, *Cas. temp. Hardw.* 225.

14. Taking oath of office. A corporation may for their own security, make a by-law requiring their clerk to be sworn; but cannot avail themselves of his omission to take the oath for the purpose of setting aside the title of a *bona fide* purchaser, on the ground that his deed had not been recorded by their duly qualified clerk. *Mass. Supreme Ct.* 1829, *Hastings v. Bluehill Turnpike Corporation*, 9 *Pick.* 80.

15. It seems that an officer cannot administer an oath to himself as a candidate, so as to authenticate and complete his own election,*—see *Rex v. Nance*, cited 4 *Burr.* 2122; *Rex v. Harper*, 5 *East*, 308.

As to Official Bonds, see SECURITIES.

II. THE TITLE TO OFFICE.

1. How questioned and tried.

16. By collateral action. The actual legal right of an incumbent of an office cannot be tried in a collateral action between third parties. *Mich. Supreme Ct.* 1865, *Facey v. Fuller*, 13 *Mich.* 527.

17. By action of ejectment. An action in the nature of ejectment cannot be brought in the name of a corporation by persons claiming to be its legal trustees, against persons who also claim to be its legal trustees, and who hold the land only as such. It is not proper, in such an action, to decide con-

* A mandamus is the proper remedy to compel the proper officer to administer the oath of office. *Achley's Case*, 4 *Abb. Pr.* 35.

A swearing in, and nothing more,—*Held*, to be a sufficient user of an office, to sustain an information in the nature of a *quo warranto*, without any possession being shown. *K. B.* 1802, *Rex v. Harwood*, 2 *East*, 177; 1803, *Rex v. Tate*, 4 *East*, 337. See *Rex v. Swyer*, 10 *Barn. & C.* 434.

flicting claims to office.* *N. Y. Supreme Ct.* 1859, *Parish of Bellport v. Tooker*, 29 *Barb.* 256.

18. — of replevin. The right or title to an office cannot be determined by an action of replevin of its appurtenances. *Iowa Supreme Ct.* 1864, *Desmond v. McCarthy*, 17 *Iowa*, 525.

19. Upon motion. Where a suit against a religious corporation was commenced in the New York Superior court, by service upon certain parties claiming to be officers, but not in possession of the offices, judgment against the corporation was had on their default,—*Held*, upon motion of the officers *de facto*:

1. That all the proceedings must be vacated as irregular.

2. That the title of the acting trustees could not be investigated upon the motion.

3. That if they were intruders, the Superior court had no jurisdiction to determine the question. *N. Y. Superior Ct. Sp. T.* 1857, *Berrian v. Methodist Society in New York*, 4 *Abb. Pr.* 424.

20. Upon habeas corpus. The right of a person to hold an office in a corporation who has been duly declared elected, and has been duly qualified, and has entered upon the discharge of the duties of his office, will not be inquired into on *habeas corpus* granted in favor of a party who has been arrested on a writ issued by such *de jure* officer. *Iowa Supreme Ct.* 1864, *Exp. Strahl*, 16 *Iowa*, 369.

21. By injunction or suit. The title of directors of a corporation, who are in under color of an election, and are, at most, irregularly chosen, cannot be inquired into collaterally, as by a suit in equity instituted to restrain them from exercising the functions of the office actually held by them as directors, upon the ground of irregularity in their election. *N. H. Superior Ct.* 1849, *Hughes v. Parker*, 20 *N. H.* 58; *Chancery*, 1847, *Mozley v. Alston*, 11 *Jur.* 315; 16 *Law J. N. S. Ch.* 217; 1 *Phill. Ch.* 790; 4 *Eng. Railw. Cas.* 636.

22. An injunction cannot be granted in an action between individuals to try the right to office in a religious corporation. The remedy is by an action in the nature of a *quo warranto*. *N. Y. Supreme Ct. Sp. T.* 1860, *Hart v. Harvey*, 82 *Barb.* 55; *S. C.* 10 *Abb. Pr.* 321; 19 *How. Pr.* 245.

* The contrary opinion is expressed in *Petty v. Tooker*, 21 *N. Y.* 267.

23. A bill in equity for an injunction to test the rights of a person claiming to be a borough officer under the appointment of a borough council, will not lie, although, as it is alleged, the appointee has not entered upon or exercised, or attempted to exercise the duties of his office. The proper remedy is at law by a *quo warranto*, to be obtained after the exercise or usurpation of authority under his appointment. *Pa. Supreme Ct.* 1864, *Updegraff v. Crans*, 47 *Pa. St.* 103.

24. The charter of a banking corporation provided that a certain amount on each share of the capital stock subscribed should be paid to the commissioners at the time of subscribing, and the remainder in such installments, and at such times as the president and directors should appoint. *Held*, that the power of the officers of the corporation, as conferred by charter, would not be abridged or restrained by injunction except upon clear proof of the illegality of their election. *N. J. Chancery*, 1834, *Hardenburgh v. Farmers' & Mechanics' Bank*, 2 *Green, Ch.* 68.

25. A bill in equity is the appropriate remedy, where, in the case of a public incorporated company, the old board of trustees refuse to surrender the control of the corporation, to the new board, duly constituted. The writ of *quo warranto* tries the rights only, and gives no relief for breach of trust. *Ga. Supreme Ct.* 1857, *Dart v. Houston*, 22 *Ga.* 506.

26. By mandamus. A mandamus lies to compel trustees of a religious corporation to induct a pastor regularly appointed by the proper ecclesiastical authority. Where there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit), and a person is kept out of possession, or dispossessed of such right, and has no other specific and legal remedy, the court ought to assist by a mandamus.*

* For cases showing that a mandamus lies to admit one elected to an office in an English corporation of a municipal character to the exercise of his right, see the following: *Shuttleworth v. Lincoln*, 2 *Bulet.* 122, alderman. *Taylor's Case*, *Poph.* 128, alderman. *Brathwaite's Case*, 1 *Vent.* 19, alderman. *Audley v. Jolce*, *Poph.* 176, *Noy*, 78, town clerk. *Parker's Case*, 1 *Vent.* 381, attorney, liberty to practice in court. *Dighton's Case*, 1 *Vent.* 77, 82, town clerk. *Roe's Case*, *Comb.* 145, office of sword-bearer. *Brpt's Case*, *Comb.* 214, office of common council. *Anon. Comb.* 244, town clerk. *Rex v. Westminster*, *Comb.* 244, office of high bailiff. *Rex v. Tidderly*, *Std.* 14, Burgess. *Rex v. Camplon*, 1 *Std.* 14, town clerk. *Middleton's Case*, 1 *Std.* 169, treasurer of corpo-

N. Y. Supreme Ct. Sp. T. 1848, *People v. Steele*, 2 *Barb.* 397. But see *People v. Dikeman*, 7 *How. Pr.* 124.

27. A mandamus will lie to a board of examiners to compel them to give a certificate of his election to a county commissioner, although he may likewise be compelled to resort to a *quo warranto* to remove an incumbent chosen at a new election which the commissioners ordered. *Mass. Supreme Ct.* 1838, *Strong, Petitioner*, 20 *Pick.* 484.

28. By *quo warranto*. An information in the nature of a *quo warranto* lies in the case of an intrusion into a corporate office created by the charter of a corporation.* *N. Y. Supreme Ct.* 1822, *People v. Kip*, 4 *Cow.* 882, note; 1825, *People v. Tibbits*, *Id.* 858. *Ohio Supreme Ct.*† 1833, *State v. Buchanan, Wright*, 238.

29. Bank directors who have come into office through the forms of law, are officers *de facto*, and, if illegally elected, should be ousted by *quo warranto*. *Ind. Supreme Ct.* 1862, *Smith v. State Bank*, 18 *Ind.* 827; *S. P. Ark. Su-*

ration. *Hurst's Case*, 1 *Sid.* 152, 94, 1 *Lev.* 75, attorney. *City of London v. Estwick*, *Style*, 82, common councilman. *Baxter's Case*, *Style*, 855, high steward. *Craford's Case*, *Style*, 407, usher of free school. *Stephen's Case*, *T. Raym.* 481, mayor. *Mill's Case*, *T. Raym.* 152, one of the approved men. *Taverner's Case*, *T. Raym.* 446, a liveryman of a company of vintners. *Stamp's Case*, *T. Raym.* 12, steward of court leet. *Rex v. Canterbury*, 1 *Lev.* 119, alderman. *Anon.* 1 *Lev.* 148, jurat. *Rex v. Mayor &c. of Wilton*, 5 *Mod.* 287, burgess of corporation. *Clerk's Case*, *Oro. Jac.* 506; burgess. *Middleton's Case*, *Dyer*, 383, *b. n.*, a citizen to his liberty. *Rex v. Wells*, 4 *Burr.* 1999, a recorder. *Regina v. Governors of Darlington School*, 6 *Q. B.* 663, master of grammar school.

* And see opinion of Parsons, C. J., in *Commonwealth v. Union Fire & Mar. Ins. Co.* 5 *Mass.* 281.

But an information in the nature of *quo warranto* will not be granted after the term of office has expired, so that a judgment of ouster cannot be pronounced. *Ohio Supreme Ct.* 1848, *State v. Jacobs*, 17 *Ohio*, 148.

If an election for managers of a corporation be not disputed during their term of office by *quo warranto*, and they are permitted to act throughout their term as managers *de facto*, the legality of the next election cannot be questioned for any vice or irregularity in the first. *Pa. Supreme Ct.* 1863, *Commonwealth v. Smith*, 45 *Pa.* 59.

A party who has exercised an office by usurpation may be proceeded against by information, though he has resigned the office, and his resignation has been accepted by the corporation. *K. B.* 1818, *Rex v. Warlow*, 2 *Maucl. & S.* 75.

† But now the common law remedy of inquiry by proceedings in *quo warranto* is superseded in Ohio by a statutory mode of contesting elections, which can alone be resorted to. Such statute binds the State as well as individuals. *Ohio Supreme Ct.* 1864, *State of Ohio ex rel. Grisell v. Mariow*, 15 *Ohio St.* 114.

A similar statute exists in New York,—see *Code of Procedure*, §

prems Ct. 1839, *State v. Ashley*, 1 *Ark.* 513; 1841, *State v. Harris*, 3 *Ark.* 570.

30. That a relator, on an application for a *quo warranto* against an intruder into an office claimed by him, must show title to be in himself,—see *Miller v. English*, 1 *Zabr.* 317.

31. Where a defendant, in an information in *quo warranto*, fails in the title set up by him, judgment must be rendered for the crown. *K. B.* 1768, *Rex v. Leigh*, 4 *Burr.* 2148.

32. To establish an application for an information in the nature of a *quo warranto*, it must appear that the party, against whom the writ was directed, has been in the actual possession of the office. It is not sufficient that the person elected to an office has tendered himself to be sworn in. *K. B.* 1792, *Rex v. Whitwell*, 5 *Durnf. & E.* 85.

33. Who may question the title. Where a member of a corporation, having knowledge of defects in the preliminaries of organization of the corporation, took part in an election for directors, and the officers so elected acted and contracted as such,—*Held*, that having held the corporation out to the world as being properly organized, he could not file an information in the nature of *quo warranto* against such directors. *Ga. Supreme Ct.* 1859, *Cole v. Dyer*, 29 *Ga.* 434.

34. It is no objection to an application for a *quo warranto* to oust the defendant from the office of alderman, by a corporator who objected to his qualification at the time of his election, that he afterward made no objection to his election to the principal office of magistracy (which required the defendant to be an alderman as a qualification), and attended at and concurred in corporate meetings, where the defendant presided or attended in his official capacity. *K. B.* 1800, *Rex v. Clarke*, 1 *East*, 38.

35. Proof of title. In all cases of dispute between conflicting bodies in the same corporation, at least in all bodies *under law*, where there has been an authorized election for the office in controversy, the certificate of election which is sanctioned by law or usage, is the *prima facie* written title to the office, and can be set aside only by a contest in the forms prescribed by law. *Pa. Supreme Ct.* 1864, *Kerr v. Trego*, 47 *Pa. St.* 292.

36. Proof of user of an office may be made by any witness who has knowledge of the fact. *Mich. Supreme Ct.* 1865, *Facey v. Fuller*, 18 *Mich.* 527.

37. It is competent to prove who were elected directors of a company, by the testimony of witnesses, who were present at the election. *N. Y. Supreme Ct.* 1857, *Partridge v. Badger*, 25 *Barb.* 146.

2. Officer de facto.

38. Definition of officer *de facto*,—see *Rex v. Corporation of Bedford Level*, 6 *East*, 856.

39. That a person may, by color of election, be an officer *de facto*, though indisputably ineligible,—see *Knight v. Corp. of Wells*, *Lutw.* 508.

40. A bare swearing-in and acting does not make an officer *de facto*; there must be, at least, the form of an election, though the election may be subsequently set aside. *K. B.* 1738, *Rex v. Lisle*, 2 *Str.* 1090.

41. One who is elected to be an officer of a banking corporation by the body in which the right to elect is vested, but by a less number than the charter requires, may be an officer *de facto*, and his acts, at least so far as they affect third persons, may be sustained. *Pa. Supreme Ct.* 1824, *Baird v. Bank of Washington*, 11 *Serg. & R.* 411.

42. A bank was governed by thirteen directors, five of whom were a quorum for ordinary discounts, but a majority of the whole number was required for corporate business. At a meeting when five only were present, the directors elected G. B. to fill a vacancy in the board; and, at another meeting, when seven were present, including G. B., agreed by a vote of six to one to accept real estate in satisfaction of a debt; G. B. voted in favor of such acceptance. *Held*, that G. B. having come into the direction under color of right, was an officer *de facto*, and consequently, that the contract was binding on the bank. *Id.* See also *Blandford v. School District*, 2 *Cush.* 39; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.* 21 *Pa. St.* 181; *Sampson v. Bowdoinham Steam Mill Corp.* 36 *Me.* 78; *Penobscot & Kennebec R. R. Co. v. Dunn*, 39 *Me.* 587.

43. Presumption in aid of his acts. Persons acting publicly as the officers of a corporation will be presumed rightfully in office, so far as it regards third persons; and their official acts will be binding on the corporation to the extent of the rights of such third persons. *Ga. Supreme Ct.* 1848, *Hall v. Carey*, 5 *Ga.* 239; *Md. Supreme Ct.* 1852, *Susquehanna Bridge &c. Co. v. General Ins.*

Co. 8 *Md.* 305; *Vt. Supreme Ct.* 1855, *State v. Williams*, 27 *Vt.* 755. And see *Lemington v. Blodgett*, 37 *Vt.* 210; *Durkin v. Exchange Bank of Virginia*, 3 *Patt. & H.* 277; *St. Luke's Church v. Matthews*, 4 *Desauss.* 578; *Riddle v. County of Bedford*, 7 *Serg. & R.* 392; *York County v. Small*, 9 *Watts & S.* 320; *Kingsbury v. Ledyard*, 2 *Id.* 41; *McGargell v. Hazelton Coal Co.* 4 *Id.* 425; *Despatch Line of Packets v. Bellamy Manuf. Co.* 12 *N. H.* 205; *Smith v. Erb*, 4 *Gill*, 437.

44. A proprietors' committee having in their behalf entered into a submission of demands to referees under a statute, representing themselves as duly authorized so to do, and the proprietors having been heard upon the merits before the referees, and making no objection to the submission, upon error brought to reverse a judgment rendered on the award, the court presumed that the committee had due authority, though the want of authority was assigned for error. *Ms. Supreme Ct.* 1827, *Proprietors of Fryeburg Canal v. Frye*, 5 *Ms. (5 Greenl.)* 38.

45. His power to bind the corporation. In general, the acts of one who is an officer *de facto* of a corporation, if done under color of his office are binding upon the corporation, although the election of such officer was irregular.* *Va. Ct. of Appeals*, 1846, *Burr v. McDonald*, 3 *Gratt.* 215; *N. Y. Supreme Ct.* 1838, *Matter of Mohawk & Hudson River R. R. Co.* 19 *Wend.* 185; 1851, *Lovett v. German Reformed Church*, 12 *Barb.* 67. And see *Merrill v. Farris*, 22 *Ill.* 303; *Schofield v. Watkins*, 22 *Ill.* 66.

46. — by contracts. Trustees who are in office under a judicial decision declaring their title to the office, may bind the corporation by their contract; and the fact that such decision was subsequently reversed on appeal, does not exonerate the corporation from liability. *N. Y. Com. Pl.* 1854, *Ebaugh v. German Reformed Church*, 3 *E. D. Smith*, 60.

47. A person who makes a contract with such trustees who are in possession of all the church property, without his having knowledge of any illegality in their election, may enforce his claim on the contract, though

* The official acts of a minister of the gospel, coming in question incidentally, and not declared to be void by statute, are within the rule which protects acts of officers *de facto*. [1 *N. H.* 268; 2 *Id.* 205; 4 *Durnf. & E.* 296.] *N. H. Supreme Ct.* 1843, *State v. Winkley*, 14 *N. H.* 430.

the election should afterward be adjudged illegal. And the fact that he was himself one of the trustees *de facto* does not alter the case; in the absence of bad faith. *So held*, where the courts had decided that the trustees were legally in office, and the adverse claimants had submitted to this decision, and had given no notice of any intent at that time to continue the litigation. *Id.*

48. In an action by an incorporated insurance company upon a premium note, parol evidence that the person, who, as president, signed the policy for which the note was made, was acting president of the company, is admissible to show that the policy was binding upon the company, and therefore formed a good consideration for the note. A corporation may be bound by the contracts of its officers *de facto* without their having been regularly elected. *Mich. Supreme Ct. 1845, Cahill v. Kalamazoo Mut. Ins. Co. 2 Dougl. 124.*

49. Checks, purporting to have been drawn by the president of a canal company on their treasurer, in favor of contractors, are evidence to show that such person acted as their president. *Pa. Supreme Ct. 1842, Union Canal Co. v. Loyd, 4 Watts & S. 393.*

50. — by suing. Where an action has been commenced in the name of a corporation, by direction of its officers *de facto*, no other persons claiming a right to act as the officers of the corporation, the defendant cannot be permitted to show, for the purpose of defeating the action, that the officers were illegally elected. *Mass. Supreme Ct. 1840, Charitable Association in Middle Granville v. Baldwin, 1 Metc. 359.*

51. Holding over. That a failure to elect officers at the designated times does not dissolve the corporation; the old officers hold over until their successors are appointed,—see *Smith v. Natchez Steamboat Co. 1 How. (Miss.) 479. See infra, 177, 181.*

52. The title of the person receiving the necessary votes to elect to a certain office is complete the moment the vote is declared, and the right of the former incumbent to hold over, ceases. *Va. Ct. of Appeals, 1855, Booker v. Young, 12 Gratt. 303.*

53. If the by-laws of a corporation provide that the clerk shall be chosen yearly, and also that he shall continue in office till another shall be chosen and qualified, and the person first chosen and qualified is re-

elected the next year, he continues to be clerk under the first election, till he is qualified under the second. *Mass. Supreme Ct. 1829, Hastings v. Blue Hill Turnpike Corporation, 9 Pick. 80.*

III. POWERS AND DUTIES.

1. In general.

54. Nature of authority. That the acts of a corporate officer, unless official, or in respect to his agency, are no more operative as against the institution than those of a corporator, or any stranger,—see *National Bank v. Norton, 1 Hill, 572.*

55. That the authority of officers of corporations is less extensive than that of agents of individual principals, in this respect, that their authority is regulated by statutes, or by matters recorded in the books of the corporation, of which those dealing with them may be deemed to have notice; whereas, the authority conferred by an individual upon his agent is known only to themselves,—see *Salem Bank v. Gloucester Bank, 17 Mass. 1; Foster v. Essex Bank, Id. 479.*

56. Power to bind the company. The acts of a corporate officer acting without a special authority are binding upon the corporation so far, and only so far as they are within the scope and ordinary course of the duties of his office. *N. Y. Chancery, 1833, Fulton Bank v. New York & Sharon Canal Co. 4 Paige, 127; N. Y. Supreme Ct. 1848, Boom v. City of Utica, 2 Barb. 104; Ill. Supreme Ct. 1865, New England Fire & Mar. Ins. Co. v. Schettler, 38 Ill. 166; Ga. Supreme Ct. 1866, Wright v. Georgia Railroad & Banking Co. 34 Ga. 330.*

57. If a bank cashier on its behalf has received money to be applied on the account of a third person, a subsequent misapplication by the cashier forms no defence to an action by such person against the bank. The acts of the cashier are the acts of the defendants while acting as their agent and within the scope of his authority, and any misapplication by him is a misapplication by the bank itself. *N. H. Superior Ct. 1844, Town of Concord v. Concord Bank, 16 N. H. 26.*

58. In an action by a bank, evidence of parol declarations made by "the officers of the bank" is not admissible for the defendant, without proof of the particular officers being authorized by the board of directors

to speak for them, even though it should appear that the board of directors kept no minutes of their transactions. *Pa. Supreme Ct.* 1824, *Stewart v. Huntingdon Bank*, 11 *Serg. & R.* 267.

59. Although the act of a bank cashier in furnishing means to another bank to organize illegally in evasion of the statute, is illegal, still, if it is an act done by him, not for himself or his benefit, but for the bank and the bank's benefit, and is beneficial thereto, and is known to the directors (or, if unknown, is unknown on account of their negligence), and not repudiated, exposed, or neutralized, it is the act of the bank, and debars it from resorting to the stockholders of the other bank for the payment of bills held by it on that bank. *Ga. Supreme Ct.* 1856, *Robinson v. Bealle*, 20 *Ga.* 275. And see *Hagerstown Bank v. London & C. Society*, 8 *Grant Cas.* 135.

60. In order to charge a banking association with a violation of a statute subjecting them to a penalty for receiving a bill of a foreign bank, upon the ground of a receipt of such bill by their teller, it is necessary to show that the teller, in receiving it, acted under an authority from the board of directors, or that his act was subsequently made known to and adopted by the board. The reception by the teller of such a bill is not an act within the general scope of his employment, or which those who deal with him have any right so to consider. His employment and his duty is to receive payment *in money*, of the bills and notes placed in his hands as teller. In the discharge of his duty, he has no right to receive anything but *money*, in the legal sense of the term, and, *a fortiori*, no right to receive that which the legislature has declared should in no case be considered as money. *N. Y. Superior Ct.* 1854, *Clark v. Metropolitan Bank*, 3 *Duer*, 241. See *infra*, 90.

61. A bank will not be held liable for such a statute penalty upon the ground that the prohibited bill was received by their teller, under a mere general authority to receive payment of paper held by the bank. Authority to receive the prohibited paper,—or a ratification,—must be shown. *Id.*

62. Where the servant of a ferry company, in the course of his employment, lets down a chain which guards the passage from the ferry boat to the bridge, this is an assurance to the passengers, for which the company is

responsible, that the boat is properly secured to the bridge, and that the passage way is safe. And if the chain is let down prematurely, and the passenger, relying on the implied assurance, attempts to cross, and is injured in consequence of the boat not being properly secured, the company are liable in damages. *N. Y. Ct. of Appeals*, 1867, *Ferris v. Union Ferry Co.* 36 *N. Y.* 312.

63. Presumed authority. It is to be presumed that acts which an officer of a corporation usually and customarily performs in its behalf, are authorized by its directors. *N. Y. Supreme Ct.* 1861, *Elwell v. Dodge*, 33 *Barb.* 336.

64. The acts of a cashier of a bank, done in the ordinary course of the business actually confided to such an officer, may be presumed to be within the scope of his duty. *U. S. Supreme Ct.* 1823, *Fleckner v. Bank of United States*, 8 *Wheat.* 338, 357.

65. Implied authority. If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period without objection, they are as much bound to those who are not aware of any want of authority as if the requisite power had been directly conferred. *N. Y. Supreme Ct.* 1852, *Beers v. Phoenix Glass Co.* 14 *Barb.* 358; *O. P.* 1852, *Smith v. Hull Glass Co.* 11 *C. B.* 897; 9 *Eng. L. & Eq.* 442; 21 *Law J. N. S. C. P.* 106.

66. The authority of an agent of a corporation to borrow money for the use of his principals, may be inferred from the character of his agency, his habit of borrowing money for the corporation, and the fact of the application of the money to the use of the corporation, without any direct authority being shown by a resolution of the board of directors, or by subsequent ratification. *Cal. Supreme Ct.* 1863, *Allen v. Citizens' Steam Nav. Co.* 23 *Cal.* 28.

67. Where the powers of a treasurer are expressly limited by the by-laws, they cannot be extended by inference from course of business. *Mass. Supreme Ct.* 1862, *Torrey v. Dustin Monument Assoc.* 5 *Allen*, 327.

68. Power conferred on two. Under a charter which provides that no losses shall be settled or paid by the insurance company, unless with the approbation of at least four of the directors, with the president and assistants, &c.; acceptance of an abandon-

ment by the president and assistants alone, will not be binding on the company. The corporation must act in the mode prescribed by the law creating it. *N. Y. Supreme Ct.* 1807, *Beatty v. Marine Ins. Co.* 2 *Johns.* 109; *S. P.* 1828, *Dawes v. North River Ins. Co.* 7 *Cow.* 462. Compare *Ridgway v. Farmers' Bank*, 12 *Serg. & R.* 256.

69. A president of a corporation, alone, cannot derive authority from a resolve of the directors authorizing him and the cashier to borrow money. *Pa. Supreme Ct.* 1824, *Ridgway v. Farmers' Bank*, 12 *Serg. & R.* 256.

70. A number of persons formed themselves into a company, and entered into a deed, by which it was agreed that their trade should be carried on in the name of two persons who should be trustees for the company, and that all actions should be brought in their name; and that the directors for the time being should have power to regulate the general business of the company, and that general quarterly meetings of the members should be holden. The plaintiff was afterward appointed at a general quarterly meeting, upon the recommendation of the directors, to conduct the business alone in place of the two persons originally appointed under the deed. *Held*, that he could not maintain assumpsit for goods of the company delivered to the defendant, as the alteration had not been made with the consent of or after notice given to all the company, and particularly to the defendant, who was one of the company. *K. B.* 1815, *Davies v. Hawkins*, 8 *Maule & S.* 488.

71. — or more. Under a vote appointing three persons a committee to superintend a work, and directing them to proceed as soon as funds to a specified amount should be raised, one of the committee is not authorized to purchase on the credit of the parish. *Mass. Supreme Ct.* 1815, *Kupfer v. South Parish* in August, 12 *Mass.* 185.

72. The plaintiff desiring an additional insurance on property already insured, transmitted an application to that effect to the company, with the request that the company signify their assent on the policy. This application was approved by a director of the company by an indorsement of the same.

Held, 1. That such approbation of the director was not a compliance with a by-law of the

company, requiring a subsequent insurance on the same property to have the consent of the directors signified by a statement thereof in the policy, or by indorsement thereon signed by the secretary.

2. That a waiver of compliance with the above by-law could not be inferred from the fact that the same person acted as agent for both companies in issuing the two policies, or that the first company, long after the obtaining of the second policy, notified the plaintiff of an assessment due from him, and accompanied such notice with a schedule of losses claimed of the company, in which the claim of the plaintiff was included, and marked "unadjusted." *Mass. Supreme Ct.* 1852, *Forbes v. Agawam Mut. Fire Ins. Co.* 9 *Cush.* 470.

3. Particular powers.

73. To dispose of assets. Under a statute, authorizing an officer to "assign, &c., real estate conveyed or mortgaged to" a bank, he may assign a mortgage. *N. Y. A. V. Chan. Ct.* 1843, *Curtis v. Swartwout*, 1 *N. Y. Leg. Obs.* 406.

See *PRESIDENT*.

74. Where certain county bonds were deposited by a railroad company with its president, under an agreement with an accommodation indorser, that the bonds should be disposed of, and the proceeds arising from the sale be applied to the payment of notes which had been indorsed for the benefit of the company,—*Held*, that the president became a trustee, independent of his official character, and could not make a disposition of the bonds different from that specified in the contract, although directed so to do by the company. *Ill. Supreme Ct.* 1862, *Wilkinson v. Stewart*, 30 *Ill.* 48.

75. Where a railroad company is owing debts, a resolution passed by its board of directors, who have authority to manage its affairs, authorizing and empowering its president and vice-president "to enter into such arrangements with its creditors or the holders of its securities for such relief as the circumstances of the case require, and to make such stipulations and agreements in the premises as they may deem proper and expedient," is sufficient to confer a joint authority on them to sell and dispose of the corporate property in payment of its debts. *Wis. Supreme Ct.*

1868, *Walworth County Bank v. Farmers' Loan and Trust Co.* 16 *Wis.* 620.

76. Where under such an authority the president of the company sold to a bank, to which it was indebted, with the assent of the vice-president of the company, who was also president of the bank, and acted for it in making the purchase, a quantity of railroad ties in part payment of the debt,—*Held*, that such assent of the vice-president of the company was not a due execution of the power, it being impossible for him to act as the agent, both of the bank and the railroad company, in the same transaction; and that the sale was invalid, as having been made by the president alone, and not within the authority conferred. *Ib.*

77. The president of a railroad company, duly authorized to sell and negotiate the bonds of the company, cannot make a valid transfer of them, as collateral security for a pre-existing debt, due by himself to another, where no new consideration passed at the time of transfer. *Pa. Supreme Ct.* 1857, *Pittsburgh & Connellsville R. R. Co. v. Barker*, 29 *Pa. St.* 160.

78. That a consent to an alienation of the property, given by one of the principal officers in sole charge of the company's business, in their usual form, is binding on the company,—see *Conover v. Mutual Ins. Co.* 1 *N. Y.* (1 *Comst.*) 290.

79. That a treasurer of a corporation has not, as of course, and without a resolve of the trustees, authority to assign a chose in action owned by it,—see *Jackson v. Campbell*, 5 *Wend.* 572; *Knight v. Lang*, 4 *E. D. Smith*, 881; 3 *Abb. Pr.* 227.

80. So of a president and cashier. See *Hoyt v. Thompson*, 5 *N. Y.* (1 *Seld.*) 820; and see 19 *N. Y.* 207.

81. But it seems that an officer of a corporation entrusted with the power to collect the debts of the company, may assign them without recourse upon receiving their full amount. *Ætna Ins. Co. v. Peck*, 28 *Vt.* 98.

82. A verbal direction from the directors of a bank to the cashier, without any recorded vote of the board, is a sufficient authority to guide him in the application of moneys officially received by him. *Conn. Supreme Ct.* 1848, *Stamford Bank v. Benedict*, 15 *Conn.* 497.

83. Where a public duty is imposed upon public bodies, and where costs incidentally

and necessarily arise out of proceedings instituted to call in question the propriety of acts done to enforce that duty, such bodies have necessarily a right to defray such expenses out of the public fund of which they have the superintendence and management. *K. B.* 1792, *Rex v. Inhabitants of Essex*, 4 *Durnf. & E.* 591; *S. P.* 1830, *Rex v. Commissioners for Sewers for Tower Hamlets*, 1 *Barn. & Ad.* 232; *Chancery*, 1837, *Atty. Gen. v. Mayor of Norwich*, 3 *Mylne & C.* 406.

84. To lease lands. The general agent of a corporation, having charge of its lands and buildings, cannot, by virtue of a special vote, authorizing him to enter and hold certain land, make a lease of the same, after his entry for condition broken, in order to try the title thereto. Neither is he authorized to do so by reason of his having ordinarily leased lands of the corporation for rent. *N. H. Superior Ct.* 1845, *Gillis v. Bailey*, 17 *N. H.* 18.

85. To make negotiable paper. An action of assumpsit will lie against a corporation on a promissory note, made by their agent who is duly authorized to make such a contract; and an action thereon cannot be maintained against such agent. *Vt. Supreme Ct.* 1822, *Proctor v. Webber*, 1 *D. Chip.* 371. Consult AGENTS; BILLS AND NOTES.

86. A resolution of the board of directors of a moneyed corporation, directing its officers to use certain notes in liquidating the liabilities of the company, empowers such officers to give such notes as collateral security, with the note of the company itself, in payment of a debt thereof. *N. Y. Superior Ct.* 1859, *Brookman v. Metcalf*, 5 *Bow.* 429.

87. An authority from the directors of a corporation to its treasurer to accept drafts on behalf of the corporation, must be strictly proved; but when it is proved, it may be presumed that the acceptances were supported by a valid consideration, and were for a proper purpose. *N. Y. Supreme Ct.* 1857, *Partridge v. Badger*, 25 *Barb.* 146.

88. The authority of an agent of a corporation to indorse a note may be shown by other evidence than the by-laws. *Me. Supreme Ct.* 1860, *Brown v. Donnell*, 49 *Me.* 421.

89. The act of the president of a coal company, in issuing an engagement of credit, in the nature of a bank note, contrary to an act prohibiting such issue, will not subject the corporation to the penalty of the act, in the absence of proof of authority from the

corporation to the president to issue such certificate of credit. *Pa. Supreme Ct.* 1846, *Hazeltown Coal Co. v. Megargel*, 4 *Pa. St.* 324.

90. Evidence that the teller of a bank, during all the time of his holding office, whenever the convenience of the bank or its customers required it, certified that the checks were "good," which were drawn on the bank by its customers, when funds to the amount of such checks were to the credit of the drawers, and that his so doing was, in some instances, known to the bank, and was not forbidden, and that it was the usage of the tellers of other banks to do the same thing, does not warrant a jury to infer that the power of so doing was an original, inherent, implied power of the teller as such. *Mass. Supreme Ct.* 1845, *Mussey v. Eagle Bank*, 3 *Metc.* 306. See *supra* 60.

91. To issue stock. A cashier may give new certificates of stock to a purchaser of shares sold in a tax warrant on its face good, and issued by lawful authority, though the tax may have been improperly assessed. *Mass. Supreme Ct.* 1849, *Smith v. Northampton Bank*, 4 *Cush.* 1.

92. The directors of a railway company have no power to act on an old resolution authorizing an issuance of shares after the particular purpose for which the authority was given has ceased to be available; nor to issue shares, even when they have the power, for the express purpose of creating votes to influence a coming general meeting. And an injunction will be granted on behalf of a shareholder against directors to restrain the issue of such shares. *V. Chan. Ct.* 1864, *Fraser v. Whalley*, 2 *Hem. & M.* 10.

93. Officers continued to issue stock in exchange for the debt of the company for more than two years after the rescission of the resolution empowering them to do so. *Held*, that this long usage implied an authority as effectually as an express resolution would have given it. *N. Y. Superior Ct.* 1848, *Lohman v. N. Y. & Erie R. R. Co.* 2 *Sandf.* 89.

94. To subscribe for stock. The president of one corporation subscribed for stock in another corporation, and the certificate for the stock was received by the agent of the former, and retained by it; and the stock on two occasions was voted upon by an officer or member of the former corporation. *Held*, that from these facts, the authority of the president, to make the subscription, might

be presumed. *Md. Chancery*, 1849, *Elysville Manuf. Co. v. Okisko Co.* 1. *Md. Ch. Dec.* 392. *S. P. N. Y. Supreme Ct.* 1844; *Bank of Lyons v. Demmon*, *Hill & D. Supp.* 898.

95. To grant an annuity. Directors of an incorporated manufacturing company, who have the legal custody of the corporate seal, with power to use it for the affairs of the corporation, may affix it to an indenture granting an annuity in the nature of a retiring pension, to an officer of the company, in consideration of past services, and on condition that he should abstain from acts prejudicial to the company, although no power is expressly given by their charter to grant annuities. *K. B.* 1832, *Clarke v. Imperial Gas Light Co.* 4 *Barn. & Ad.* 815; 1 *Nov. & M.* 206. But see p. 224, *ante*, note.

96. To bring suits. The trustees of a railroad, doing business in the name of the company, are liable to be sued in that name; and their property is responsible for liabilities incurred while transacting the business under that name. *Ill. Supreme Ct.* 1868, *Wilkinson v. Fleming*, 30 *Ill.* 353.

97. The cashier of a bank cannot sue, in his own name, a note belonging to the bank, at least without evidence that the bank directed the suit, or had assigned it to him. His possession of it is not in his individual capacity; he has only its custody; the bank has the possession. *N. Y. Supreme Ct.* 1836, *Olcott v. Rathbone*, 5 *Wend.* 490.

98. A general order was given by a board of commissioners in a parish to the treasurer to bring an action. *Held*, that it authorized the treasurer's successor to commence the action. *K. B.* 1827, *Cortis v. Kent Waterworks Co.* 7 *Barn. & C.* 314.

99. To modify contracts. A contract between a company and a contractor can be corrected for mistakes, only by the managers at a meeting of the board; and therefore, declarations or agreements of one or more of them made elsewhere, will not bind the company, and are inadmissible as evidence in an action by the contractor for additional compensation, founded on the alleged mistake. *Pa. Supreme Ct.* 1868, *Stoystown & Greensburg Turnp. Road Co. v. Craver*, 45 *Pa. St.* 386.

100. To prescribe regulations. The officers of an agricultural society have no authority to define and fix bounds within which no person can be permitted to enter or pass,

except in conformity with their regulations, for other purposes than those specially enumerated in the statutes regulating such associations. *So held*, with reference to the obstruction of a highway. *Mass. Supreme Ct. 1863, Commonwealth v. Ruggles, 6 Allen, 588.*

101. To waive regulations. That the general superintendent of a gas company has power to waive a company regulation requiring applicants for gas to make application in writing,—see *Shepherd v. Milwaukee Gas Co. 11 Wis. 235.*

102. An agent of an insurance company, to receive premiums and applications for insurance, and transmit policies, has no authority to waive notice of an assignment of a policy, required by the by-laws. [6 Gray, 169; 8 Id. 37.] *Mass. Supreme Ct. 1859, Tate v. Citizens' Mut. Fire Ins. Co. 13 Gray, 79.*

103. To meet out of the State. The directors of a manufacturing corporation, incorporated in Connecticut, may, where there is no restriction as to the place of holding their meetings, meet in another State, and there appoint a secretary; and the fact that such officer resides permanently in another State, will not amount to a legal disqualification. *Conn. Supreme Ct. 1827, McCall v. Byram Manuf. Co. 6 Conn. 428.*

104. To contract in their own behalf. The officers and directors of a corporate body are trustees of the stockholders, and in securing to themselves an advantage not common to all the stockholders, they commit a plain breach of duty, and they cannot enforce in equity, the instrument so obtained. [Ang. & A. on Cor. 1861, § 812; 2 Atk. 404; 3 Paige, 220; 1 R. I. 321; 19 Eng. L. & E. 361.] *U. S. Supreme Ct. 1862, Koehler v. Black River Falls Iron Co. 2 Black, 715.* And see *Newbery v. Garland, 81 Barb. (N. Y.) 121.*

105. That the officers of a corporation cannot purchase any claim against, or interest in the company, except in trust for the stockholders, after a resolution has been adopted by themselves, as managers, directing one of their number to purchase for the benefit of the company,—see *Kimmell v. Geeting, 2 Grant Cas. 125.*

106. A steamship company having virtually ceased to exist, for all purposes of business, and for promoting the object of the charter as originally granted, its powers hav-

ing been taken away, its property expended, and it being hopelessly insolvent. *Held*, that the president might contract on his individual behalf, to run steamers and do the business which the company had ceased to do, provided he put no duty, obligation, or restraint upon the company. *N. Y. Supreme Ct. Sp. T. 1863, Murray v. Vanderbilt, 39 Barb. 140.*

See also, TRUSTS.

107. To draft bequests to corporations. That the fact that the bequest to a church is contained in a will drawn up by its rector, subjects the will to a suspicion of undue influence,—see *Re Welsh, 5 N. Y. Surr. 238.*

108. To testify for or against the corporation. Trustees of a public charity are admissible as witnesses in an action brought against themselves in their corporate capacity.* *K. B. 1792, Weller v. Governors of Foundling Hospital, Peake N. P. Cas. 158.*

109. The trustees of a ministerial fund are competent witnesses in an action brought in the name of the corporation, when they are not personally named as parties to the suit. *Me. Supreme Ct. 1854, Ministerial &c. Fund in Andover v. Reed, 39 Me. 41.*

110. In Kentucky an officer or inhabitant of a county, city, or town, or an officer, member, or trustee of a corporation or religious society, although a party to the action, is competent to testify in behalf of such county, city, town, corporation, or religious society,—see *Covington & Lexington R. R. Co. v. Ingles, 15 B. Monr. 687.*

111. A committee of a religious society executed a lease in behalf of the society, and as their agents, and the society subsequently brought an action against the tenant. *Held*, that one of the committee, who had ceased to be a member of the society was not incompetent as a witness for the plaintiffs, by reason of his having executed the lease on the part and behalf of the society. *Vt. Supreme Ct. 1846, Congregational Society in Newport v. Walker, 18 Vt. 600.*

112. A prudential committee of a school district being a public agent and not personally liable for any thing done in pursuance of his legal authority, is competent to testify to a contract made in that capacity, in an

* If, pending an action brought by the trustees of a charity, one of the plaintiffs resigns his trust, but is still liable for costs, he is not a competent witness. *Mass. Supreme Ct. 1823, Adams v. Leland, 7 Pick. 62.*

action against the district upon such contract. *Mass. Supreme Ct.* 1883, *Allen v. School District No. 2 in Westport*, 15 *Pick.* 85.

113. A clerk of a corporation is a competent witness to identify its books and verify its records, though he is a member of the corporation, and interested in the suit in which those books and records are used as evidence. *Mass. Supreme Ct.* 1844, *Wiggin v. Freewill Baptist Church in Lowell*, 8 *Metc.* 301.

114. The president and secretary of an insurance company who are not stockholders therein, are competent witnesses for the company, in an action upon a policy executed by the company. *Md. Ct. of Appeals*, 1860, *National Fire Ins. Co. v. Crane*, 16 *Md.* 260.

See cases on the competency of President and Secretary separately considered, stated under those titles.

115. The teller of a bank, though interested by reason of his liability to the bank for his mistakes, is competent for it, from necessity, to prove his acts in the regular course of his duty. *N. Y. Supreme Ct.* 1836, *United States Bank v. Stearns*, 15 *Wend.* 814.

116. In a suit brought by a bank against a transportation company, as common carriers, to recover for a package of bank bills intrusted to them but never delivered, the teller of the bank who delivered the package to the carrier, is a competent witness for the plaintiffs. *Vt. Supreme Ct.* 1846, *Farmers & Mechanics' Bank v. Champlain Trans. Co.* 18 *Vt.* 181.

117. The cashier of a bank, in which a draft has been left for collection, is a competent witness to prove that due notice of its dishonor has been given to the several parties. *Me. Supreme Ct.* 1841, *Huntress v. Patten*, 20 *Me.* (2 *App.*) 28.

118. In a *sci. fa.* against a bank, as the garnishee of a depositor, the cashier is a competent witness for the bank, although the money was paid out on the checks of the principal defendant by his direction. *Pa. Supreme Ct.* 1848, *Jackson v. Bank of United States*, 10 *Pa. St.* 61.

119. Where the trustees of a company made a loan from a bank, and mortgaged real estate of the company to secure its payment, and the cashier of the bank afterward by mistake entered satisfaction of the mortgage on the record in the register's office, under his own seal, and the bank proceeded at law, and recovered judgment against the trustees,

—*Held*, that the cashier was a competent witness to explain the mistake, and that the trustees, being in the condition of sureties to the company, were entitled to have the mortgage enforced for their benefit. *S. C. Ct. of Appeals*, 1847, *Bank of South Carolina v. Rose*, 1 *Stroddh. Eq.* 257.

120. That a cashier is estopped by the performance of duties in his official capacity, from denying that they were prescribed by the directors,—see *Durkin v. Exchange Bank of Virginia*, 2 *Patt. & H.* 277.

121. The cashier of a bank, whose charter provides for the examination of its officers, as to the contents of the books, whenever the bank shall be a party, is not a competent witness to prove the contents of the books of the bank, not within his own knowledge, in those cases in which the bank is not a party. *Ga. Supreme Ct.* 1849, *Williams v. Kelsey*, 6 *Ga.* 365.

122. A stockholder in a corporation is competent to testify to his official acts as treasurer, in an action to which the corporation is a party. *Me. Supreme Ct.* 1855, *York & Cumberland Railroad Co. v. Pratt*, 40 *Me.* 447.

IV. RIGHTS.

123. Right to compensation, in general. Corporations are not liable on a *quantum meruit* for services performed by their officers. Corporate offices are usually filled by the chief promoters of the corporation, whose interest in the stock, or in other incidental advantages, is supposed to be a motive for executing the duties of the office without compensation; and this presumption prevails until overcome by an express pre-arrangement of salary. *Pa. Supreme Ct.* 1865, *Kilpatrick v. Penrose Ferry Bridge Co.* 49 *Pa. St.* 118.

124. An officer of a municipal corporation is not entitled to claim a general reward offered for the performance of a service where the service was performed by him in the general line of his official duty. *Mass. Supreme Ct.* 1849, *Pool v. City of Boston*, 5 *Cush.* 219.

125. In an action by a member of a corporation upon an implied contract, for the value of services as an officer of the corporation, the defendant may show, that according to the usage of the corporation, no compensation was chargeable for labor performed in that capacity. *Cal. Supreme Ct.* 1861, *Fraylor v. Sonora Mining Co.* 17 *Cal.* 594.

126. In general, directors are not entitled to compensation for their personal services, unless rendered under some express contract,—see *Hall v. Vermont & Mass. R. R. Co.* 28 *Vt.* 401.

127. Railroad directors cannot recover a compensation for their services beyond the rate fixed by the general resolutions of the board. Thus, where a director acted as a member of the executive committee of the board, and was engaged in selling the bonds of his company,—*Held*, that his services should be regarded as having been rendered in his capacity of director, and that the amount of his compensation should be limited to that allowed directors. *Vt. Supreme Ct.* 1857, *Hodges v. Rutland & Burlington R. R. Co.* 29 *Vt.* 220.

128. Services in obtaining subscriptions. Charges for services of a corporator in a railroad company, rendered in procuring the stock subscriptions necessary to a full organization of the company, were allowed, though there was no express promise for their payment. As the services were necessary, an express promise will be implied. *Vt. Supreme Ct.* 1856, *Hall v. Vermont & Massachusetts R. R. Co.* 28 *Vt.* 401.

129. Charges for services rendered by the plaintiff as a committee of the corporators, and also of the directors, for procuring additional stock subscriptions, were allowed, the corporators having voted, at the time the plaintiff was appointed a member of the committee, that all such expenses, if reasonable, should be audited and allowed.* *Id.*

For cases upon the Employment of agents to obtain subscriptions, see SUBSCRIPTIONS.

130. Extra services. Where a director of a railroad corporation performs services for the company, disconnected with his office, he is not restricted in regard to compensation, by any resolution of the board, in re-

* Where the value of the plaintiff's services in obtaining subscriptions to the capital stock of a corporation, and arousing public attention to the enterprise, was drawn in question,—*Held*, that correspondence between him and others interested in the subject, was admissible as bearing upon the extent of his services, and also, that he had previously conducted a business in a successful way, which required qualifications similar to those demanded by the business in question. *N. H. Supreme Ct.* 1864, *Low v. Conn. & Passumpsic River Railroad*, 45 *N. H.* 370.

Evidence of the statement of a president of a railroad company that the plaintiff ought to be paid for his services, if any one was paid, is not admissible without showing some authority beyond the mere fact of his holding that office. *Id.*

gard to the compensation to be made the directors. *Vt. Supreme Ct.* 1855, *Henry v. Rutland & Burlington R. R. Co.* 27 *Vt.* 435.

131. But where a director of a moneyed institution rendered extra services for the company, and during the period of eight years that he continued a director, after rendering such services, made no claim for compensation,—*Held*, that a contract to pay could not be implied. *N. Y. Supreme Ct.* 1880, *Utica Ins. Co. v. Bloodgood*, 4 *Wend.* 652.

132. An officer of a municipal corporation, whose services are compensated by a fixed salary, is not entitled to extra compensation for any additional duties lawfully required of and performed by him. Especially is this the case, where the city charter requires such officers to be paid by salaries, and prohibits the payment of fees to them. *N. Y. Supreme Ct.* 1859, *Wendell v. City of Brooklyn*, 29 *Barb.* 204.

133. Lien. The cashier of an insolvent bank has no lien upon its funds for the payment of his salary, and is not entitled to a preference over other creditors. *N. Y. Chancery*, 1829, *Bruyn v. Receiver of the Middle District Bank*, 1 *Paige*, 584.

134. Withholding. A violation of the by-laws no ground for withholding the salary of an officer, in the absence of fraud,—see *Neall v. Hill*, 16 *Cal.* 145.

135. Stockholders, when liable. The deed of settlement of a company formed in 1850, provided that in all contracts entered into on behalf of the company for the performance of any work or service, or any other account, the directors should expressly stipulate that the funds and property of the company should alone be liable. On the winding up of the company, all the assets having been exhausted,—*Held*, that the shareholders were not personally liable to satisfy a claim by directors for unpaid salary. *Re Anglo-California Gold Mining Co.* 37 *Law J. N. S. Ch.* 78; 17 *L. T. N. S.* 164.

136. The compensation due to an officer of the corporation under an agreement to pay him by the year, does not become a "debt" within the meaning of a statute imposing an individual liability for debts of the company, until the expiration of a year, or until the earlier termination of the relation. *N. Y. Supreme Ct.* 1862, *Oviatt v. Hughes*, 41 *Barb.* 541.

187. Improper payment of salaries. Where the directors pay salary to one of their number for services during a period for which it was understood no compensation was to be allowed, the transaction may be overhauled by any stockholder suing in behalf of himself and others. *N. Y. Ct. of Appeals*, 1867, *Butts v. Wood*, 87 *N. Y.* 817; 38 *Barb.* 181.

188. Where a canal company were empowered by their charter to raise a fund by lotteries, which should not form a part of the dividend-bearing capital, but which should be considered as a bounty to the corporation to enable them to make the tolls as low as possible, and the company suspended the construction of the canal, but continued to raise large sums by lotteries and to pay unnecessary salaries to officers. *Held*, that it was competent for the legislature to interfere to prevent the funds so raised from being perverted, and to do so by an act, that no officer should receive compensation while the work was suspended; and that the corporation having assented to this amendment, an officer holding at the pleasure of the managers could not object, that the law impaired the obligation of contracts. *Pa. Supreme Ct.* 1829, *Ehrenzeller v. Union Canal Co.* 1 *Rawls*, 181.

189. Right to reimbursement of money expended. Where one of the directors of a mining company who advanced money to pay the necessary expenses of the company, acted in good faith, though not in accordance with their borrowing powers,—*Held*, that he was entitled on the winding up of the company, to repayment, with interest, out of the general assets after payment of the general creditors; and in case of failure of assets, to contribution from the shareholders. *V. Chan. Ct.* 1864, *Lowndes v. Garnett & Co. Mining Co.* 38 *Law J. N. S. Ch.* 418; 10 *Law Times*, *N. S.* 229; 12 *Week. Rep.* 572.

140. The directors of a company purchased a patent, and at a meeting of the company the purchase was reported and approved. The patent proved unprofitable, and the directors were removed for mismanagement. *Held*, that the company were bound to make good to the directors their liabilities in respect of the purchase. *V. Chan. Ct.* 1849, *Gleadon v. Hull Glass Co.* 19 *Law J. N. S. Ch.* 44; 13 *Jur.* 1820.

141. The regulations of a loan association created for the benefit of its members,

provided that any person depositing a sum, however small, should become a stockholder. The directors soon after the creation of the corporation fraudulently declared a dividend for the payment of which no profits existed, and continued to declare dividends until the company became insolvent. The plaintiff, who was a director of the association, with knowledge of, and, participation in, the frauds of his co-directors, made a loan to the corporation to pay a dividend fraudulently declared. *Held*, that his claim upon the estate of the corporation, in the hands of an assignee for benefit of creditors, should be postponed until all the stockholders, both those who became such before, and those who became such after, the fraudulent dividend, were fully paid. *Pa. Supreme Ct.* 1866, *Kisterbock's Appeal*, 51 *Pa. St.* 483.

142. Officers of manufacturing corporations who have been compelled to pay corporate debts, under the *Mass. Stat.* of 1851, ch. 315, § 3,—which provides that the officers, in the first instance, shall be liable to satisfy judgments against the corporation, if no corporate property can be found,—cannot maintain a bill in equity for contribution against stockholders; the officers being primarily liable, the stockholders only secondarily. *Mass. Supreme Ct.* 1868, *Stone v. Fenno & Allen*, 579.

V. LIABILITIES.

143. For misconduct. Bank officers are but agents of the corporation, and if they transcend or abuse their powers, are as much responsible to their principal, as are the agents of an individual. *N. Y. Supreme Ct.* 1847, *Austin v. Daniels*, 4 *Den.* 299.

144. Directors and stockholders of an institution who are guiltless of fraud themselves, and innocent successors or assignees of those guilty of fraud, are not bound by the acts or conduct of their predecessors and assignors. *Ga. Supreme Ct.* 1858, *Schley v. Dixon*, 24 *Ga.* 273.

145. The chairman of a railway company appropriated various unallotted shares to the use of various persons whose names he did not mention, in order to secure or reward services, which it was insinuated, could be rewarded only by secret service money. *Held*, that having applied the property of the company in a manner which would not bear

the light, he must suffer the consequences; and that, being charged with the receipt of the money, he could not discharge himself by the suggestion of such an application. *Rolls Ct.* 1858, *York &c. Railway Co. v. Hudson*, 19 *Eng. L. & Eq.* 861; 16 *Beav.* 495; 22 *Law J. N. S. Ch.* 529.

146. — of subordinates. Trustees appointed by statute for public purposes, with power to levy tolls, but not deriving any personal benefit, are liable in their corporate capacity for damage sustained by reason of the default of their servants or agents to the same extent as absolute owners levying tolls for their own profit, although there is no improper conduct on the part of such trustees. *H. of Lords*, 1866, *Mersey Docks Trustees v. Gibba*, 1 *Law Rep. H. L.* 93; 12 *Jur. N. S.* 571; 35 *Law J. N. S. Exch.* 225; 14 *Law Times, N. S.* 877.

147. The bill against an agent or officer of the company for misconduct, producing loss to it, must be filed by the corporation, and not by stockholders. *N. Y. V. Chan. Ct.* 1841, *Forbes v. Whitlock*, 3 *Edw.* 446.

For the right of a stockholder or the corporation, to sue the Directors in their aggregate capacity for misuse of the corporate property, see STOCKHOLDERS.

148. The right of action to recover damages for a fraudulent misapplication of property of a corporation by an officer, is assignable equally as if the property of an individual was thus misapplied or converted. *N. Y. Supreme Ct.* 1866, *Grocers' National Bank v. Clark*, 43 *Barb.* 26.

149. Joint action. Where the charter of a company fixes the number of directors at sixteen, and makes a majority of them necessary to constitute a board competent for the transaction of business, a joint action cannot be maintained against four for acts done as directors. The four defendants are incapable of doing any corporate act, and cannot jointly as directors. If they have wasted and lost the funds of the corporation, the action must be against them severally as individuals. *N. Y. Supreme Ct.* 1829, *Franklin Ins. Co. v. Jenkins*, 3 *Wend.* 180.

150. Effect of by-laws. In a suit against an officer of a corporation on his official bond, the by-laws of the corporation are evidence against him to show that he knew what his duties were as prescribed by the by-laws.

Del. Superior Ct. 1840, *Bank of Wilmington & Brandywine v. Wollaston*, 3 *Harring.* 90.

151. Liability for error. Making a list, pursuant to a statute requirement, of the children capable of attending school, between the ages of five and sixteen years, by which list the money received and raised by the township for the support of schools was to be apportioned,—*Held*, a judicial and not a ministerial act; and that the trustees were not civilly responsible for error or fraud therein; and that the truth of the list could not be collaterally questioned. *N. J. Supreme Ct.* 1859, *Township of Morris v. Carey*, 3 *Dutch.* 877.

152. The selectmen of a town, in Massachusetts, are liable in an action on the case, to a citizen whom they illegally deprive of his right of voting, although they are not actuated by improper motives, but merely commit an error in judgment. *Mass. Supreme Ct.* 1814, *Lincoln v. Hapgood*, 11 *Mass.* 350; 1817, *Bridge v. Lincoln*, 14 *Mass.* 367.

153. — for corporate debt. That in the absence of statute, an action does not lie to enforce a personal liability for the debt of a corporation upon the facts that the by-laws required the assent of five directors to a call upon the stockholders; that the defendant was a director; that no call was made; and that the company became insolvent at a time when the amount which remained due upon its stock and subject to call was more than sufficient to pay all its debts,—see *Seymour v. Sturgess*, 26 *N. Y.* 134.

For the Liability of officers and stockholders, in place of the corporation, for company debts, see INDIVIDUAL LIABILITY.

154. Where a trader charged against a corporation in his books of account the price of articles procured for them, but never delivered and accepted, as due at the time when they were ready for delivery and acceptance, and recovered a judgment against the corporation upon his account made up as due at that time, with interest thereafter,—*Held*, that he could not afterward, in an action brought for the purpose of holding the officers of the company personally responsible therefor, aver that the debt was not due until a later date. *Mass. Supreme Ct.* 1863, *Bond v. Clark*, 6 *Allen*, 361.

155. Where the rules of a mutual insurance company provided that claims should

be paid by means of checks countersigned by the secretary and manager, and that the money to pay the claims should be raised by bills to be drawn by him on the members of the association,—*Held*, that he was properly made a defendant to a bill to enforce a claim against the company, notwithstanding that he was not a member of the association, and was not personally liable to pay any portion of the claim. *V. Chan. Ct.* 1865, *Pepper v. Green*, 2 *Hem. & Mil.* 478.

156. And where the secretary and manager had become bankrupt after bill filed,—*Held*, that the suit was unaffected thereby, and that his assignees were not necessary parties. *Id.*

See *SUTTS*.

157. The California statute respecting corporations (Laws of April 22, 1850, § 14) imposed personal liability upon the directors of a corporation, when the debts should exceed the capital stock paid in, for such excess,—*Held*, that the statute should be construed strictly in favor of a director; and that in an action brought against such officer to impose such personal liability, the plaintiff must prove that the debts were contracted under the administration of the defendant, and that he was "present when the same did happen." *Cal. Supreme Ct.* 1868, *Irvine v. McKeon*, 28 *Cal.* 472.

158. — on special promise. Where the assets of an incorporated association were sold, and the ownership of the proceeds transferred to its treasurer, in consideration of his undertaking to pay the company's debts and a certain sum per share to the shareholders out of the fund,—*Held*, that his promise to that effect inured to the benefit of every creditor and shareholder; and any one of them might maintain an action upon it. *N. Y. Com. Pl.* 1858, *Therasson v. McSpedon*, 2 *Hill.* 1.

159. Liability to punishment for neglect of duty. The charter of a turnpike company declared that every neglect to keep and preserve the road in good repair, should be deemed a misdemeanor in the president and individual directors for the time being of the company. *Held*, that the directors were severally, as well as jointly liable to indictment. The refusal of one to concur in a resolution directing the repairs, or in making the necessary appropriation for that purpose, may have been the cause of the road continu-

ing out of repair, although all the other directors then in office were entirely innocent. It is no excuse to one who has been guilty of a public offence, that others are equally guilty. *Prima facie* every director is guilty of a neglect of duty in not joining with his associates in making the necessary provision, and if any one has done his duty, but has been unable to effect the object, through the neglect or misconduct of others, he must show that fact on his trial. *N. Y. Ct. of Errors*, 1881, *Kane v. People*, 8 *Wend.* 203. Compare *State v. Patton*, 4 *Ired. Law*, 16.

160. What will relieve. A statute by which a corporation, chartered as a road and bridge company, was permitted to divide, a new corporation being formed to own the bridge,—*Held*, not to exonerate the officers of the road company from the penalties imposed by the original act, it being manifest that the legislature did not intend to relieve them from their liabilities. *N. Y. Ct. of Errors*, 1881, *Kane v. People*, 8 *Wend.* 203.

161. Liability to punishment for embezzlement. Money of a railroad corporation drawn out from its place of deposit by the treasurer of the company, is the property of the corporation, and subject to embezzlement by such officer. *Mass. Supreme Ct.* 1857, *Commonwealth v. Tuckerman*, 10 *Gray*, 172.

162. An indictment against an officer of a bank for embezzling property belonging to or deposited in the bank, must charge a specific act of fraud, and the defendant must be proved guilty of the specific offence charged; and not more than one offence can be well alleged in one count of the indictment. *Mass. Supreme Ct.* 1844, *Commonwealth v. Wyman*, 8 *Metc.* 247.

163. The officers of banks are not included in the provisions of the Revised Statutes of Massachusetts (ch. 183, § 10), that, in the prosecution of the offence of embezzling the money, &c., of any person, by his clerk, servant, or agent, it shall be sufficient to allege generally, in the indictment, an embezzlement of money to a certain amount, and to give evidence, on the trial, of any such embezzlement committed within six months next after the time stated in the indictment. *Id.*

164. That the provision in the Rev. Stat. of Massachusetts (ch. 126, § 27), for the punishment of embezzlement committed by any cashier "or other officer" of a bank, includes

embezzlement committed by the president and directors of a bank,—see *Id.*

165. The treasurer of a railroad company is an "officer," &c., of an incorporated company within a statute relative to embezzlement by such persons. *Mass. Supreme Ct.* 1857, *Commonwealth v. Tuckerman*, 10 *Gray*, 178.

166. That the phrase "officers, agents, or servants," in a statute punishing embezzlement, does not necessarily include "clerks,"—see *Budd v. State*, 8 *Humph.* 488.

167. What is a fraudulent conversion by an employee of an incorporated bank, of the securities of the depositors therein, under the *Mass. Gen. Statutes*, ch. 161, § 89. *Commonwealth v. Tenney*, 97 *Mass.* 50.

168. That the words "incorporated bank" in such statute include banks chartered since, as well as those in existence at the passage of the act, and extend to banking corporations organized under the laws of the United States, located in the State, as well as similar corporations created under the laws of the commonwealth. *Id.*

VI. DETERMINATION OF OFFICE.

1. Resignation.

169. Intent to resign, inferred from acceptance of an incompatible office. See *Verior v. Sandwich*, 1 *Sid.* 805; *Rex v. Goodwin*, *Dougl.* 897, note 22; *Milward v. Thatcher*, 3 *Durnf. & E.* 87; *Rex v. Patemen*, *Id.* 779.

170. When premature. A person who has been elected to an office cannot resign the same before the time has arrived when he is entitled by law to possess it, and has become invested with its privileges by subscribing to the oaths, and giving the obligations required by law. Hence, an attempt on the part of one elected to an office to resign before he is made an incumbent, is abortive and ineffectual. *Cal. Supreme Ct.* 1864, *Miller v. Supervisors of Sacramento County*, 25 *Cal.* 93.

171. How made. Where an office is granted by deed, the resignation or surrender ought also to be by deed; but, where an officer is appointed by election, the corporation may accept a resignation or surrender by parol. *Rex v. Mayor &c. of Rippon*, 1 *Ld. Raym.* 563; 2 *Salk.* 488.

172. Acceptance necessary. Under provisions of a charter, which direct that an alderman or other officer may resign by giv-

ing written notice to the city clerk, and publishing a copy of such notice in the corporation papers,—a simple communication to the mayor and common council, tendering a resignation, is ineffectual. *Brooklyn City Ct.* 1857, *Lewis v. Oliver*, 4 *Abb. Pr.* 121.

173. An overseer of the highways cannot, at his pleasure, lay aside his office. A mere notification of the fact that he resigns is not sufficient to discharge him from his office; but his resignation, to be effectual, must be accepted by competent authority. *N. J. Supreme Ct.* 1864, *State ex rel. Reeves v. Ferguson*, 31 *N. J. Law* (2 *Vroom*), 107.

2. Expiration.

174. Abridging the term. Where the term of an office is fixed by statute, the appointing power has no right to abridge its duration by a resolution of appointment. *Mich. Supreme Ct.* 1865, *Stadler v. City of Detroit*, 13 *Mich.* 346.

175. Extending it. The Maryland act of 1852, ch. 221, to incorporate cemetery companies, provided that annual elections should be held for boards of managers of companies incorporated under it, at such times and places as the by-laws of each company should specify. A board of managers of such a company, at a meeting of a majority of its members held several months subsequent to an annual election, passed a resolution altering the day of election as fixed in the company's by-laws, by which they extended their own terms of office for six months, for the alleged purpose of protecting the interests of the stockholders from their own apprehended mismanagement. *Held*, that the resolution was invalid.

1. The object of the provision in the general law of holding the elections according to the specifications of the by-laws, was to secure an annual election, and not to enable the board of managers to prevent such an election.

2. The incumbents in the boards of managers could not extend their terms indefinitely. *Md. Ct. of Appeals*, 1865, *Mottu v. Primrose*, 23 *Md.* 482.

176. "Years." Where a charter speaks of years with reference to an office, years of office, and not calendar years, are intended. *K. B.* 1830, *Rex v. Swyer*, 10 *Barn. & C.* 486.

177. Holding over. Though the officers:

of a corporation are required by its charter, or by its by-laws, to be elected yearly, yet they may continue in office until their successors are duly chosen. *Conn. Supreme Ct.* 1827, *McCall v. Bryam Manuf. Co.* 6 *Conn.* 428. And see *Foot v. Prowse*, 1 *Str.* 625.

178. The clerk of a corporation, unless the laws of the state or by-laws of the corporation provide otherwise, remains in office until another is chosen.* *Me. Supreme Ct.* 1849, *South Bay Meadow Dam Co. v. Gray*, 30 *Me.* 547.

179. Where a statute respecting religious societies provided that the members of such corporations should have power to appoint a committee to order the affairs of the society for the year ensuing,—*Held*, that the committee would hold their office, after the expiration of the year, until superseded by the appointment of another committee. *Conn. Supreme Ct.* 1884, *Congregational Soc. of Bethany v. Sperry*, 10 *Conn.* 200.

180. Under a statute directing that the clerk chosen by a school district should hold his office until another should be chosen and sworn in his stead, where the clerk of a school district removed into an adjoining district, but within the same town, and another was chosen in his place, but not sworn,—*Held*, that the first continued competent to act as clerk. *Mass. Supreme Ct.* 1838, *Williams v. School District in Lunenburg*, 21 *Pick.* 75.

181. The charter of a bank appointed directors by name, and then provided that directors, from and after that period, "shall be elected for one year by the stockholders, on the first Monday in January, in each and every year, during the existence of the corporation. The directors chosen at such meetings shall take their seats on the second Monday in January, in each and every year, and, until the new directors take their seats, the former president and board shall continue to manage the affairs of the company in the same manner as before such election, so that no risk shall be run of the affairs of said company being properly managed,

until the new directors form a board, from and after the said first Monday in January, 1809. No directors were elected after the year 1838. A suit was instituted by the bank more than a year after the time for the election of directors had elapsed. *Held*, that the directors holding over were in office for the purpose of maintaining suits for the collection of the dues of the bank. *Tenn. Supreme Ct.* 1842, *Nashville Bank v. Petway*, 3 *Humph.* 522.

182. Death. Where a corporation, at the request of their registrar, appointed a deputy registrar to assist him,—*Held*, that the authority of the latter was determined by the death of the former. *K. B.* 1805, *Rex. v. Corporation of Bedford Level*, 6 *East*, 356.

183. Alteration of districts. The charter of a municipal corporation provided that the councilmen should reside in the wards for which they were chosen. After an election had been had the city was divided anew, by which some of the councilmen were thrown into different wards from those by which they were elected. *Held*, that such councilmen still remained in office, and that the proceedings in which they participated were valid. *Ohio Supreme Ct.* 1853, *Scovill v. City of Cleveland*, 1 *Ohio St.* 126.

3. Removal. Restoration.

184. Power to remove. The board of directors of Girard college have power to remove an officer thereof, created by an ordinance of the city of Philadelphia, without assigning cause; and may, therefore, displace the steward of the college at their pleasure. See *Field v. Directors of Girard College*, 54 *Pa. St.* 283.

See the subject of Removal of corporate officers treated under AMOTION.

185. A charter of a university provided, "that the places of any of the trustees, who should resign, remove from the territory, die, or willfully absent himself from three stated meetings, should, from time to time, be supplied by the board of trustees at their stated meetings by elections to be had in a certain way."

Held, 1. That the failure to attend meetings would not *per se*, vacate the seats of particular members; nor would the failure to hold meetings be a dissolution, *per se*, of the corporation, nor would the simple removal of any of the trustees from the State, vacate their seats.

* Under section 23 of article 6 of the constitution of Virginia,—which provides that judges and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices, after their terms of service have expired, until their successors are qualified,—the chief executive officer of the State continues in office, after the expiration of his term, until his successor is qualified. *Va. Ct. of Appeals*, 1868, *Exp. Lawhorne*, 18 *Gratt.* 85.

2. That for willful absence or removal of any trustee, the remaining trustees might vacate his seat, after giving him an opportunity to be heard. *Ind. Supreme Ct.* 1854, *State v. Trustees of Vincennes University*, 5 *Ind.* 77.

186. A by-law restricting the discretionary power of removing a master or usher of a grammar school vested in the governors, as given by the charter is void. *Exch. Ch.* 1844, *Regina v. Governors of Darlington School*, 6 *Q. B.* 682.

187. Recovery of compensation after removal. An officer appointed by a municipal corporation to an office created by them, is not bound by a removal from office without actual notice of the removal. Such an office is in the nature of a contract of employment; and if the corporation suffer the officer to go on rendering the services, after they have resolved on his removal, they are liable for his compensation until they give him notice. *N. Y. Com. Pl.* 1844, *Jarvis v. Mayor &c. of N. Y.* 2 *N. Y. Leg. Obs.* 396.

188. A railway company is not legally justified in dismissing a clerk under an agreement for hire determinable by three months' notice, or payment of three months' salary, without notice and without payment of his salary, because a letter was written by him, accusing the company of shuffling conduct. *Held*, that such clerk was entitled to set off his quarter's salary against a claim of the company for money received to their use. *O. P.* 1851, *East Anglian Railways Co. v. Lythgoe*, 10 *C. B.* 726; 2 *Eng. L. & Eq.* 381; 20 *Law J. N. S. O. P.* 84.

189. — of expenditures. A municipal officer, who had been removed from office by the city government, on charges of misconduct, sued to recover his salary for the entire term during which he was removed, alleging that such removal was illegal; and also claimed to recover for money expended by him in defending himself against said charges. *Held*, that such expenses were not damages which he could recover. *Ga. Supreme Ct.* 1856, *Shaw v. Mayor of Macon*, 19 *Ga.* 468.

190. Mandamus to restore. A mandamus will not lie to compel an admission or restoration to any place or office, unless it has some relation to the public; and hence, an application for a writ to be directed to a company of gunmakers, commanding them to restore an approver of guns who had been

deprived of his place, was refused. *Q. B.* 1708, *Vaughan v. Company of Gunmakers*, 6 *Mod.* 82; 2 *Ld. Raym.* 989.

191. A mandamus will lie to restore directors of a banking corporation, who have been refused the exercise of their rights as directors by a majority of the board. *La. Supreme Ct.* 1835, *Prieur v. Commercial Bank*, 7 *La.* 509.

192. A mandamus will lie to restore a pastor, constituted by the charter of the church a corporator, who was removed without notice being given to the congregation, as prescribed by the constitution of the society. *Md. Ct. of Appeals*, 1864, *Weber v. Zimmerman*, 23 *Md.* 156.

193. A mandamus was granted to compel the trustees of an endowed dissenting meeting house, to admit a minister who was duly elected. *K. B.* 1762, *Rex v. Barker*, 3 *Burr.* 1265; 1 *Wm. Black.* 300, 352.

194. A mandamus will be granted at the suit of a school district to compel the committee of the district to reinstate a teacher removed by them. *Conn. Supreme Ct.* 1866, *Gilman v. Bassett*, 33 *Conn.* 298.

195. Mandamus granted to restore to the position of usher in a free school. *The Protector v. Craford*, *Style*, 457.

196. Mandamus will lie to restore a person to the office of sexton. *K. B.* 1683, *He's Case*, 1 *Ventr.* 143, 153; 1719, *Rex v. Guardians of Thame*, 1 *Str.* 115.

197. What is sufficient to sustain a removal. Where it appears from the showing of an officer that the corporation justly though irregularly removed him from his office, a mandamus to restore will not be granted. *K. B.* 1777, *Rex v. Mayor &c. of Axbridge*, 2 *Cowp.* 523; 1787, *Rex v. Mayor &c. of London*, 2 *Durnf. & E.* 177; 1822, *Rex v. Mayor &c. of Bristol*, 1 *Dowl. & R.* 389; *sub nom.* *Rex v. Griffiths*, 5 *Barn. & Ald.* 731.

198. "*Non fuit electus*" is a good return to a mandamus. *Rex v. Twitty*, 7 *Mod.* 83; *Rex v. Corporation of Cornwall*, 11 *Mod.* 174. And see *Regina v. Aldborough*, 10 *Mod.* 101.

199. It is good ground for quashing a writ of mandamus, granted to restore a person to the office and functions of pastor under the charter of a religious society, that the petitioner was subsequently disqualified from holding such office under the charter. *Md. Ct. of Appeals*, 1865, *Weber v. Zimmerman*, 23 *Md.* 45.

200. That the prosecutor has in due manner resigned his office, is a good return to a mandamus to restore. *Rex v. Mayor of Rippon*, 1 *Ld. Raym.* 563; 2 *Salk.* 433.

ORGANIZATION.

1. That a liberal interpretation is to be placed upon provisions of a charter relating to the steps to be taken to organize,—see *Judah v. American Live Stock Ins. Co.* 4 *Ind.* 333.

Upon the Interpretation of charters generally, see CHARTERS.

2. If, in the organization of a railroad company, all the requirements of the charter are observed, although not in the order prescribed, the organization is sufficient. *Ind. Supreme Ct.* 1859, *Eakright v. Logansport & C. R. R. Co.* 13 *Ind.* 404.

3. Necessity of a preliminary subscription. A subscription of the whole amount of stock is not a condition precedent to a legal corporate existence, except when it is made so by the act of incorporation. [6 *Pick.* 28; 9 *Id.* 187; 10 *Id.* 142; 1 *Mood. & Mal.* 151; 4 *Eng. L. & Eq.* 455.] *N. Y. Ct. of Appeals*, 1854, *Schenectady & Saratoga Plank Road Co. v. Thatcher*, 11 *N. Y.* (1 *Kern.*) 102.

4. That where the charter of a corporation requires that a certain number of shares of the capital stock shall be subscribed before the organization of the company takes place, the decision of the majority of the subscribers that this condition has been complied with, and the actual organization of the company in pursuance of such determination, must be regarded as binding upon the minority,—see *Straus v. Eagle Ins. Co.* 5 *Ohio St.* 59.

For the rules governing Subscription to stock of corporations, see SUBSCRIPTION.

5. — of an acceptance of charter. It is not essential to a valid organization that the records of the corporation should show a formal acceptance of the act by the persons incorporated, or any notice given of the first meeting. *Mass. Supreme Ct.* 1838, *Russell v. M'Lellan*, 14 *Pick.* 63. And see *Sampson v. Bowdoinham Steam Mill Corp.* 36 *Me.* 78; *Lathbone v. Tioga Nav. Co.* 2 *Watts & S.* 74.

6. A notice for a meeting to organize, signed by those named in the charter, is evi-

dence of an acceptance of the charter. *Tenn. Supreme Ct.* 1853, *Gleaves v. Brick Church Turnpike Co.* 1 *Sneed*, 491.

7. The powers and duties of commissioners for opening the subscription books of a new corporation — explained. *Litchfield Bank v. Church*, 29 *Conn.* 137.

8. Commissioners appointed by an act of the legislature to carry out its provisions are agents, the act being in the nature of a power of attorney to them, and the authority thereby conferred includes the right to exercise the usual and appropriate means to accomplish the ends of the agency. Thus, when commissioners are appointed to receive subscriptions to the stock of a bank, which are required to be *bona fide*, they are to determine what is a *bona fide* subscription. And if the commissioners are required to receive ten per cent. in gold or silver, on said subscriptions, no time being designated for the payment, they have the discretion to allow a reasonable time. *Ga. Supreme Ct.* 1852, *Napier v. Poe*, 12 *Ga.* 170.

9. The power of commissioners in the distribution of stock subscribed for, is judicial, and if a number of commissioners, not sufficient to constitute a legal board, assume to make the distribution, the proceeding is *coram non judice* and void, and does not create a corporation. *N. Y. Supreme Ct.* 1839, *Crocker v. Crane*, 21 *Wend.* 211.

As to the Apportionment of stock among the subscribers, see STOCK.

10. A majority may act. A provision in the charter of a corporation that books of subscription to the capital stock should be opened under the direction of the persons named in the act of incorporation, and public notice given thereof, does not make it necessary that such notice should be signed by all the persons named in the act; such notice may be given by a majority of such persons. *Me. Supreme Ct.* 1856, *Penobscot R. R. Co. v. White*, 41 *Me.* 512.

11. Where the act of incorporation of a bank required that the books for receiving subscriptions to the capital stock should be opened under the direction of seven commissioners named, "or a majority of them,"—*Held*, that the majority had full power to discharge the duties required of the commissioners, without the concurrence of the others; and it having appeared that all except one were willing to act, the court would

not grant a peremptory mandamus to compel that one to act, for the reason that the issuing of such writ was unnecessary. *Vt. Supreme Ct.* 1851, *Matter of White River Bank*, 23 *Vt.* 478.

12. The legislature appointed nine commissioners, who, or any three of them, were authorized to organize a bank. A majority of the whole number corruptly agreed to transfer the franchise to a citizen of another State. *Held*, that a minority of the commissioners, if consisting of three persons, had valid authority to proceed with the organization, and that letters patent, issued in pursuance of such organization, were valid. *Pa. Supreme Ct.* 1858, *Commonwealth v. McKean County Bank*, 82 *Pa. St.* 185.

13. When their powers are exhausted. Where commissioners were appointed under an act of the legislature to obtain subscriptions to the capital stock of a company to a certain amount, and then to proceed to the election of directors to manage the affairs of the company,—*Held*, that after they had once acted under the law, and the directors elected had succeeded to the corporate management, an injunction would lie to restrain them from proceeding further in the premises. *Ill. Supreme Ct.* 1854, *Smith v. Bangs*, 15 *Ill.* 399.

14. Convening for election of directors. The fact that the notice of the first meeting to elect directors was not signed by the very persons named for that purpose in the certificate of incorporation, is not ground for impeaching the official acts of the directors elected. *Ohio Supreme Ct.* 1864, *Chamberlain v. Painesville & Hudson R. R. Co.*, 15 *Ohio St.* 225.

15. It is no defence to an action by a mutual insurance company to collect assessments from a member, to show that it met and chose officers before its charter went into effect, if the agreement of the member was made subsequently to that time, with the persons found, under the authority of the corporators, and without objection from the commonwealth, actually exercising the corporate powers, and claiming and using the franchise. *Mass. Supreme Ct.* 1862, *Appleton & Co. Ins. Co. v. Jesser*, 5 *Allen*, 446. See INSURANCE COMPANIES.

Upon the Election of directors, and their powers and duties, see BOARD; DIRECTORS; ELECTIONS.

16. Effect of certificates. The New York statute of 1849, authorizing the formation of mutual insurance companies, and of joint stock insurance companies, in the one case requiring a certain amount of notes for premiums to be taken as capital, and in the other case, a certain money capital,—does not require the certificate of the examiners on the organization of a company to state in express terms which plan of organization is adopted. It is enough in this respect if they certify that the capital consists of premium notes. *N. Y. Supreme Ct.* 1858, *Hart v. Achilles*, 28 *Barb.* 576.

17. A certificate of payment of capital stock, made within thirty days after the officers had satisfied themselves that payment had been made,—*Held*, a sufficient compliance with a charter requirement that such a certificate be made "within thirty days after payment of the last installment." *Waters v. Quimby*, 8 *Dutch.* 198.

18. Under a clause in the charter of a navigation company, authorizing the collection of tolls as soon as the governor, after receiving the certificate of certain commissioners, shall proclaim the right, the proclamation and certificate, by itself, is not evidence of the organization of the company. *Ala. Supreme Ct.* 1846, *Duke v. Cahawba Navigation Co.* 10 *Ala. N. S.* 82.

19. Proving organization. The books of a corporation are competent evidence, at least as against a subscriber to the stock, of the corporate acts and proceedings. Where certain steps are required to be taken before a corporation has existence, such as the opening of books, subscription of the capital stock, and the choice of directors; the production of the corporate books, showing the election of officers, is, *prima facie*, sufficient to show a compliance with statutory pre-requisites, and that the corporation has an existence. *Ill. Supreme Ct.* 1851, *Ryder v. Alton & Sangamon R. R. Co.* 13 *Ill.* 516.

Upon the effect of Corporate records as evidence generally, see RECORDS.

20. To show that the number of shares requisite to authorize the organization of a railroad corporation had been subscribed, when certain assessments were laid, and before the company entered into a contract for building and completing the road, the records of the proceedings of the stockholders and the books of the directors if authorized

to act, are competent *prima facie* evidence. *Me. Supreme Ct.* 1855, *Penobscot & Kennebec Railroad Co. v. Dunn*, 89 *Me.* (4 *Heath*), 587.

21. Where the bill charges that a company, represented by the respondents to have been duly organized, was never duly organized, the record of the organization is the best, and suitable evidence of the fact, and not the oath of one of its officers.* *U. S. Circ. Ct. (Mass.)* 1845, *Warner v. Daniels*, 1 *Woodb. & M.* 90; 9 *Law Rep.* 160.

22. The copies of the examiner's certificate and of the charter filed in the county clerk's office, as required by section 11 of the general statute of 1849, for the formation of mutual insurance companies (1 *Rev. Stat.* 4 ed. 1279), are essential to the authority of the corporation to commence business and issue policies, and are sufficient evidence of its authority to act as a corporation, until impeached by a direct proceeding on behalf of the people. *N. Y. Supreme Ct. Sp. T.* 1855, *Jones v. Dana*, 24 *Barb.* 395.

23. But this evidence cannot relate back and legalize policies on common premium notes, other than the stock notes, given on the necessary preliminary contracts for insurance. *N. Y. Supreme Ct.* 1857, *Williams v. Babcock*, 25 *Barb.* 109.

24. In an action by a railroad corporation to recover a subscription to its stock, the certificate of the secretary of state to a copy of the articles of association, is evidence of the filing and recording, and of the time when these acts were done. It is enough that the articles were filed and recorded before the commencement of the action. Whether the defendant became a subscriber for the stock before or after filing is not material. *N. Y. Ct. of Appeals*, 1859, *Buffalo & Pittsburgh R. R. Co. v. Hatch*, 20 *N. Y.* 157.

25. Upon the question whether the organization was made in good faith, the declarations of a stockholder, whose subscription is alleged to be fraudulent, made long after the organization of the corporation, are inadmissible. *Me. Supreme Ct.* 1856, *Penobscot R. R. Co. v. White*, 41 *Me.* 512.

* The complainants, in a bill in equity, claimed to be an incorporated company, and the answer denied that the company had been legally organized. The only proof of organization offered, was an *ex parte* affidavit, which was excepted to by defendant. *Held*, that the complainants had failed to prove a legal organization, and that the bill should be dismissed. *Va. Ct. of Appeals*, 1853, *Bowyer v. Giles & Co. Turnpike Co.* 9 *Gratt.* 109.

26. Due organization presumed, after company had been in operation unquestioned for several years. *Agricultural Bank v. Burr*, 24 *Me.* 256.

27. Where the act of incorporation of a bank provided that notice of the organization of the bank should be given on or before a certain date, and the bank was found in operation afterward,—*Held*, that it must be presumed, in the absence of evidence to the contrary, to have been organized by the time prescribed. *U. S. Circ. Ct. (Vt.)* 1848, *Bank of United States v. Lyman*, 1 *Blatchf.* 297; 20 *Vt.* 666; 1 *Law Rep. N. S.* 156.

28. A member of a corporation which has been organized in fact, and done business for several years as a body corporate, cannot object, when sued for the amount of his original subscription, that the corporation was not at first duly organized. *Mass. Supreme Ct.* 1819, *Chester Glass Co. v. Dewey*, 16 *Mass.* 94.

29. Cannot be taken collaterally. The regularity of the proceedings taken to organize a corporation cannot be questioned collaterally. [26 *N. Y.* 75.] *N. Y. Superior Ct.* 1863, *Perse & Brooks Paper Works v. Willett*, 19 *Abb. Pr.* 416; *N. Y. Supreme Ct.* 1865, *Doyle v. Peerless Petroleum Co.* 44 *Barb.* 239. And see *Wight v. Shelby R. R. Co.* 16 *B. Monr.* 4.

30. How they may be cured. That the legislature has power to cure any defect in the organization of a corporation formed under a general act; and after they have done so, obligations and subscriptions taken before such confirmation, may enure to the benefit of the company,—see *Illinois & C. R. R. Co. v. Cook*, 29 *Ill.* 237; *Goodrich v. Reynold*, 31 *Ill.* 490.

Compare INCORPORATION; LEGISLATION.

PARISHES.

RELIGIOUS CORPORATIONS.

PENALTIES.

1. What is a penalty. A statutory forfeiture of a certain percentage on its circulation, imposed on a bank for failure to keep its notes at par, is a *penalty* and not a *tax*. *Pa. Supreme Ct.* 1856, *Harrisburg Bank v. Commonwealth*, 26 *Pa. St.* 451.

2. The liability imposed by the Ohio statute of January 27, 1816, is in the nature of a penalty, for issuing notes in a form and with a design to be circulated as money, and a right of action therefor is barred in four years. *Ohio Supreme Ct.* 1857, *Lawler v. Burt*, 7 *Ohio St.* 840.

3. Construction. That a corporation is not liable to a statute penalty imposed on "the owner, agent, or superintendent" of a manufacturing establishment, for employing children under the age of twelve years more than ten hours a day,—see *Benson v. Monson & Brimfield Manuf. Co.* 9 *Metc.* 562.

4. Two actions, how far allowed. Under a statute forbidding the issue of small notes, and allowing a holder to recover on such notes with a penalty, against a corporation issuing them and any person giving them currency,—a holder may maintain an action against such a corporation, and also an action against the officers who signed such notes, but can have but one satisfaction. *Pa. Supreme Ct.* 1850, *Alleghany City v. McClurkan*, 14 *Pa.* 81.

5. Set-off. That a penalty imposed by statute upon a corporation, is not, when sued for by the State, subject to a set-off of any demand which the corporation may arrest against the State,—see *Bank of Chambersburg v. Commonwealth*, 2 *Grant's Cas.* 384.

For penalties upon individuals for violations of By-laws and Ordinances, see *By-Laws*, 42-60; *Municipal Corporations*, 358-372.

PERSONALITY.

Foreign Corporations, 9-11; *Incorporation*, 14-25.

PERSONAL LIABILITY.

INDIVIDUAL LIABILITY.

PLACE OF BUSINESS.

1. Statement of in charter. The place where the business of a corporation is transacted, sufficiently appears from the face of the act of incorporation, to enable the circuit court to decide as to its jurisdiction growing out of the residence of the parties. *U. S.*

Circ. Ct. (Ind.), 1847, *Vallette v. Whitewater Canal Co.* 4 *McLean*, 192; *S. C.* 5 *West. Law J.* 80. Compare *Com. Exchange Bank v. Western Transportation Co.* 15 *Abb. Pr.* 319, *note*.

2. — or articles. A foreign corporation was bound by its articles to keep its office in the State of incorporation. *Held*, that nevertheless, in proving presentment of its promissory note, evidence was admissible to show that in fact its office was kept elsewhere. *Iowa Supreme Ct.* 1860, *Merrick v. Burlington & Warren Plank Road Co.* 11 *Iowa*, 74.

See also *RESIDENCE*.

As to what is to be deemed the Place of business within laws imposing taxes, see *TAXES*.

PLANK ROAD COMPANIES.

TURNPIKE COMPANIES.

POWERS.

[Under this title are presented cases on the general doctrine of Corporate Powers, whether expressed in the charter or other acts of legislature, or implied from expressed powers; and the rules common to the exercise of all classes of powers. But those powers which have a distinctive character, such as the power to make By-Laws, or CONTRACTS, or to hold PROPERTY, and those which are practically peculiar to particular classes of companies, such as BANKS, RAILROAD CORPORATIONS, &c. are more specially treated under their own titles.]

I. GENERAL DOCTRINE.

II. MODE OF EXERCISE.

I. GENERAL DOCTRINE.

1. A creature of limited powers. A corporation has no power except what is given by its incorporating act, either expressly, or as incidental to its existence, and to its express powers.* *U. S. Supreme Ct.* 1830, *Beatty v.*

* To the same effect are the following cases: *McMullen v. City Council of Charleston*, 1 *Bay*, 46; *People v. Utica Ins. Co.* 15 *Johns.* 358; *New York Firemen's Ins. Co. v. Ely*, 5 *Conn.* 560; *State v. Washington Social Library Co.* 11 *Ohio*, 96; *Boyce v. City of St. Louis*, 29 *Barb.* 650; 18 *How. Pr.* 125; *State v. Mayor of Mobile*, 5 *Port.* 279; *The President &c. of Jacksonville v. McConnel*, 12 *Ill.* 188; *Petersburgh v. Mappin*, 14 *Id.* 193; *Petersburg v. Metsker*, 21 *Id.* 905; *Oakland v. Carpenter*, 18 *Cal.* 540; *Martin v. Nashville Building Association*, 2 *Caldwell*, 418; *Shand v. Henderson*, 2 *Dow. Parl. Cas.* 519. See also, *Gozler v. Corporation of Georgetown*, 6 *Wheat.* 593; *Jackson v. Brown*, 5 *Wend.* 590; *Sumner v. Marcy*, 8 *Woodb. & M.* 105; *Blanchard's Gun Stock Turning Co. v. Warner*, 1 *Blatchf. C. Ct.* 258; *Trustees of South Newmarket Methodist Society v. Peaslee*,

Knowler, 4 *Pet.* 152 (affirming S. C. 1 *McLean*, 41); 1850, *Perrine v. Chesapeake & Delaware Canal Co.* 9 *How.* 172; *U. S. Cir. (Ill.)* 1850, *Russell v. Topping*, 5 *McLean*, 194; *N. Y. Ct. of Appeals*, 1859, *Brady v. Mayor &c. of N. Y.* 20 *N. Y.* 812; *Conn. Supreme Ct.* 1853, *New London v. Brainard*, 22 *Conn.* 522; *Ohio Supreme Ct.* 1855, *Straus v. Eagle Ins. Co.* 5 *Ohio St.* 59; *Pa. Supreme Ct.* 1856, *Commonwealth v. Erie & North East R. R. Co.* 27 *Pa. St.* 389; *Ala. Supreme Ct.* 1857, *City Council of Montgomery v. Plank Road Co.* 31 *Ala. N. S.* 76; *Ill. Supreme Ct.* 1864, *Caldwell v. City of Alton*, 38 *Ill.* 416; *Cal. Supreme Ct.* 1852, *Smith v. Morse*, 2 *Cal.* 524.

2. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators. If created with a fund limited by the act, it cannot enlarge or diminish that fund but by license from the legislature, and if the number of shares is fixed by the act, it cannot be changed by the corporation. *Mass. Supreme Ct.* 1827, *Salem Mill Dam Corporation v. Ropes*, 6 *Pick.* 23.

3. Corporations not citizens. A corporation is not a citizen within the meaning of the provision of the United States constitution which declares that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States. The privileges and immunities intended to be secured by that provision are personal, and do not pertain to a mere artificial person, the creature of a special charter, having no rights but such as are thereby granted. *N. J. Supreme Ct.* 1852, *Tatem v. Wright*, 3 *Zabr.* 429; *N. Y. Supreme Ct.* 1855, *People v. Imlay*, 20 *Barb.* 68.

4. Hence it is competent for the State to forbid foreign corporations from transacting business within the limits of the State except upon conditions, though such conditions be not imposed upon citizens. [12 *B. Mon.* 212; 3 *Zabr.* 429; 4 *Wash. Ct.* 371.] *Va. Ct. of Appeals*, 1856, *Slaughter v. Commonwealth*, 13 *Gratt.* 767.

5. A statute forbidding any person, asso-

ciation or corporation, from carrying on banking business unless authorized by law, applies to foreign as well as domestic corporations; and a bank chartered by another State is not thereby authorized to carry on banking business here. A sister State cannot confer powers which shall qualify the general prohibition of the law of this State. *N. Y. Supreme Ct.* 1831, *Pennington v. Townsend*, 7 *Wend.* 276.

6. Notice. The public laws of a State forbidding corporations to do certain acts, are notice to all who deal with such corporations. *U. S. Cir. Ct. (Mich.)* 1845, *Root v. Wallace*, 4 *McLean*, 8.

7. They are notice as well to persons out of the State as well as to those within it. *U. S. Cir. Ct. (Mich.)* 1842, *Root v. Goddard*, 3 *McLean*, 102.

8. Acts of a corporation, done in pursuance of the authority of the legislature to grant additional powers from time to time, to corporations, are binding, unless they conflict with the vested rights or impair the obligations of contracts, which are protected by the provisions of statutes or the constitution. *N. J. Chancery*, 1854, *Gifford v. New Jersey R. R. Co.* 2 *Stockt.* 171.

9. Vested rights. The rule that the rights legally vested in any corporation cannot be controlled or destroyed by any subsequent statute, unless power for that purpose be reserved to the legislature in the act of incorporation, applies as well to implied as to express powers of a corporation. *N. Y. Supreme Ct.* 1832, *People v. Manhattan Co.* 9 *Wend.* 351. See also *People v. Marshall*, 1 *Gilm.* 672.

10. Conditions. If, by the charter of a corporation or by contract, a condition precedent exists to its right to exercise corporate powers, or perform corporate acts, that condition must be performed or waived by the opposite party, before such right can be exercised. *Ind. Supreme Ct.* 1856, *Brookville & Greensburg Turnpike Co. v. McCarty*, 8 *Ind.* 892.

11. Mode of action. A body corporate can act only in the mode prescribed by the law creating it. To enable its agents to bind the company, they must act pursuant to the incorporating act. [3 *Cranch*, 166.] *N. Y. Supreme Ct.* 1807, *Beatty v. Marine Ins. Co.* 2 *Johns.* 109; *N. Y. Supreme Ct.* 1849, *Farmers' Loan & Trust Co. v. Carrol*, 5 *Barb.*

15 *N. H.* 317; *Commissioner of Roads v. McPherson*, *Spears*, 218.

That the powers of unincorporated associations are limited by their articles,—see *Livingston v. Lynch*, 4 *Johns. Ch.* 578; *Irvine v. Forbes*, 11 *Barb.* 587.

618; 1851, *Conro v. Port Henry Iron Co.* 12 *Barb.* 27; *N. Y. V. Chan. Ct.* 1838, *Scott v. De Peyster*, 1 *Edw.* 513. And see *People v. Utica Ins. Co.* 15 *Id.* 358, 383; 1824, *N. Y. Firemen Ins. Co. v. Ely*, 2 *Cow.* 678, 699; 1830, *Hosack v. College of Physicians &c. of N. Y.* 5 *Wend.* 547; *Goodnow v. Commissioners of Ramsey County*, 11 *Minn.* 81; *Holland v. San Francisco*, 7 *Cal.* 361.

12. Express powers must be exercised in the manner pointed out by the statute, but powers merely incidental may be exercised by its officers or agents.* *Cal. Supreme Ct.* 1856, *Smith v. Eureka Flour Mills Co.* 6 *Cal.* 1.

13. Illustrations of the rule. A corporation in executing a public work, cannot substitute their own more convenient mode of proceeding, for that pointed out by their constituting statute. *Q. B.* 1842, *Regina v. Manchester & Leeds Railway Co.* 3 *Q. B.* 528.

14. Where a specific act is directed to be done by a particular agent, it must be done by that agent. *Ky. Ct. of Appeals*, 1859, *Maddox v. Graham*, 2 *Metc.* 56.

15. Where the statute creates a debt and gives the corporation a mode of recovering it, that mode only can be pursued. *Q. B.* 1841, *Dundalk Western Railway Co. v. Tapster*, 1 *Q. B.* 667. Compare *St. Pancras Vestry v. Batterbury*, 2 *C. B. N. S.* 477, 485.

16. Mode of contracting. A corporation created to construct a railroad, has the power to borrow money, as one of the implied means necessary and proper to carry into effect its specified powers; and this is so, though the charter directs that the funds shall be raised by subscription. In the construction of charters the power to contract and the mode of contracting is not limited to the express grant, but may be extended by implication to all necessary and proper means for the accomplishment of the purposes of the charter. [*Ang. & A.* 200; 15 *Johns.* 383; 1 *Cow.* 513; 21 *Pick.* 270.] *Tenn. Supreme Ct.* 1845, *Union Bank v. Jacobs*,† 6 *Humph.* 515.

* As to delegation of power to bind out children,—see *Female Orphan Asylum v. Johnson*, 48 *Ms.* 136.

† An opinion of James Kent, who was consulted in the case, is appended to the report of this case, in which he asserts the American doctrine to be adverse to this view. See the cases in the title *CONTRACTS*, ante, I and IV.

17. If no mode is prescribed for the exercise of a power, the grant of which is clearly defined, the corporation may adopt such mode as in its judgment will secure the purpose contemplated. And even, as a general rule, a grant specifying the mode and manner of exercising powers, is construed as merely directory, unless there are negative words excluding the right to adopt any other mode. *Fla. Supreme Ct.* 1853, *Southern Life Ins. & Trust Co. v. Lanier*, 5 *Fla.* 110, 165.

18. Statute cannot be waived. Neither the directors nor stockholders of a corporation can waive the provisions of a prohibitory statute, expressly forbidding the directors from participating in the benefits of a contract with the corporation. [2 *Sandf.* 247; 11 *Wheat.* 258; 5 *Hill* 27.] If directors may enter into contracts with themselves, fair competition may be prevented, and the stockholders may thus be compelled to pay much more than they would if the contracts were thrown open and awarded to the lowest bidders. *N. Y. Supreme Ct.* 1854, *Barton v. Port Jackson &c. Plank Road Co.* 17 *Barb.* 397.

19. That in the absence of a provision limiting the company to a particular time within which to take lands, mere delay (not amounting to an absolute abandonment of the enterprise) does not operate to bar the right, but the works may be carried forward at any time,—see *Thicknesse v. Lancaster Canal Co.* 4 *Mees. & W.* 472; 3 *Jur.* 11.

20. So long as a corporation retains its organization it may collect dues to pay its debts, though the undertaking for which it was created has been abandoned. *Ind. Supreme Ct.* 1860, *Hardy v. Merriweather*, 14 *Ind.* 203.

21. When exhausted by exercise. A general power given by the charter of a corporation formed for the purpose of improving a navigable river, to make such canals as it should judge necessary, is not abridged by a subsequent provision of the charter that if it should not, within a limited time, make the river navigable for vessels of a certain draft, its charter should be forfeited. After performance of this condition the power is not exhausted, but the corporation may proceed further under the general authority. *Md. Ct. of Appeals*, 1832, *Chesapeake &c. Canal Co. v. Ohio R. R. Co.* 4 *Gill. & J.* 1, 116.

22. That where discretion given in fixing

toll-gates has once been exercised, it is at an end, and the company cannot capriciously change them. *N. Y. Supreme Ct.* 1820, *Griffen v. House*, 18 *Johns.* 397; 1837, *People v. Collins*, 19 *Wend.* 56.

23. A corporation cannot, by relinquishing the management of their franchise to others, preserving only a nominal organization, for the purpose of complying with the law, absolve themselves from the performance of their obligations, without the consent of the legislature.* [1 *Sim. N.* 8 550; 13 *L. & E.* 506.] *U. S. Supreme Ct.* 1854, *York & Maryland R. R. Co. v. Winans*, 17 *How.* 30. See also *Great Northern Railw. Co. v. Eastern Counties Railw. Co.* 12 *Eng. L. & Eq.* 224; 9 *Hare*, 306.

24. Implied powers. Corporations, together with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt in the exercise of similar powers. *Ind. Supreme Ct.* 1865, *New England Fire & Marine Ins. Co. v. Robinson*, 25 *Ind.* 536; *N. Y. Supreme Ct.* 1847, *Brady v. Mayor &c. of Brooklyn*, 1 *Barb.* 584; *A. V. Chan. Ct.* 1844, *Barry v. Merchants Exch. Co.* 1 *Sandf. Ch.* 280; *Wis. Supreme Ct.* 1856, *Madison &c. Plank Road Co. v. Watertown &c. Plank Road Co.* 5 *Wis.* 173. And see *Clark v. Farrington*, 11 *Id.* 306.

25. Thus, although the general banking law of New York gave no power to banking associations to borrow money, in express terms, it is a necessary incident to their right to become indebted in the ordinary course of their business, that they have power to borrow money to pay their indebtedness; for without the power to resort to credit they could not carry on business in many emergencies. *N. Y. Supreme Ct.* 1848, *Leavitt v. Blatchford*,† 5 *Barb.* 9.

26. An unqualified power given to a moneyed corporation to purchase real estate implies power to sell and to mortgage. *N. Y. Supreme Ct.* 1830, *Jackson v. Brown*, 5 *Wend.* 590.

27. Restrictions. Privileges which may exempt the body from burdens common

to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist. Hence, the grant of a power to trade in money to a given amount, does not imply an exemption of the stock in trade from taxation. *U. S. Supreme Ct.* 1830, *Providence Bank v. Billings*, 4 *Pet.* 514, 560.

28. Powers that would impair vested rights are not raised by implication. *N. J. Chancery*, 1855, *Morris & Essex R. R. Co. v. City of Newark*, 2 *Stockt.* 352.

29. Corporations, with power to sue and be sued, may perform by agents necessary services incident to such business, such as making affidavits, &c., which are, in the case of natural persons, required to be done by the principal. [6 *Halst.* 171.] *Ala. Supreme Ct.* 1839, *Planters & Merchants' Bank v. Andrews*, 17 *Ala.* (8 *Port.*) 404. But compare *Alabama & Tenn. R. R. Co. v. Oaks*, 37 *Ala. N. S.* 694.

30. Implied prohibition. A corporation has no other powers than such as are specifically granted, or are necessary to carry into effect the powers expressly granted.* Many powers and capacities are tacitly annexed to a corporation duly created, but they are such only as are necessary to carry into effect the purposes for which it was established. The specification of certain powers operates as a restraint to such objects only, and is an implied prohibition of the exercise of other and distinct powers. *N. Y. Supreme Ct.* 1818, *People v. Utica Ins. Co.* 15 *Johns.* 358; 1824, *N. Y. Firemen Ins. Co. v. Ely*, 2 *Cow.* 678; *Conn. Ct. of Errors*, 1825, *The Same v. The Same*, 5 *Conn.* 560. To the same effect, *N. Y. Ct. of Appeals*, 1850, in *Halstead v. Mayor &c. of N. Y.* 3 *N. Y.* (3 *Comst.*) 430.

31. Power to issue bonds. Authority to a town to issue bonds in aid of a railroad, authorizes it to issue negotiable debentures, if that be an ordinary and convenient form for securities of that class. *Wis. Supreme Ct.* 1860, *Bushnell v. Beloit*, 10 *Wis.* 195.

32. Where a statute authorized a municipal corporation to subscribe for stock of a railroad company, and to borrow money to pay therefor,—*Held*, that it might issue its negotiable bonds to the railroad company for the amount. A power to borrow money includes a power of giving bonds or other usual securities. And such a power is well ex-

* Corporation enjoined from surrendering charter, *Ward v. Society of Attorneys*, 1 *Coll.* 370.

† Reversed in part, on other grounds. *Court of Appeals*, 1849, *sub nom. Leavitt v. Palmer*, 3 *N. Y.* (3 *Comst.*) 19.

* Approved in *McMasters v. Reed*, 1 *Grant's Cas.* (Penn.) 86.

ecuted by making bonds to bearer and selling them in the market. If the power be to borrow money to pay a debt, it is well executed by giving such bonds to the creditor. *Pa. Supreme Ct.* 1859, *Commonwealth v. Pittsburgh* 34 *Penn. St.* (10 *Casey*), 496.

83. — notes, &c. That notes issued by a bank organized under an unconstitutional law will be void, and will constitute no consideration for a promissory note,—see *Skinner v. Deming*, 2 *Ind.* 558.

84. The power conferred upon a railroad company to “grant such evidences of debt which may be incurred, as may be, by the by-laws thereof, directed, to such an amount as shall be deemed necessary for transacting the business of the corporation,” does not authorize the company to engage in the business of banking. *Mich. Supreme Ct.* 1864, *People v. River Raisin & Lake Erie R. R. Co.* 12 *Mich.* (8 *Cooley*), 389.

85. Power to borrow money on interest, and give bonds payable at such times and places as might be agreed; authorizes a contract to pay interest periodically before payment of principal. *Ohio Supreme Ct.* *Coe v. Columbus &c. R. R. Co.* 10 *Ohio St.* 372, 396.

86. A general assignment by the directors of a corporation of all its property, is fraudulent and void as against the stockholders not consenting thereto, whether the company be solvent or not. *N. Y. Com. Pl.* 1864, *Smith v. N. Y. Consolidated Stage Co.* 18 *Abb. Pr.* 419.

87. Partnership. As a general rule, corporations are not capable of forming a partnership; but they may make joint contracts by which both parties may become liable. *Ill. Supreme Ct.* 1862, *Marine Bank v. Ogden*, 29 *Ill.* 248. And see *Sharon Canal Company v. Fulton Bank*, 7 *Wend.* 412. Compare *Van Kuren v. Trenton Locomotive & Machine Manufacturing Co.* 2 *Beas.* 302; *Catskill Bank v. Gray*, 14 *Barb.* 471.

88. Municipal powers.* A power to abate and remove nuisances confers no authority to prevent them, nor to impose penalties for their creation; but a power to do all acts, and make all regulations which the council deems necessary for the preservation of health and the suppression of disease, im-

plies full authority to pass ordinances for the prevention and punishment of nuisances injurious to health. *N. Y. Supreme Ct.* 1850, *City of Rochester v. Collins*, 12 *Barb.* 559.

89. A power to tax persons and property does not, of itself, imply a power to sell land for non-payment of a tax; but, if power to direct the manner in which real property sold for taxes shall be redeemed is also given, the power to sell is clearly implied. *Mo. Supreme Ct.* 1845, *City of St. Louis v. Russell*, 9 *Mo.* 507.

40. A college established by the regents of the University (New York), in the county of Ontario, have no power to exercise the franchise of appointing a medical faculty in the city of New York, for the purposes of instruction in medicine. *N. Y. Supreme Ct.* 1830, *People v. Trustees of Geneva College*, 5 *Wend.* 211.

41. The trustees of an academy, incorporated “to promote morality, piety and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies,” with authority to apply property already given, or which shall be hereafter given, &c., to the above purposes, are thereby empowered to raise by subscription a fund to found an institution for the education of indigent young men with a sole view to the ministry, to be incorporated with the academy. And they may transfer notes, taken for subscriptions, to a college, having power to receive, and required to apply, such fund according to the will of the donors. *Mass. Supreme Ct.* 1828, *Amherst Academy v. Cowles*, 6 *Pick.* 427. See, also, *Genesee College v. Dodge*, 26 *N. Y.* 213.

42. Insurance companies have an implied power to give credit for premiums, and to take notes in payment, and to negotiate such notes. *Ill. Supreme Ct.* 1848, *McIntyre v. Preston*, 5 *Gilm.* 48. To similar effect is *Hope Mut. Life Ins. Co. v. Perkins*, 4 *Robert.* 182.

43. An insurance company, authorized by its charter to insure against loss by fire simply, has no power to pass a by-law “that the company will be liable for losses on property burned or damaged by lightning.”* *Me. Su-*

* A fire district, under a statute authorizing the inhabitants of fire districts to lay taxes for the purpose of protecting property from fire, may purchase a fire engine, and the apparatus connected therewith. *Vt. Supreme Ct.* 1864, *Hunnehan v. Fire District No. 1, in Jamaica*, 37 *Vt.* 40.

* That marine policies are not valid claims against a life insurance company, under English winding up act; but premiums paid therefor are,—see *Exp. Phoenix Life Assurance Co. v. Johns*, 6 *H.* 441; 31 *Law J. N. S.* 749; 9 *Jur. N. S.* 15; 7 *Law Times*, 191; 10 *Week. Rep.* 816.

preme Ct. 1854, *Andrews v. Union Mut. Fire Ins. Co.* 37 *Mo.* 256.

44. A bridge company, with general powers, may contract to permit water-pipes to be attached to their bridge for the purpose of conveying water across the river. *Ky. Ct. of Appeals*, 1857, *Frankfort Bridge Co. v. City of Frankfort*, 18 *B. Monr.* 41.

45. Turnpike company. That a power conferred by the legislature upon a turnpike company, to build a turnpike, erect gates, and receive tolls, confers an implied power to erect toll houses; doing as little injury as may be, to adjoining landholders,—see *Wright v. Carter*, 3 *Dutch.* 76; *Ridge Turnpike Co. v. Stoeber*, 6 *Watts. & S.* 378.

The contrary held, under a power to erect a toll bridge. *Me. Supreme Ct.* 1827, *Thompson v. Androscoggin Bridge*, 5 *Greenl.* 62.

46. That power to make a road, and take tolls, does not authorize establishing a line of stage coaches thereon,—see *Downing v. Mount Washington Co.* 40 *N. H.* 230; *Wishwall v. Greenville &c. Plank Road Co.* 3 *Jones, N. C. (Eq.)* 188.

Consult also RAILROAD COMPANIES.

47. Presumption of power.* The dealings of a corporation, which, on their face, or according to their apparent import, are within its charter, are not to be regarded as illegal or unauthorized without some evidence to show that they are of such a character. In the absence of proof, there is no legal presumption that the law has been violated. On the contrary, these artificial bodies, like natural persons, are entitled to the benefit of the rule which imputes innocence rather than wrong to the conduct of men. *N. Y. Ct. of Appeals*, 1859, *Chautauque County Bank v. Rialley*, 19 *N. Y. (5 Smith)* 369. To the same effect, *N. Y. Supreme Ct.* 1824, *N. Y. Firemen's Ins. Co. v. Sturges*, 2 *Cov.* 664; 1857, *Budlong v. Van Nostrand*, 24 *Barb.* 25; *N. Y. Ct. of Errors*, 1842, *Safford v. Wyckoff*, 4 *Hill*, 442; *A. V. Chan. Ct.* 1846, *Farmers' Loan & Trust Co. v. Perry*, 3 *Sandf. Ch.* 389; *N. Y. Ct. of Appeals*, 1850, *Farmers' Loan & Trust Co. v. Clowes*, 3 *N. Y. (3 Comst.)* 470; 1860, *De Goff v. American Linen Thread Co.* 21 *N. Y.* 124; *Vt. Supreme Ct.* 1850, *McDaniels v. Flower Brook Manufacturing Co.*

* As to the application of the presumption to questions of pleading,—see *Fuller v. Naugatuck R. R. Co.* 21 *Conn.* 557; *Perkins v. Church*, 31 *Barb.* 84; *Struver v. Ocean Ins. Co.* 9 *Add. Pr.* 22; 2 *Hill*, 475.

22 *Vt.* 274; *Minn. Supreme Ct.* 1860, *Dana v. Bank of St. Paul*, 4 *Minn.* 385.

48. The acts and dealings of corporations are in general subject to the same presumptions as those of private persons. *U. S. Supreme Ct.* 1827, *Bank of United States v. Dandridge*, 12 *Wheat.* 64; *Pa. Chancery*, 1846, *Bank of Ky. v. Schuylkill Bank*, *Para. Sel. Cas.* 180, 251; *Pa. Supreme Ct.* 1850, *Commonwealth v. Cullen*, 18 *Pa. St.* 133; *Mass. Supreme Ct.* 1841, *Narragansett Bank v. Atlantic Silk Co.* 3 *Meta.* 382; *Middlesex Husbandmen & Manuf. Bank v. Davis*, *Id.* 133; *Ala. Supreme Ct.* 1841, *Bates v. State Bank*, 2 *Ala.* 451.

49. Where an act has been done by a public company, to the legality of which certain formalities are requisite, and the circumstances are such, that knowledge and acquiescence may be imputed to every shareholder, the court will, as against the company, infer that the necessary formalities have been complied with. *Chancery*, 1863, *British Provident &c. Ass. Soc. Exp. Grady*, 9 *Jur. N. S.* 631; 32 *Law J. N. S.* 326; 8 *Law Times N. S.* 98; 11 *Week. Rep.* 385.

50. In giving construction to the powers of a corporation, the language of the charter should in general neither be construed strictly nor liberally, but according to the fair and natural import of it, with reference to the purpose and objects of the corporation. [17 *Conn.* 454; 5 *Ohio St.* 39.] *N. H. Supreme Ct.* 1860, *Downing v. Mount Washington Road Co.* 40 *N. H.* 230.

51. There is no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created. *Mass. Supreme Ct.* 1865, *Brown v. Winnisimmonet Co.* 11 *Allen*, 326.

52. Grants of corporate power, being in

derogation of common right, are to be strictly construed, particularly where the power claimed is a delegation of the sovereign power of eminent domain. *Ohio Supreme Ct.* 1860, *Currier v. Marietta & Cincinnati R. R. Co.* 11 *Ohio St.* 228.

53. A principal power or grant conferred by a statute or charter, is not to be construed to carry, as an incident, anything not implied in the principal—not usually appurtenant to it, and not possessed of a similar character. [4 *Pet.* 152.] Nor can it include anything which would have been refused as a principal, or anything, on the most liberal construction justifiable, which is not necessary and proper to carry the principal express powers into effect. [2 *Kent. Com.* 298; 9 *Conn.* 180; 5 *Id.* 560; 2 *Cranch*, 127; 4 *Pet.* 152; 15 *Johns.* 388; 15 *Wend.* 259; 2 *Woodb. & M.* 168; 5 *Taunt.* 792; 2 *Cow.* 667, 678.] *U. S. Circ. Ct. (Mass.)* 1847, *Sumner v. Marcy*, 2 *Woodb. & M.* 105.

54. Thus the incidental power of a business corporation to borrow money, does not extend to justify purchasing a controlling interest in a bank, so as to be able to lend to themselves. *Id.*

55. The usual provision in bank charters, authorizing the bank to hold "such lands as are *bona fide* mortgaged or conveyed to it in satisfaction of the debts previously contracted in the course of its dealings,"—is intended for the protection of the community against holding in mortmain, not to prevent the funds being unprofitably invested; and its effect is only to restrict the right to cases where the debt is real, not merely colorable, and in its origin a purchase; and where the transaction is fair on the part of the debtor, it is not material whether or not the taking of the conveyance was necessary to secure a debt thought to be in danger. *Pa. Supreme Ct.* 1824, *Baird v. Bank of Washington*, 11 *Serg. & R.* 411.

56. A conveyance in trust to permit a corporation, which cannot accept of the legal title, to receive the rents and profits, or a conveyance that in any shape entitles the corporation to be put in possession, would be as much a violation of the law, as a direct conveyance of the legal title; but a conveyance, made with a view not to permanent ownership by the corporation, but of raising money by the sale of the property, would be neither within the letter nor the spirit of the prohi-

bition implied in such a provision of the charter. *Id.*

57. A statute, which prohibited banks from purchasing and holding real estate, contained a proviso that the act should not prevent any bank from taking mortgages or other liens on lands to secure existing debts. *Held*, in construction of this provision, that a bank, which had obtained such a lien, might make its security available by purchasing the property. *Miss. Ct. of Errors*, 1855, *Ingraham v. Speed*, 80 *Miss.* 410.

58. The deed of settlement of a joint stock copartnership provided that the business of the company should be to issue promissory notes payable to bearer on demand, to discount bills and promissory notes, and to lend money on the security of personal property or of cash accounts. *Held*, that the directors were not thereby precluded from issuing post bills, in the nature of bills of exchange. *Each.* 1855, *Forbes v. Marshall*, 32 *Eng. Law & Eq.* 589; 11 *Each.* 166.

59. Powers not construed to be exclusive. Since a corporation is strictly confined to the privileges conferred by its charter, and can take no implied rights as against the law-making power, *a fortiori* should it not be permitted to encroach by implication upon the rights of individuals who are in no respect parties to the compact between the legislature and such corporation. Hence, the acts authorizing the formation of plank-road companies are not to be construed to give by implication to such companies, any exclusive right to maintain a road; and the proprietor of adjacent lands may open a free road upon his own ground, although it operates to the detriment of the corporation. *N. Y. Ct. of Appeals*, 1854, *Auburn & Cato Plank Road Co. v. Douglass*, 9 *N. Y.* (5 *Seld.*) 444.

60. The implied power of borrowing money is not limited to the extent of the capital of the company; nor when that capital is fully paid, does the power cease for all but mere temporary objects, and for short periods. *N. Y. A. V. Chan. Ct.* 1844, *Barry v. Merchants' Exchange Co.* 1 *Sandf. Ch.* 280.

61. Sale. That the general power given by a charter to acquire and convey all property necessary, and the provision of a statute that the real and personal property of corporations shall be liable to execution, do not extend to authorize a conveyance or execution sale of franchises and corporate rights,

but only of property separable from the use peculiar to the franchise. *Ohio Supreme Ct.* 1859, *Coe v. Columbus &c. R. R. Co.* 10 *Ohio St.* 372.

62. **Loan.** Under a statute authorizing a municipal corporation to loan credit to each of two railroad companies, and also authorizing the companies to consolidate, a loan may be made to the consolidated company. *Ill. Supreme Ct.* 1859, *Robertson v. City of Rockford*, 21 *Ill.* 451.

63. **A power to subscribe for stock, and to sell the same as soon as it could be sold at par.**—*Held* to be satisfied by a sale in consideration of the purchaser's assuming the amount of the subscription and interest thereon. *Newark Town Council v. Elliott*, 5 *Ohio St.* 118.

64. **Change of location.** Under an act authorizing the trustees of a university to change the location of the institution to R., if they should so elect, it is not competent for them to pass a resolution to remove the institution to R. or its vicinity. *N. Y. Supreme Ct. Sp. T.* 1850, *Hascall v. Madison University*, 8 *Barb.* 174.

65. **Construction of canal.** A charter authorizing the corporation to purchase land to construct a canal,—*Held*, not to limit the corporation to purchases of land enough for the thread of the canal, but giving a reasonable discretion as to quantity. *N. Y. Supreme Ct.* 1885, *Spear v. Crawford*, 14 *Wend.* 20.

66. **Discretionary power.** Where a corporation have the power of doing or not doing an act, at their discretion, equity will not interfere with the lawful exercise of the discretion. It must infer fraud, to interpose. *Ga. Supreme Ct.* 1856, *Semmes v. Mayor &c. of Columbus*, 19 *Ga.* 471; *N. Y. Chan.* 1847, *Oswego Falls Bridge Co. v. Fish*, 1 *Barb. Ch.* 547.

67. But the corporation may abandon the use or enjoyment of the right secured by the election, if no detriment thereby accrues to the public. *Tenn. Supreme Ct.* 1852, *Louisville &c. Turnpike Co. v. Nashville & Kentucky Turnpike Co.* 2 *Svan*, 282.

68. **Municipal determination conclusive.*** An act empowering a municipal corporation

* A discretionary power to determine the number of officers required for certain duties, is one of a legislative character which can neither be reviewed, nor made the basis of an action against the city. The number fixed will be presumed sufficient for the proper care of the interests entrusted to them. *Mich. Supreme Ct.* 1867, *Dewey v. City of Detroit*, 15 *Mich.* 307.

to make subscriptions to the capital stock of a railroad, provided that no stock should be taken by the common council in such company, except two-thirds of the residents of the city should petition to that effect. *Held*, that the common council, having decided that the requisite number of freeholders of the city had petitioned for the subscription, their determination was conclusive, unless set aside in some direct proceeding for that purpose. *Ind. Supreme Ct.* 1860, *Evansville &c. R. R. Co. v. City of Evansville*, 15 *Ind.* 395.

69. Where the articles of association of a corporation, for the construction of a public way,—e. g. a plank road,—provide that the road is to be carried near a specified route, some deviation is allowable in the discretion of the company. [19 *Wend.* 58; 23 *Id.* 328; 1 *Cal.* 177; 18 *Johns.* 397.] *N. Y. Supreme Ct.* 1849, *Hamilton & Deansville Plankroad Co. v. Rice*, 7 *Barb.* 157.

70. **Mandatory statute.** Where a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words, "power and authority," in such case, may be construed duty and obligation. If in such case no remedy is prescribed, a right of action accrues at common law. *Md. Ct. of Appeals*, 1863, *County Commissioners of Anne Arundel County v. Duckett*, 20 *Md.* 468.

To similar effect, *Mayor &c. of Baltimore v. Marriott*, 9 *Md.* 160; *Commissioners v. Alleghany*, 20 *Md.* 449. Compare, however, *Goodrich v. City of Chicago*, 20 *Ill.* 445.

71. A company obtaining an act of Parliament for executing great public works, are bound to fulfill all the duties thereby thrown upon them; and may be compelled by mandamus so to do.* *Q. B.* 1841, *Regina v. Bristol Dock Co.* 2 *Eng. Railw. Cas.* 599.

72. A bill in equity to enforce the performance of public duties by a corporation, is not maintainable by a private party, in the absence of proof of any special injury resulting to him or his property, as contradistinguished from injury suffered in common with the whole public. *Pa. Supreme Ct.* 1865, *Buck Mountain Coal Co. v. Lehigh Coal &c. Co.* 50 *Pa. St.* 91.

* As to the obligation to do whatever may be necessary to prevent their works from causing nuisance,—see *Rex v. Bristol Dock Co.* 6 *Barn. & C.* 181; 9 *Dowl. & R.* 309; *The Same v. The Same*, 2 *Q. B.* 94; 2 *Eng. Railway Cas.* 599; 6 *Jur.* 216; 1 *Gale & D.* 256.

73. *Ultra vires.* An act of a corporation entirely foreign to the purposes of its institution is void from want of power; but an act relating to the subjects within its powers, though it should exceed those powers, is not void, though it might be a ground for the resumption of the franchise by the State. *Miss. Ct. of Errors*, 1850, *Haynes v. Covington*, 13 *Smed. & M.* 408.

74. The performance by the officers, of an act which the corporation had no power to perform,—e. g. a loan upon a note, where the charter forbids loans by the company, except upon bond and mortgage,—is the act of the corporation, not a mere act of the officers. *N. Y. Supreme Ct.* 1831, *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.* 7 *Wend.* 81. Compare *Bissell v. Mich. & C. R. R. Co.* 22 *N. Y.* 258; *Hertzo v. City of San Francisco*, 83 *Cal.* 134.

75. *Abuse or perversion of powers.** Corporations have only such powers as are within the scope of their charters, and where they are wasting or misappropriating the corporate property or funds, courts of equity treat them as trustees of the property for the benefit of the individual corporators, and on this ground, as well as on the ground that such misappropriation of the property is a fraud upon the rights and interests of the corporators individually, they interfere by injunction to restrain and prevent any such wasting or destruction of the corporate property. And it makes no difference whether the corporation is a joint stock manufacturing or trading corporation, or a municipal or territorial corporation, or is of the character of a school district. *Conn. Supreme Ct.* 1858, *Scotfield v. Eighth School District*, 27 *Conn.* 499. See also, *Smith v. Bangs*, 15 *Ill.* 399.

76. A corporation is not entitled, without express permission in the incorporating statute, to apply its corporate powers to the support of any undertaking which does not come within the purposes for which it was incorporated. It is not empowered to guarantee out of its corporate funds the payment of a dividend to parties carrying on such undertaking, although it may be calculated to increase the proper business of the corpora-

tion, and the majority of the corporators approve of such application of the corporate funds, and the object of the undertaking be in no respect contrary to the public interests.*

Rolls Ct. 1846, *Coleman v. Eastern Counties Railway Co.* 10 *Beav.* 1; 16 *Law J. N. S.* 73; 11 *Jur.* 74; 4 *Eng. Railw. Cas.* 513. To similar effect, 1849, *Salomons v. Laing*, 12 *Beav.* 339; 6 *Eng. Railw. Cas.* 289; 14 *Jur.* 279; 19 *Law J. N. S.* 225; *V. Chan. Ct.* 1849, *Bagshaw v. Eastern Union Railway Co.* 7 *Hare*, 114.

77. A court of equity will not restrain the directors and agents of a company from using the corporate name, seal and credit in an application to the legislature, for an alteration of their powers, or of the relative rights of two classes of stockholders; but it may restrain them from applying its existing funds in prosecuting such a bill. *Rolls Ct.* 1851, *Stevens v. South Devon Railway Co.* 2 *Eng. L. & E.* 188; 15 *Jur.* 235; *Vice Chan. Ct.* 1852, *Great Western Railway Co. v. Rushout*, 10 *Eng. L. & E.* 72; 16 *Jur.* 238.

78. A majority of the stockholders in a prosperous corporation have no right, contrary to the wishes of the minority, to sell the whole corporate property, and invest their capital in other enterprises. The contract is, that the joint funds shall be employed for certain specified purposes under the direction of the directors. [Gow. on P. app. 576; 4 *Johns. Ch.* 573; 2 *Russ. & M.* 461; 13 *Cond. Eq.* 131; 1 *Am. L. Reg.* 154.] If there is no time specified in the charter, at which the use of the funds for a specific purpose shall cease, the contract is, that so long as the company is in a prosperous condition the use shall continue, unless all the stockholders consent to the contrary. When the duration of the specified employment of the funds is limited in the charter, they must be so employed until that time, unless, perhaps, in case of a clear loss. *N. J. Chancery*, 1853, *Kean v. Johnston*, 1 *Stockt.* 401. Compare *Gifford v. N. Jersey R. R. Co.* 2 *Id.* 171.

As to the powers peculiar to Particular classes of corporations, see the title of each class; thus, banking powers are treated under

* Misuse or abuse of corporate privileges has been defined as consisting in any positive act in violation of the charter, and in derogation of public right, willfully done, or caused to be done, by those appointed to manage the general concerns of the corporation. *Erie & North East R. R. Co. v. Casey*, 26 *Pa. St.* 267. And see *Lumbard v. Stearns*, 4 *Ouseh.* 60.

* A canal company may be restrained by injunction from converting a canal, for erecting which the company were incorporated, into a railway. *Mandaley v. Manchester Canal Co.* *Cooper's C. Pr.* 510. A bank erecting a building in violation of its charter may be proceeded against by the State. *New Haven v. City Bank*, 31 *Conn.* 106.

BANKS; the power to make insurances, under INSURANCE COMPANIES; the power to construct and operate canals and railroads, under CANAL COMPANIES and RAILROAD COMPANIES.

As to the right of a stockholder to resist a Perversion of funds, see STOCKHOLDER.

For Other instances of the perversion of funds, see RAILROAD COMPANIES, ULTRA VIRES, and the titles of particular classes of companies.

II. MODE OF EXERCISE.

79. By whom. That the stockholders or members cannot exercise powers which, by the charter, are vested in the directors,—see *McCullough v. Moss*, 5 *Den.* 567; *Conro v. Port Henry Iron Co.* 12 *Barb.* 27; *Cammeyer v. United German Lutheran Churches*, 2 *Sandf.* 186; *Union Mut. Fire Ins. Co. v. Keyser*, 82 *N. H.* 818; *Gashwiler v. Willis*, 38 *Cal.* 11.

80. The power to fill vacancies in a corporation and elect officers, is a corporate incident, but this power does not attach to the board of officers, to fill vacancies in their own board.* *N. J. Chancery*, 1854, *Kearney v. Andrews*, 2 *Stockt.* 70.

81. Special body. Where a charter or act of incorporation requires it, a certain number of a special body, or board existing within the corporation, must be present at the doing of any corporate act, or at the making of a particular species of contracts, as deeds, in order to their validity as corporate acts. *Pa. Supreme Ct.* 1820, *The President &c. of Berks and Dauphin Turnpike Road v. Myers*, 6 *Serg. & R.* 12; 1822, *Case of St. Mary's Church*, 7 *Serg. & R.* 517; *K. B.* 1838; *Hill v. Manchester & Salford Water Works Co.* 5 *Barn. & Ad.* 866; 2 *Nov. & M.* 578.

82. Majority may act.† The members of

corporate bodies are bound by the acts of the majority within the powers conferred by the charter. The fundamental principle of every association for the purposes of self-government is, that no one shall be bound except with his own consent, expressed by himself or his representatives; but actual assent is immaterial, the assent of the majority being the assent of all; and this is not only constructively but actually true; for that the will of the majority shall in all cases be taken for the will of the whole, is an implied but essential stipulation in every compact of the sort. *Pa. Supreme Ct.* 1822, *Case of St. Mary's Church*. 7 *Serg. & R.* 517, 543.

83. So long as they act within the scope and in obedience to the provisions of the constitution of the corporation, the will of the majority, duly expressed at a legally constituted assembly must govern. *N. J. Chancery*, 1854, *Gifford v. New Jersey R. R. Co.* 3 *Stockt.* 171; *K. B.* 1741, *Attorney General v. Davy*, 2 *Atk.* 212. See *Korn v. Mutual Assurance Society of Virginia*, 6 *Cranch*, 192; *Dean v. Tucker*, 2 *Cranch*, *C. Ct.* 26; *Dela-ware R. R. Co. v. Thorp*, 1 *Houston (Del.)* 149; *Rex v. Varlo*, 1 *Cowp.* 248.

84. That a majority actually voting at an election for directors is sufficient to elect, see *Columbia Bottom Levee Co. v. Meier*, 39 *Mo.* 58.

85. Where the by-laws of a private corporation confer upon the directors power to act in behalf of the corporation, without special limitations as to the manner, a majority may act, within the scope of the authority given to the board, and bind the corporation, either where there is a consultation of all together, and a concurrence of a majority, or where there is a regular meeting at which all might be present, and a majority actually attend, and act by a major vote; and when the act purports to be the act of the board, it may be presumed it was the act of the majority, until the contrary is shown. *N. H. Superior*

* A charter may give a power of election to a less number than the majority of a definite body. In a prescriptive corporation a usage to this effect is evidence of such a charter; so that in either case a person is well elected by a majority of the subsisting members, as distinguished from a majority of the full body. *K. B.* 1796, *Rex v. Hoyte*, 6 *Dunf. & E.* 430.

† It is no objection to the validity of a vote for imposing a railroad tax, that the power was given to the president and directors of the company to designate the time of taking the vote, instead of the county. *Ky. Ct. of Appeals*, 1853, *Slack v. Maysville & Lexington R. R. Co.* 18 *B. Monr.* 1.

‡ Where several persons are empowered by law to execute a public trust or power, and, in the execution thereof, all are present to deliberate, the act of a majority will be valid. And they will all be presumed to have been present

and to have deliberated upon the act, unless the contrary expressly appears. *Mich. Supreme Ct.* 1843, *Scott v. Detroit Young Men's Society*, 1 *Doug.* 119; *Ms. Supreme Ct.* 1839, *Jackson v. Hampden*, 16 *Ms.* 184; *N. Y. Chancery*, 1837, *Bank Commissioners v. Bank of Buffalo*, 6 *Pease*, 497. *C. P.* 1798, *Grindley v. Barker*, 1 *Boa. & P.* 259; *K. B.* 1837, *Cortis v. Kent Waterworks Co.* 7 *Barn. & C.* 314; 1839, *Rex v. Whittaker*, 9 *Barn. & C.* 648; *Esch.* 1533, *Wilkinson v. Malin*, 3 *Crompt. & J.* 636. To similar effect, *K. B.* 1790, *Rex v. Beeston*, 3 *Dunf. & E.* 522.

Ct. 1841, *Despatch Line of Packets v. Bellamy Manuf. Co.* 12 *N. H.* 205.

86. **Limit of power.** What the majority determine, within the scope of their mutual contract, they each agree to abide by, but there their mutual contract ends, and no majority, however large, has a right to divert the joint capital to any purpose not consistent with and growing out of this original fundamental joint intantion. *N. J. Chancery*, 1858, *Kean v. Johnston*, 1 *Stockt.* 401.

87. **Form.** Courts of justice cannot regard the wishes of the majority of the members of a corporation, unless expressed in a valid form, in conformity with the by-laws and charter. *La. Supreme Ct.* 1859, *German Ev. Congregation v. Pressler*, 14 *La. An.* 799; *Chan.* 1855, *Re Direct East &c. Railway Co. Eap. Johnson*, 31 *Eng. Law & Eq.* 430.

88. **Must act within the State.** Upon general principles all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty which granted the charter of incorporation, are wholly void. The corporation is an artificial person existing in contemplation of law. The new faculty which a charter confers on the corporators is one which they can only have by virtue of the the law which confers it, and that law is inoperative beyond the bounds of the legislative power by which it is enacted. The corporate faculty cannot accompany the natural persons beyond the boundaries of the sovereignty which confers it. *Mo. Supreme Ct.* 1847, *Miller v. Ewer*,* 27 *Mains* (14 *Shep.*), 509. Compare *Freeman v. Machias Water Power &c. Co.* 38 *Id.* (3 *Heath*) 343.

89. That statute authority to act in another State does not authorize a change of corporate location,—see *Aspinwall v. Ohio &c. R. R. Co.* 20 *Ind.* 492.

90. **Foreign contracts.** Corporations legally established under the laws of one of the United States are legally competent to negotiate and enter into contracts beyond the jurisdiction of the State where they are created. Although they must have their being in the State of their creation only, yet the existence there will be recognized in other places, and residence in one State creates

no objection to contracting in another. *U. S. Supreme Ct.* 1839, *Bank of Augusta v. Earle*, 13 *Pet.* 519; 1846, *Tombigbee R. R. Co. v. Kneeland*, 4 *How.* 16; *Mass. Supreme Ct.* 1856, *Kennebec Co. v. Augusta Ins. & Banking Co.* 6 *Gray*, 204; *Tenn. Supreme Ct.* 1850, *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.* 11 *Hump.* 1; 1859, *Talmadge v. North American Coal Co.* 3 *Head.* 337; *Mo. Supreme Ct.* 1847, *Blair v. Perpetual Ins. Co.* 10 *Mo.* 559; *Md. Ct. of Appeals*, 1858, *Wellersburgh &c. Plank Road Co. v. Young*, 13 *Md.* 476; *Wis. Supreme Ct.* 1864, *Connecticut Mut. Life Ins. Co. v. Cross*, 18 *Wis.* 109. And see *Miller v. Ewer*, 27 *Mo.* (14 *Shep.*) 509.

91. That the corporation was restrained from acting out of the State by which it was created, will not be presumed, but must be shown, when relied upon as a bar to an action for not performing its contracts. *N. Y. Superior Ct. Sp. T.* 1854, *N. Y. Floating Derrick Co. v. New Jersey Oil Co.* 3 *Duer*, 648. To similar effect, *Ct. of Appeals*, 1851, *Mumford v. American Life Ins. & Trust Co.* 4 *N. Y.* (4 *Const.*) 463.

92. — **business.** Although a corporate body may carry on business beyond the limits of the State which created it, it has no corporate existence beyond those limits. [13 *Pet.* 588.] *U. S. Circ. Ct.* 1850, *Day v. New-ark India Rubber Manuf. Co.* 1 *Blatchf. C. C.* 628.

93. — **lands.** A corporation chartered in one State do not necessarily commit any usurpation upon the sovereignty of another State by purchasing and taking a conveyance of land therein for the accommodation of their business. *Vt. Supreme Ct.* 1853, *State v. Boston, Concord &c. R. R. Co.* 25 *Vt.* (2 *Deane*) 433; *U. S. Supreme Ct.* 1840, *Runyan v. Coster*, 14 *Pet.* 122.

94. It is not a violation of the act restraining unauthorized banking, for an incorporated bank of another State to lend money and take a mortgage on lands in New York, where the transaction is not within the State. The act was intended to prevent banking operations within the State. *N. Y. Chancery*, 1820, *Silver Lake Bank v. North*, 4 *Johns. Ch.* 370.

95. **Use of seal.** That the mode of assenting to and authenticating the acts of a corporate body which uses a seal, is to affix the seal, with the declaration that it is the seal

* Compare *Copp v. Lamb*, 3 *Fairf.* 312, where a similar objection was held untenable after the lapse of forty years. And see *Hiller v. Parrish*, 14 *N. J. Eq.* (1 *McCart.*) 330; *City Bank of Columbus v. Beach*, 1 *Blatchf.* 425.

of the corporation, and to verify the act by the signatures of the president and secretary, —see *Kinzie v. Chicago*, 2 *Scam.* 187.

96. Seal not necessary.* The general rule that a corporation cannot act but by its seal, cannot be extended so far as to prevent their liability arising from the nature of their institution, or incidentally arising from an authority delegated by the body to their agent legally appointed. *Md. Ct. of Appeals*, 1813, *Kennedy v. Baltimore Ins. Co.* 3 *Harr. & J.* 367.

97. An agreement by authorized agents of a corporation, for the sale of land, is not void for want of the corporate seal. *Va. Ct. of Appeals*, 1817, *Legrand v. Hampden Sidney College*, 5 *Munf.* 324; 1825, *Banks v. Poitiaux*, 3 *Rand.* 136.

98. Contract. A corporation is not incapable of contracting except under their corporate seal. Anciently it seems to have been held that corporations could not do anything without deed. [13 H. 8, 12; 4 H. 7, 6; 7 H. 7, 9.] But the rule has been gradually relaxed. [Plowd. 91, b; 2 Saund. 805; Bro. Corp. 51; 3 Salk. 191; 8 Lev. 107; Moore, 512.] At length it seems to have been established that though they could not contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. [3 P. Wms. 419; 1 Fonb. 305, Phil. ed. note a.] And a contract so made by him, whether in the name of the corporation or in his own name and ratified by the corporation, is binding on the corporation.† It seems a sound principle, that wherever a corporation is acting within the scope of the legitimate purposes of its in-

stitution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. [3 Bro. Ch. 262, Doug. 524; 3 Mass. 364; 5 Id. 80, 491; 6 Id. 40.] *U. S. Supreme Ct.* 1813, *Bank of Columbia v. Patterson*, 7 *Cranch*, 299; 1823, *Fleckner v. Bank of the United States*, 8 *Wheat.* 338; *Me. Supreme Ct.* 1837, *Maine Stage Co. v. Longley*, 14 *Me.* 444; 1847, *Badger v. Bank of Cumberland*, 26 *Me.* 428; *Conn. Ct. of Errors*, 1830, *Savings Bank v. Davis*, 8 *Conn.* 192; *Vt. Supreme Ct.* 1826, *Poultney v. Wells*, 1 *Aikens*, 180; *Mass. Supreme Ct.* 1849, *Melledge v. Boston Iron Co.* 5 *Cush.* 158; *N. Y. Supreme Ct.* 1815, *Danforth v. Schoharie Turnpike Co.* 13 *Johns.* 227; 1817, *Dunn v. Rector of St. Andrews*, 14 *Id.* 118; 1823, *Mott v. Hicks*, 1 *Cow.* 518; 1847, *Brady v. Mayor &c. of Brooklyn*, 1 *Barb.* 584; 1849, *St. Mary's Church v. Cagger*, 6 *Id.* 576; *Ct. of Appeals*, 1858, *Peterson v. Mayor &c. of N. Y.* 17 *N. Y.* 449; *Penn. Supreme Ct.* 1817, *North Whitehall v. South Whitehall*, 3 *S. & R.* 117; 1818, *Chestnut Hill, &c. Turnpike Co. v. Rutter**, 4 *Id.* 16; 1847, *Hamilton v. Lycoming Mut. Ins. Co.* 5 *Barr.* 344; *Md. Ct. of Appeals*, 1827, *Union Bank of Md. v. Ridgley*, 1 *Harris & G.* 329, 413; *Chancery*, 1849, *Elysfield Manuf. Co. v. Okisko Co.* 1 *Md. Ch. Dec.* 392; *Miss. Ct. of Errors*, 1846, *Petrie v. Wright*, 6 *S. & M.* 647; *N. J. Supreme Ct.* 1825, *Baptist Church v. Mulford*, 3 *Halst.* 182; *Ky. Ct. of Appeals*, 1840, *Commercial Bank v. Newport Manuf. Co.* 1 *B. Monr.* 13; *S. Car. Const. Ct.* 1818, *Garvey v. Colcock*, 1 *Nott & McC.* 281; *Tenn. Supreme Ct.* 1845, *Union Bank v. Jacobs*, 6 *Humph.* 515; *Ind. Supreme Ct.* 1848, *Ross v. City of Madison*, 1 *Carter*, 281; 1857, *Hamilton v. Newcastle &c. R. R. Co.* 9 *Ind.* 359; *N. C. Supreme Ct.* 1835, *Buncombe Turnpike Co. v. McCarson*, 1 *Dev. & B.* 306.

To similar effect: *Smith v. Congregational Meeting-house*, 8 *Pick.* 178; *Abbott v. Hermon*, 7 *Greenl.* 118; *Watson v. Bennett*, 13 *Barb.* 190; *American Ins. Co. v. Oakley*, 9 *Paige*, 496; *Everett v. United States*, 15 *Ala.* (8 *Port.*) 166; *Stone v. Berkshire Congregational Society*, 14 *Vt.* 86; *Gassett v. Andover*,

* The early English books abound in authorities for the rule, not applied in this country, that a corporation can only act by deed. The same rule has been recently applied in *Mayor &c. of Ludlow v. Charlton*, 6 *Mees. & W.* 815; *Sutter v. Spectacle Makers' Co.* 10 *Law Times, N. S.* 411; 13 *Week. Rep.* 742.

† Where an agent is in point of fact directed as such, by the corporation, to make promissory notes for payment of demands against the corporation, the corporation are liable on a note made by him accordingly, and the agent is not, *So held*, where the note ran, I, &c., as agent, &c., promise to pay, and was signed with the addition of agent, &c. *Vt. Supreme Ct.* 1822, *Proctor v. Webber*, *D. Chtp.* 371.

And the authority of the agent need not be by vote, writing or by-law. *Me. Supreme Ct.* 1837, *Maine Stage Co. v. Longley*, 14 *Me.* 444; 1840, *Warren v. Ocean Ins. Co.* 16 *Id.* 459; 1847, *Badger v. Bank of Cumberland*, 26 *Id.* 428.

* Overruling, *Breckbill v. Lancaster Turnpike Co.* 3 *Dall.* 496.

21 *Vt.* (6 *Washb.*) 348; *Sheldon v. Fairfax*, 21 *Vt.* (6 *Washb.*) 103; *State v. Morris & Essex R. R. Co.* 3 *Zabr.* 860; *Palm v. Medina Ins. Co.* 20 *Ohio*, 529; *Muir v. Louisville & Portland Canal Co.* 8 *Dana*, 161.

99. If a corporation be disseized, the entry to revest their estate need not be by any authority under seal. And if the ancient rule were still in force, an entry by the officers of a disseized corporation, made under authority given to the trustees, by statute, is equally effectual. *Mass. Supreme Ct.* 1837, Second Precinct in Rehoboth *v.* Catholic Cong. Church &c. in Rehoboth, 23 *Pick.* 189.

100. Acts of board. The ancient doctrine that a corporation acts only through the instrumentality of its common seal, has no application to corporations created by statute whose charters contemplate the business of the corporation to be transacted exclusively by a board of directors. The acts of such board, evidenced by a written vote, are as binding as the most solemn acts under the corporate seal. *U. S. Supreme Ct.* 1823, *Fleckner v. U. S. Bank*, 8 *Wheat.* 383. Followed, 1840, *Bank of Metropolis v. Guttschlick*, 14 *Pet.* 19.

101. A resolution, adopted by the board and certified to the plaintiff, containing a proposal of a contract, is, if duly accepted by him, binding on the corporation, even though no record was made of the act. It is now perfectly well settled that the acts of corporations may be proved in the same manner as the acts of individuals. If there be no record evidence, they may be proved by the testimony of witnesses, and even where no direct evidence of such acts can be given, facts and circumstances may be proved from which the acts may be inferred [Cranch, 299; 9 Paige, 490; 12 *Wheat.* 64; 4 *Cow.* 645; 4 *Serg. & R.* 317]. The omission of a corporation to make a record of its own doings does not prejudice the rights of a party who has, in good faith, relied upon an official assurance of its corporate act.* *N. Y. Su-*

* An order or resolution of the board, in writing and appearing on its minutes, may be rescinded by a vote without writing, and the rescission may be proved by oral testimony. *Md. Ct. of Appeals*, 1823, *Whittington v. Farmers' Bank*, 5 *Harr. & J.* 489.

Where the directors of a railroad corporation adopted resolutions releasing their contractor from his liabilities, admitting that the corporation had failed to fulfill their contract with him, and requesting him to finish the work at his own expense and retain it till repaid by its earnings; and it was also proved by parol that it was then understood

preme Ct. 1849, *St Mary's Church v. Caggar*, 6 *Barb.* 576; *S. P. U. S. Supreme Ct.* 1827, *Bank of U. S. v. Dandridge*, 12 *Wheat.* 64.

102. A corporation may be bound by its record, or by-law, without the certification of its liability by its seal. A corporation cannot deny or evade the legal effects of its own record; and the seal is not necessary to the validity or conclusiveness of its record. Whatever a corporation has done or engaged to do, by record, or whatever the law would infer from its record that it had agreed to or is bound to do, will subject it to legal liability to the extent of the obligation, either expressed or implied. *Ky. Ct. of Appeals*, 1880, *Waller v. Bank of Kentucky*, 8 *J. J. Marsh*, 201.

103. Thus it is not essential that the act of a corporation in adopting a set of written rules should be in writing. The acts of a corporation may now be evidenced not only without seal but without writing. *Md. Ct. of Appeals*, 1827, *Union Bank of Maryland v. Ridgely* 1 *Harris & G.* 324, 418.

104. Evidence. The acts of corporations may be proved in the same way as the acts of individuals. If there be no record evidence they may be proved by the testimony of witnesses; and even where no direct evidence of such acts can be given, facts and circumstances may be proved from which the acts may be inferred. The tendency of the modern decisions is to assimilate the actions, rights, duties and liabilities of corporations to those of individuals [12 *Wheat.* 64; 7 *Cranch*, 299; 6 *Barb.* 576; 12 *Id.* 27, 53; 4 *Cow.* 645; 15 *Johns.* 44, 55]. *N. Y. Ct. of Appeals*, 1853, *Moss v. Averell* 10 *N. Y. (3 Seld.)* 449. To similar effect *Ala. Supreme Ct.* 1856, *Alabama R. R. Co. v. Kidd*, 29 *Ala. N. S.* 221. *Mo. Supreme Ct.* 1860, *Southern Hotel Co. v. Newman*, 80 *Mo.* 118.

105. The acts of a corporation, evidenced by a vote written or unwritten, are as completely binding upon it, and as full authority to its agents, as the most solemn acts done under the corporate seal; and promises and engagements may as well be implied from its acts, and the acts of its agents, as if it were

between the parties that another person should finish the work, and the contractor promised that he should do so, and he accordingly undertook the work:—*Held*, that this was a valid release of the former contractor, and would raise an implied promise in favor of the new contractor. *Miss. Ct. of Errors*, 1846, *Petrie v. Wright*, 6 *Smodes & M.* 647, 707.

an individual. *Md. Chancery*, 1849, Elysville Manufacturing Co. v. Okisko Co. 1 *Md. Ch. Dec.* 892; *Md. Ct. of Appeals*, 1827, Union Bank of Maryland v. Ridgely, 1 *Harris & G.* 324; 1844, Burgess v. Pue, 2 *Gill*, 254; *N. Y. Supreme Ct.* 1844, Bank of Lyons v. Demmon, *Hill & D.* 398.

PRESIDENT.

[Since this is the most common name for the chief officer of a business corporation, it is used to include all matters peculiar to the chief officer of such corporations, disregarding the fact that in particular instances a different name is given him. Rules applicable to the presidents of companies in common with other officers, are under OFFICERS, and the titles connected with that. Rules peculiar to the chief officer of a particular class of companies are under the title of that class.]

1. Sufficiency of election. Where an act of incorporation provides that there shall be "three directors, out of whom a president shall be chosen," it is sufficient if the president be elected by a legally constituted meeting, at the same time with the other directors; without having been previously appointed a director. There is no real utility in requiring a circuitry of action; and, as a previous election, as director, was not required by the act, there is no objection to the appointment of a president and director (both of which characters are to combine in the same person) at one ballot. *Va. Ct. of Appeals*, 1809, Currie v. Mutual Ins. Co. 4 *Henn. & M.* 815, 858.

2. A person appointed by the legislature, a director of the State Bank, though the courts are bound to know of such appointment, cannot be judicially recognized as president, when chosen *pro tempore* by the board. His authority to perform an act belonging to that office must be established by proof. *Ala. Supreme Ct.* 1844, Crawford v. Branch Bank at Mobile, 7 *Ala. N. S.* 205.

As to Election of corporate officers generally, see ELECTIONS.

3. Right to vote. The president of a corporation has a right to vote upon all questions to be determined by the president and directors. *Md. Ct. of Appeals*, 1846, McCullough v. Annapolis & Elkridge R. R. Co. 4 *Gill*, 58.

4. The right of a president of a corporation to vote upon general questions to be determined (with him) by the direction, cannot be restricted by a resolution of the

company to a mere casting vote in case of a tie. *Ib.*

5. Powers generally. That the president of a corporation may perform acts of an ordinary nature, which, by usage or necessity, are incident to his office, without special authority,—see *Chicago, Burlington, & Quincy R. R. Co. v. Coleman*, 18 *Ill.* 297.

See AGENTS; OFFICERS.

6. How conferred. The power of the president of a corporation to bind the company as its agent may be implied from facts and circumstances. Thus where the company, by an advertisement signed by the secretary, offered goods for sale; and the plaintiff's agent called on the secretary, who referred him to the president, who effected the sale, and agreed to pay the plaintiff, a broker, a commission; and the contract of sale was then signed by the secretary. *Held*, that even if the secretary was the only authorized agent, yet that the acts of the president, referred to as above, bound the company; and that as the president thus had power to make the sale, he had also authority to bind the company to pay the brokerage. *Md. Ct. of Appeals*, 1859, Northern Central Railway Co. v. Bastian, 15 *Md.* 494.

7. If the president of a corporation is in the habit of acting as its business agent with its knowledge and without objection; making sales, settling accounts and collecting debts, actual authority may be inferred from such acts, and the company will be bound thereby. [12 *Wheat.* 64; 11 *Serg. & R.* 179; 2 *Harris*, 81.] *Pa. Supreme Ct.* 1867, Dougherty v. Hunter, 54 *Pa. St.* 380. Compare *Farmers' Loan & Trust Co. v. Mann*, 4 *Robt.* 856.

8. Though a payment be made irregularly by the president of a corporation, yet, when it is justly due, and there is no reason for withholding it, it cannot be recovered back on the ground that the president had verbal directions, only, from the directors, to make it. *La. Supreme Ct.* 1837, New Orleans Building Co. v. Lawson, 11 *La.* 84.

9. Power to dispose of assets. The president of a corporation is not *ex officio* an agent to sell its property, and his representations as to property to be sold are not binding on the company, unless he be specially authorized. *Va. Ct. of Appeals*, 1851, Crump v. United States Mining Co. 7 *Gratt.* 352.

10. The president of a railroad company

has no power to dispose of the personal property of the company—*e. g.* ties—to secure a corporate debt, by virtue of the power inherent in his office, without special authority from the board of directors; nor has he such power by a vote of the directors making him the fiscal agent of the company with authority to sell securities, and to purchase equipments, &c. *Wis. Supreme Ct.* 1861, *Walworth County Bank v. Farmers' Loan & Trust Co.* 14 *Wis.* 325.

11. — to contract for the company. The power of a president of a private corporation to bind it by contracts, extends only to matters arising in the ordinary course of its business; and a contract entered into by him to purchase property, intended and useful only for extending the business of the corporation, is in excess of his powers. *Cal. Supreme Ct.* 1862, *Blen v. Bear River &c. Co.* 20 *Cal.* 602. Compare *St. Nicholas Ins. Co. v. Howe*, 7 *Bow.* 450.

12. The president of an incorporated company, as such, cannot make any agreement binding upon the corporation, unless it is shown to be within the scope of his authority. *Pa. Supreme Ct.* 1845, *Farmers' Bank of Bucks County v. McKee*, 2 *Pa. St.* 318; *Miss. Ct. of Errors*, 1856, *Bacon v. Mississippi Ins. Co.* 31 *Miss.* 116.

13. When the directors of a corporation have established by resolve the rate at which certain services shall be compensated, the president cannot bind the corporation to pay a higher rate. *Vt. Supreme Ct.* 1857, *Hodges v. Rutland & Burlington R. R. Co.* 29 *Vt.* 220.

14. That he has no implied power, when authorized in general terms "to issue a mortgage," to insert a clause unusual in such mortgages, and unfavorable to his company, —see *Jesup v. City Bank*, 14 *Wis.* 331.

15. — to borrow money. The president of an incorporated company has no authority by virtue of his office merely, without reference to powers actually conferred, to borrow money for the company. *N. Y. Supreme Ct.* 1831, *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.* 7 *Wend.* 31.

16. — to receive payment. Payment or allowance of a claim to "A. B., president of the T. Bank," is the same as payment, &c., to the bank. *Vt. Supreme Ct.* 1855, *Tremont Bank v. Paine*, 28 *Vt.* 24.

17. — to compromise debts. The presi-

dent of a bank in Rhode Island has no authority, as such, to surrender or release the claims of the bank against any one; and can only derive such authority from the board of directors, by their vote, or from their assent, express or implied. *R. I. Supreme Ct.* 1862, *Olney v. Chadsey*, 7 *R. I.* 224; *N. Y. Superior Ct.* 1847, *Brouwer v. Appleby*, 1 *Sandf.* 158.

18. Where the president of a corporation is a member of the finance committee, and has the general direction and superintendence of the affairs of the company, settlements of money transactions with him, made regularly during a long term of years, are valid, notwithstanding a by-law of the company declared that all accounts against the company should be audited by the finance committee; —the company having clearly waived and abandoned such by-law by their course of business. *N. Y. Superior Ct.* 1867, *Farmers' Loan & Trust Co. v. Mann*, 4 *Robt.* 356.

19. The president of a banking corporation, unless authorized by charter either expressly or incidentally, cannot, without the permission of the directors, to whom are intrusted the management of the concerns of the institution, stay the collection of an execution against the estate of one of its debtors. *Ala. Supreme Ct.* 1845, *Spyker v. Spence*, 8 *Ala. N. S.* 338.

20. — to bring suits. The president of a manufacturing corporation has no power to bind the corporation by commencing an action in its name, unless specially authorized. *Mass. Supreme Ct.* 1848, *Ashuelot Manuf. Co. v. Marsh*, 1 *Cush.* 507.

21. — to defend suits. The president of a bank, being its chief executive officer, has a right as such to appear and answer for it, and employ counsel for its defense. *Ky. Ct. of Appeals*, 1859, *Savings Bank of Cincinnati v. Benton*, 2 *Metc.* 240. *S. P. N. Y. Com. Pl.* 1859, *Oakley v. Workingmen's Union Benevolent Society*, 2 *Hill.* 487.

22. If the president of a corporation authorize an attorney or solicitor to appear for the corporation, the corporation will be bound by his acts, as their attorney or solicitor; and if the president exceed his authority, in retaining such attorney or solicitor, the corporation must look to him for any damages sustained in consequence of such unauthorized act. *N. Y. Chancery*, 1842, *American Ins. Co. v. Oakley*,

9 *Paige*, 496; *N. Y. Supreme Ct.* 1848, *Mumford v. Hawkins*, 5 *Den.* 355; *U. S. Supreme Ct.* 1847, *Alexandria Canal Co. v. Swann*, 5 *How.* 83.

23. — to waive regulations. The president of an insurance company cannot waive a condition in the policy,—*e. g.* a defect in the preliminary proofs,—unless he is authorized by the charter, or by the board of directors.* *N. Y. A. V. Chan. Ct.* 1889, *McEvers v. Lawrence*, *Hoffm.* 172.

24. — to testify. When the president is a competent witness, for or against the corporation,—see *Philadelphia Ins. Co. v. Washington Ins. Co.* 23 *Pa. St.* 250; *New York & Virginia State Stock Bank v. Gibson*, 5 *Duer*, 574; *Watson v. Phoenix Bank*, 8 *Metc. (Mass.)* 217; *Woods v. De Figanieri*, 1 *Robt.* 641; *President of Bank of Ithaca v. Bean*, 1 *Code R.* 183; 7 *N. Y. Leg. Obs.* 225.

25. That declarations of a president of a bank, in relation to past transactions, are not admissible to charge the bank,—see *Lime Rock Bank v. Hewitt*, 52 *Me.* 581; *Sterling v. Marietta Co.* 11 *Serg. & R.* 179.

26. Compensation. The general rule is, that presidents are not entitled to recover compensation for their official services, if there was neither a special contract nor some vote of the corporation or its directors providing for its payment. In the absence of such provision, the presumption is that the service is gratuitous. The fact that he informally stated to some of the directors that he should expect compensation, without any response from them does not alter the case. And this presumption that the services were gratuitous is especially applicable in the case of a corporation whose objects are partly charitable. *Mass. Supreme Ct.* 1863, *Sawyer v. Pawner's Bank*, 6 *Allen*, 207.

27. Where the charter of a bank provides that the president shall receive no pay for official services, unless it be voted to him by the board of directors, any service performed by him for the bank will be presumed to have been done by him as president, unless from its nature, or from the evidence, it appears that it was rendered outside of the

duties of his office. *R. I. Supreme Ct.* 1862, *Olney v. Chadsey*, 7 *R. I.* 224.

28. Where an incorporated insurance company passed a vote, fixing the salary of its president at a certain sum per annum, and another president was subsequently elected, who claimed the salary fixed by that vote, as standing upon the ground of a written or record agreement with him. *Held*, that the vote was only presumptive evidence of the amount of the president's salary, and that the presumption might be rebutted by proof that such was not the intention of the parties, but that when he was elected president, the active business of the corporation had been brought to a close, the services of a president had almost terminated, and that the purpose of his election was little more than to keep up a corporate organization. *Mass. Supreme Ct.* 1843, *Commonwealth Ins. Co. v. Crane*, 6 *Metc.* 64.

29. A vote fixing the compensation of president,—*Held*, under the circumstances, to amount to an agreement to pay for past as well as future services at that rate,—see *Rosborough v. Shasta River &c. Co.* 22 *Cal.* 556.

30. Liability for neglect of duty. Where the president of a railroad company, being informed that a suit was about to be brought against the company before a justice of the peace, instructed the most convenient station agent to attend the trial, and, in case of a recovery against the company, to appeal, and it appeared that such agent, though a diligent and faithful officer, failed, from ignorance of the law, to procure security for the appeal,—*Held*, that there was no such laches on the part of the president as deprived the company of a right to a *recordari*. *N. C. Supreme Ct.* 1860, *North Carolina R. R. Co. v. Vinson*, 8 *Jones, Law*, 119.

31. Where it was the duty of the president of a railroad company to take special charge of all the bonds of the officers, and to exercise general supervision of the accounts, &c., of the company, and he neglected to take the bond prescribed for the security of the company from the secretary,—*Held*, that he was liable for the defalcations of the secretary to the amount of the bond. *La. Supreme Ct.* 1837, *Pontchartrain R. R. Co. v. Paulding*, 11 *La.* 41.

32. — for wrong. The president of a corporation is not made liable to an action for

* The charter of an insurance company declared the president and one-third of the directors to be a quorum, competent to transact all business; and that all business might be conducted by committees, without the presence of a board. *Held*, that the president alone had no power to dispense with the preliminary proofs. *N. Y. Supreme Ct.* 1827, *Dawes v. North River Ins. Co.* 7 *Cow.* 462.

a personal injury, merely by transmitting an order of the corporation to a servant, who, in executing it, uses illegal force; but otherwise, if the order is issued by him on his own responsibility. *Mass. Supreme Ct. 1802, Hewett v. Swift, 8 Allen, 420.*

For rules applicable to the president in common with Other officers, see OFFICERS.

PRIVATE CORPORATIONS.

1. **Definition.** A corporation founded by private beneficence, though for objects of general welfare, such as the education of young men, is a private and not a public corporation. Public corporations are generally esteemed such as exist for public politic purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interest; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution. The uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person. *U. S. Supreme Ct. 1819, Dartmouth College v. Woodward, 4 Wheat. 518, 562. Followed, U. S. Circ. Ct. (Pa.) 1849, Rundle v. Delaware & Raritan Canal, 1 Wall. C. Ct. 275.*

2. That generally speaking, public corporations are towns, cities, counties, parishes, existing for public purposes; while private corporations are such as banks, insurance, roads, canals, bridges, &c., where the stock is owned by individuals; but their use may be public,—see *Bonaparte v. Camden & Amboy R. R. Co. Baldu. 205, 223.*

For Definition and examples of public corporations, see PUBLIC CORPORATIONS.

3. The distinction between public and private corporations—considered. *People v. Morris, 13 Wend. 325; Morey v. Town of Newfane, 8 Barb. (N. Y.) 645; City of Louisville v. Commonwealth, 1 Durr. 295; Rex v. Bishop of Ely, 2 Durnf. & E. 290; Bentley v. Bishop of Ely, Fort. 299.*

4. Railroad companies are deemed private corporations, and although performing many important public functions, and invested with prerogative franchises, to a certain extent, so far as the construction of their works is concerned, they do not possess the same immunity from liability to make compensation for private damage caused by the construction and operation of their works, as would be enjoyed by persons in the execution of a strictly public trust, for the public benefit. As these companies' works are constructed by private capital, for private emolument, the companies are held subject to the ordinary liability of private persons, for all such acts as are not expressly, or by necessary implication, conceded to them, on behalf of the sovereignty, by their charter powers. Public corporations are such only as are created for political purposes, to carry forward the functions of the State. Over such corporations the legislature have an unlimited control, to create, modify, or destroy, at pleasure. But the grant and acceptance of a private charter is a compact which the legislature cannot violate. The liability of the corporation for damages does not depend upon whether it is public or private, but whether the franchise is created for private emolument or exclusively for the public good. *N. J. Supreme Ct. 1857, Tinsman v. Belvidere & Delaware R. R. Co. 2 Dutch. 148.*

5. Railroad companies are not public corporations within the meaning of a statute providing that members of such corporations shall be competent witnesses in cases affecting the interests of such corporations. *N. H. Superior Ct. 1851, Dearborn v. Boston & Montreal R. R. Co. 4 Post. 179.*

6. Banks. If the stock of a banking corporation is owned by private individuals, the bank is a private corporation, although the public, by the legislature, exercise over it a supervisory power, and may annul its charter for cause. Nor is the character of such a corporation altered from the fact that the State or the United States own a portion of its stock. *Iowa Supreme Ct. 1848, Miners' Bank of Dubuque v. United States, 1 Greene, 553; S. P. United States Bank v. Planters' Bank, 9 Wheat. 904; Turnpike Co. v. Wallace, 8 Watts, 816.*

Compare LEGISLATION.

7. That colleges are in general, private and not public corporations, — see *Dartmouth*

College v. Woodward, 4 *Wheat.* 518; Allen v. McKeen, 1 *Sumn.* 276.

8. That an incorporated academy is a private corporation, although it may derive a part of its support from the government,—see *Cleveland v. Stewart*, 8 *Ga.* 288.

9. That a canal company is a private corporation; a corporation is not public because it may be for the public benefit,—see *Ten Eyck v. Delaware & Raritan Canal*, 8 *Harring.* 200.

PROPERTY.

[This chapter embraces the general doctrine of the power of a corporation to own property,—including the nature of the property it may hold,—the nature of its ownership and how far it may hold property out of the State of its creation,—or by right of adverse possession. Rules relative to property considered as an essential element of organization, are treated in their aspect which looks towards the sovereign power, under CAPITAL, and in that which looks towards the shareholders, under STOCK, except so far as they are peculiar to a particular species of corporations, in which case they are under its corporate title.]

1. **Nature of corporate title.** That real property, held for the purposes of a trading company, is, in equity to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern,—see *Bligh v. Brent*, 2 *You. & C. Exch.* 268; 6 *Law J. N. S. Exch. Eq.* 58.

2. A corporation cannot take an estate in joint tenancy, either jointly with another corporation or with a natural person. *S. C. Ct. of Appeals*, 1851, *Telfair v. Howe*, 8 *Rich. Eq.* 235.

3. **Interest of members.** The individual members of a corporation are not owners of the personal property vested in the corporation, nor is each of them owner of any part of it, nor are they joint owners of the whole, although they are each interested in the property, as they may derive individual benefit from its increase, or loss from its destruction. But the abstract entity, the corporation, is the owner and the only owner of the property.* *Q. B.* 1846, *Regina v. Arnaud*, 16 *Law J. N. S. Q. B.* 50. Compare *Townsend v. Ash*, 3 *Atk.*

* To this general rule some exceptions are recognized in England, chiefly in cases of trading corporations, established by statute, where the legislature having attempted

4. **The power to acquire property.** By the common law, corporations have a right to purchase and hold property, so far as may be necessary to carry into execution the objects of their creation.* *U. S. Circ. Ct. (Conn.)* 1848, *Blanchard's Gun-stock Turning Factory v. Warner*, 1 *Blatchf. C. Ct.* 258.

5. At common law a corporation has, unless restricted by its charter or by statute, the legal capacity to take a title in fee to real property; and in a State where no restrictions have been placed upon the exercise of this right by the adoption of statutes of mortmain, this power, incident to a corporation, is unlimited, except in cases where the corporation purchases and undertakes to hold real property for purposes foreign to the object of its creation. *Vt. Supreme Ct.* 1868, *Page v. Heineberg*, 40 *Vt.* 81.

6. Where a railroad company, authorized by charter to take and hold lands, either by proceedings *in invitum*, or by donation, acquired the title to certain real estate by warranty deeds, in the usual form, and subsequently, having changed the location of their road bed, abandoned the same for the purposes of the road. *Held*, that the land did not, by reason of such abandonment, revert to the original owner, but that the corporation acquired in the property an absolute fee. *Id.*

7. That corporations in Missouri have power to hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in the charter; and under this power, a corporation created for the purpose of mining and transportation of coal, &c., has the power to purchase and use a steamboat for the purposes of its business in transporting and delivering coal, &c.,—see *Callaway & Co. v. Clark*, 32 *Mo.* 305.

8. — for the corporate purposes. A corporation can purchase and hold lands only

to combine the characters of the copartnership and corporation, the corporation is deemed to have only the management of the property. See *Townsend v. Ash*, 3 *Atk.* 236; *Bligh v. Brett*, 2 *You. & C. Exch.* 265.

* A corporation was chartered in Massachusetts by the name of "Blanchard's Gun-stock Turning Factory," with all the powers and rights vested by law in manufacturing corporations in that State. *Held*, that the corporation had, on the face of its charter, independently of any act referred to therein, power to purchase Blanchard's patent "for turning irregular forms," and, among other things, gun-stocks, issued before the incorporation. *Blanchard's Gun-Stock Turning Factory v. Warner*, 1 *Blatchf. C. Ct.* 258.

for such purposes as are authorized in their charter.* The grant of corporate franchises, being restrictions of individual rights, will not be extended beyond the letter and spirit of the charter; yet it is not to be so strictly construed as to defeat the object of the grant; besides the powers expressly granted, such as are strictly incidental and necessary to the object of the grant, are implied. Thus, depots, car and engine houses, tanks, repairing shops, houses for bridges and switch-tenders, coal and wood yards, are necessary appendages to the operations of a railroad and transportation company, and their power to hold land for these purposes will be implied without an express grant in their charter; but lands for dwellings of employees, for car or locomotive factories, coal mines, and matters of that kind, are things of convenience, and not of necessity. *N. J. Supreme Ct. 1852, State v. Commissioners of Mansfield, 8 Zab. 510. Compare First Parish in Sutton v. Cole, 8 Pick. 232.*

9. A railroad corporation, authorized by charter to hold real estate necessary for the purpose of locating, constructing and repairing their road not exceeding one hundred feet in width, may purchase and hold land for the procurement of materials, or for the economical construction of the road. *Ohio Supreme Ct. 1846, Overmyer v. Williams, 15 Ohio, 26.*

10. Presumption in aid of title. A conveyance to a corporation authorized to receive conveyances of land for certain purposes will be presumed to have been received for some purpose within the powers of the corporation, unless an illegal purpose is made to appear. *N. Y. Ct. of Appeals, 1852, Farmers' Loan & Trust Company v. Curtis, 7 N. Y. (3 Seld.) 466; 1859, Chautauque Co. Bank v. Risley, 19 N. Y. 869; N. Y. Supreme Ct. 1827, Exp. Peru Iron Co. 7 Cow. 540.*

11. In an action brought by a corporation as owner of certain property which it had the right to acquire, the presumption of law is, that it was lawfully acquired, where the manner of its acquisition does not appear from the complaint. The defendant must aver and prove that it was obtained illegally,

if he bases his defense upon that ground. *Wis. Supreme Ct. 1863, Farmers' & Millers' Bank of Milwaukee v. Detroit & Milwaukee R. R. Co. 17 Wis. 372.*

12. Authority to take private property without consent of the owner is not given without express words or necessary implication; and if clearly given, is void, unless compensation is provided for. *Mass. Supreme Ct. 1836, Thatcher v. Dartmouth Bridge Co. 18 Pick. 501.*

13. The right to select and acquire land for the authorized purposes of a corporation is property. It is an incorporeal hereditament, not a legal title to the land itself, nor a mere capacity or a faculty to acquire land, such as every individual possesses, but a right or privilege to acquire the legal title to the land, subjected by the grant to the will of the corporation; and no corporation, after the previous grant of such right to another, can legally acquire any such right of way over, or title to, the land over which the franchise extends, as will hinder the latter corporation in the exercise and enjoyment of its franchise. *Md. Ct. of Appeals, 1832, Chesapeake Canal Co. v. Ohio R. R. Co. 4 Gill & J. 1.*

14. — to acquire real property. A corporation, although created but for a limited period, may acquire title in fee to lands necessary for its use. Hence, a deed to a railroad company which is incorporated for a term of fifty years, granting lands to it and its successors, conveys an estate in fee, if the grantor had such an estate. *N. Y. Ct. of Appeals, 1854, Nicoll v. N. Y. & Erie R. R. Co. 12 N. Y. (2 Kern.) 121. And see Rives v. Dudley, 8 Jones, Eq. 126.*

15. A corporation authorized to take and hold land for the purposes for which it was created may take a grant of lands in fee. Where such a corporation had taken a grant of lands in fee, and had conveyed the same in fee to individuals, and was afterwards dissolved by a statute limiting the duration of its charter,—*Held*, that the title of the grantees was not impaired by the dissolution. *N. Y. Supreme Ct. 1848, People v. Mauran, 5 Den. 889.*

16. In Maine, banks may receive real estate as security for a loan, or in payment of debts due. *Me. Supreme Ct. 1842, Thomaston Bank v. Stimpson, 21 Me. 195.*

17. — in another State. Whether a

* Whether property to which a corporation has the apparent legal title is necessary for the purposes of its incorporation, so that it has power to hold it, is a question to be raised by government alone, and not by a defendant in ejectment. *Natoma & Co. v. Clarkin, 14 Cal. 544.*

corporation created by the laws of one State can acquire and hold lands in another,—see *New York Dry Dock v. Hicks*, 5 *McLean*, 111; *Farmers' Loan & Trust Co. v. McKinney*, 6 *Id.* 1; *Lumbard v. Aldrich*, 8 *N. H.* 81; *Libbey v. Hodgdon*, 9 *Id.* 394; *State v. Boston &c. R. R. Co.* 25 *Vt.* 433; *Silver Lake Bank v. North*, 4 *Johns. Ch.* 370; *Lathrop v. Commercial Bank of Scioto*, 8 *Dana*, 119; *Bank of Washtenaw v. Montgomery*, 2 *Scamm.* 428; *Metropolitan Bank v. Godfrey*, 28 *Ill.* 579.

18. **Construction of power to purchase.** A power to purchase includes a power to take a mortgage or pledge. [2 *Ala.* 472.] *Miss. Ct. of Errors*, 1843, *Commercial Bank of Manchester v. Nolan*, 7 *How.* 508. And see *Deloach v. Real Estate Bank*, 18 *La.* 447.

19. A provision allowing a bank to hold such real property as should be purchased by it at sales upon judgments, decrees, and mortgages, obtained or made for debts due to it, does not authorize the bank to take an assignment of the right of a purchaser at a sheriff's sale of real property of a judgment debtor of a bank, where such sale was made on an execution on a senior judgment in favor of a third party, and the time for redemption from the sale had passed. *N. Y. Supreme Ct.* 1847, *Chautauque Co. Bank v. Risley*, 4 *Den.* 480.

20. **Distinction between the power to purchase and to hold.*** *Leasure v. Hillegas*, 7 *Serg. & R.* 813; *Runyan v. Coster*, 14 *Pet.* 132.

21. — **of prohibition upon purchasing.** There is a broad distinction between a pro-

* Where a bank was chartered with power to have, hold, purchase, and retain lands, &c., and to sell them, provided that such lands, which the said corporation are hereby enabled to purchase and hold, shall extend only to lots, &c., necessary for the business of the bank, and to such as are bona fide mortgaged to them as securities for their debts;—

Held, 1. The bank might take a conveyance of land in a distant county in payment of a debt. A corporation has from its nature the power to purchase land, though the charter contains no license to do so, and a restriction against purchasing and holding is not equivalent to one against purchasing. And (by the English statutes of mortmain, in force in Pennsylvania) conveyances to corporations to uses not superstitious, are not absolutely void, but only void so far as to enable the commonwealth to appropriate the estate.

2. That, until the commonwealth interposed, the corporation could convey the land, but that the purchaser would take the same defeasible estate. Meanwhile, as against third persons such conveyances are valid. *Pa. Supreme Ct.* 1894, *Baird v. Bank of Washington*, 11 *Serg. & R.* 411. Compare *Bank of Michigan v. Niles*, 1 *Doug. (Mich.)* 401; *Martin v. Branch Bank at Decatur*, 15 *Ala. N. & S.* 587.

hibition in a charter of a corporation to purchase or take, and a prohibition to hold; and where an act incorporating a bank made it capable to have, hold, purchase, receive, possess, enjoy, and retain lands, rents, tenements, goods, chattels, and effects of whatever kind, nature, or quality, to the amount of two millions of dollars, and no more; provided, nevertheless, that such lands and tenements, which the said corporation were enabled to purchase and hold, should only extend to such lot and lots of ground, and convenient buildings and improvements thereon erected, or to be erected, as they should find necessary and proper for carrying on the business of the said bank, and should actually occupy for that purpose.—*Held*, that the bank might purchase, absolutely, lands in a distant country which they did not occupy, though they, or the third person to whom they might convey, would hold them by a title defeasible by the commonwealth and the commonwealth alone, as is the case with the title of aliens. *Pu. Supreme Ct.* 1821, *Leasure v. Hillegas*, 7 *Serg. & R.* 813. See also *Baird v. Bank of Washington*, 11 *Id.* 411; *Goundie v. Northampton Water Co.* 7 *Pa. St.* 233.

22. That if a corporation is forbidden by its charter to purchase or take lands, a deed made to it would be void; as its capacity may be determined from the instrument which gives it existence,—see *Leasure v. Hillegas*, 7 *Serg. & R.* 813.

23. A prohibition on purchasing or dealing in land does not necessarily forbid taking a mortgage to secure a debt. *Wis. Supreme Ct.* 1860, *Blunt v. Walker*, 11 *Wis.* 324.

24. A purchase of a note is not a violation of a statute of the provision of 1 *Rev. Stat.* 600, forbidding a corporation to buy bills of exchange. *N. Y. Supreme Ct.* 1843, *American Life Ins. & Trust Co. v. Dobbin*, *Hill & D. Supp.* 252.

25. **Power to hire.** A power to acquire property by gift, purchase, or otherwise, allows the corporation to take leasehold property. And a power to hire buildings, authorizes the usual covenants to repair. *Miss. Ct. of Errors*, 1858, *Abby v. Billups*, 35 *Miss.* 618.

26. **Power to subscribe to stock.** Power "to do a general insurance agency, commission, and brokerage business, and such other things as are incidental to, and necessary in, the management of that business," does not give power to subscribe to the stock of a sav-

ings bank and building association; and such a subscription if made by the directors is not binding on the corporation. *Conn. Supreme Ct.* 1855, *Mechanics' &c. Savings Bank v. Meriden Agency Co.* 24 *Conn.* 159. And see *Sumner v. Marcy*, 8 *Woodb. & M.* 105.

27. It is not objectionable for directors to take stock in another company in payment of property sold and as the means of selling it, if taken with a view to sell again. *Aliter*, with the intent permanently to hold it. *R. I. Supreme Ct.* 1853, *Hodges v. New England Screw Co.* 8 *R. I.* 9. Compare *Dobinson v. Hawks*, 10 *Sim.* 407; 12 *Jur.* 1037.

For the power of a corporation to own shares in its own stock, see *Stock*.

For the power of one corporation to subscribe for stock in another, see *SUBSCRIPTION*.

28. That power to invest in personal securities embraces power to purchase a bill of exchange,—see *Gee v. Alabama Life Ins. & Trust Co.* 13 *Ala. N. S.* 579.

29. Power to accumulate. A corporation has a right to accumulate its profits. *N. Y. V. A. Chan. Ct.* 1844, *Barry v. Merchants' Exchange Co.* 1 *Sandf. Ch.* 280.

30. Where the charter authorized the corporation to divide the profits among its stockholders at such times as might be deemed expedient. *Held*, that this did not compel the division of the profits, nor prevent their accumulation, and that such accumulation might legally be invested in a building for the purposes of the corporation, so as to be incapable of distribution as a dividend. *Id.*

31. The accidental increase in the income of a corporation, derived from its vested estates, to a point beyond what its charter prescribes, cannot have the effect to divest its title in any portion of such estates. *N. Y. V. Chan. Ct.* 1847, *Bogardus v. Trinity Church*, 4 *Sandf. Ch.* 633, 758.

32. Power to mortgage. That power to mortgage the property of a corporation for a particular purpose—*e. g.* to raise funds to complete specified improvements,—will not authorize it to mortgage for different purposes, or to apply the funds raised by the mortgage to other purposes,—see *Trevilian v. Mayor of Exeter*, 27 *Eng. L. & Eq.* 578.

Same principle declared respecting the implied power of a bank to borrow and pledge its property, for purposes of its business, *Leavitt v. Yates*, 4 *Edw.* 184.

33. A statute which forbids corporations to mortgage their real estate, or to give any lien thereon, does not preclude a lien from arising in favor of a vendor of land to such a corporation, for which they do not pay. The vendor's lien is not given by the purchaser, but is created by operation of law. *N. Y. Supreme Ct.* 1863, *Dubois v. Hull*, 43 *Barb.* 26.

34. Mortgage. An authority conferred upon a plank road company to "mortgage the road or other property," permits a mortgage of the franchise of receiving tolls; but not the mortgage of any franchise essentially corporate in its nature, and not enjoyable by a natural person. *Mich. Supreme Ct.* 1863, *Joy v. Jackson &c. Plank Road Co.* 11 *Mich.* 155. See *MORTGAGE*.

35. Authority to mortgage a part only of the road is likewise implied, provided it be divisible, so that separate tolls may be taken on the separate parts. *Id.*

36. A power given by statute "to pledge the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof," authorizes a mortgage of the road itself and of the franchise or right to operate the road. It also necessarily authorizes a transfer of rolling-stock and equipments afterwards to be acquired, as this is necessary to the security which a mortgage of the right to operate the road is intended to afford. *Ohio Supreme Ct.* 1859, *Roe v. Columbus &c. R. R. Co.* 10 *Ohio St.* 372.

37. — to pledge. A bank has an implied power to secure its loans in any manner not prohibited by the charter or any statute. [2 *Ala.* 472]. *Miss. Ct. of Errors*, 1843, *Commercial Bank of Manchester v. Nolan*, 7 *How.* 508.

38. Power to dispose of property generally. That the real property of a corporation can be dealt with only by the judicial authority of the State in which such property lies, even though the corporation is created by the concurrent acts of several governments,—see *Binney's case*, 2 *Bland*, 99, 142.

39. That if there is no restriction in the charter, the corporation may dispose of any property which it has a right to acquire,—see *Town Council of Newark v. Elliott*, 5 *Ohio St.* 118; *Barry v. Merchants' Exchange Co.* 1 *Sandf. Ch.* 280.

40. A corporation authorized to dispose of its property may in general dispose of any

interest in the same it may deem expedient, having the same power in this respect as an individual. *Ohio Supreme Ct.* 1831, *Reynolds v. Commissioners of Stark County*, 5 *Ohio*, 204.

41. *It seems* that an absolute sale, in good faith, for a valuable consideration, by an insolvent corporation, is not void, when no contingent interest remains in the grantor. *Buell v. Buckingham*, 16 *Iowa*, 284. Compare ASSIGNMENTS.

42. **Presumption in aid of disposition.** Where a corporation is authorized under certain circumstances to hold and convey real property, it will be presumed, in the absence of proof to the contrary, that real property conveyed by it was held and conveyed in pursuance of its powers. *N. Y. Ct. of Appeals*, 1852, *Farmers' Loan & Trust Co. v. Curtis*, 7 *N. Y.* (3 *Seld.*) 466.

43. **Power to purchase implies power to sell.** Where authority to purchase real estate is conferred on a moneyed corporation, if the purpose to which it is to be appropriated is not particularly specified, and all other dispositions of it are prohibited, the power to sell and convey it is necessarily implied; and a general authority to sell and convey includes the authority to mortgage. *N. Y. Supreme Ct.* 1830, *Jackson v. Brown*, 5 *Wend.* 590.

44. A provision in a railroad charter that the corporation and their successors shall be capable of purchasing, holding, and conveying, any lands, tenements, goods, and chattels, whatever, necessary and expedient to the objects of this incorporation, only authorizes property to be sold or conveyed when it is necessary or expedient for the objects of the incorporation, and does not allow that the source from which the corporation derives its income should be sold and conveyed. *N. J. Chancery*, 1858, *Kean v. Johnson*, 1 *Stockt.* 401.

45. **Power to dispose of real property.** A corporation which has authority to make contracts, acquire and transfer property, can make a valid sale of real estate belonging to it. *Iowa Supreme Ct.* 1864, *Buell v. Buckingham*, 16 *Iowa*, 284.

46. When land is vested in a corporation, *e. g.* county commissioners for general corporate purposes, there is no restraint upon the power of alienation. *Ohio Supreme Ct.* 1831,

Reynolds v. Commissioners of Stark County, 5 *Ohio (Ham.)* 204.

47. — **of chattel property.** That a corporation has power to maintain a retail store to supply goods to its servants,—see *Dauchy v. Brown*, 24 *Vt.* 197.

48. The implied power of a corporation to sell a store and stock of goods, includes the power to bind themselves by conditions, *e. g.* to refund a part of the price in case of a diversion of the custom. *N. Y. Ct. of Appeals*, 1860, *De Groff v. American Linen Thread Co.* 21 *N. Y.* 124.

49. **Power to sell bonds at a discount,** conferred on a railroad company,—*Held*, to render valid bonds exchanged for property necessary for the road, and a mortgage made to secure bonds sold at a discount or so exchanged. *Ohio Supreme Ct.* 1859, *Coe v. Columbus & C. R. Co.* 10 *Ohio St.* 372.

Compare CONTRACTS.

50. — **stock.** That a corporation which has power to take its own stock in payment of debts may sell it again and take notes for the price, under the general power of the directors to manage the business,—see *State Bank v. Fox*, 3 *Blatchf. C. Ct. R.* 431.

51. That a power given to a municipal corporation to sell stock subscribed for by them at par, authorizes a sale on credit, and it may be a sale in consideration of the purchaser assuming to pay the subscription and interest,—see *Newark Town Council v. Elliott*, 5 *Ohio St.* 113.

52. **Power to transfer promissory notes** is not a necessary incident to the power given all incorporations to loan on notes, to buy and sell exchange, and to issue bills. *Miss. Ct. of Errors*, 1858, *McIntyre v. Ingraham*, 35 *Miss.* 25. To similar effect, *Mo. Supreme Ct.* 1829, *Hamtramch v. Bank of Edwardsville*, 2 *Mo.* 169.

53. **Use of corporate property.** Although companies are not to abuse their powers, yet, within the extent of those powers, and in the absence of any express prohibition, they may do with the land acquired for the purposes of the act as any other proprietor, could do; always admitting that it is not to be applied to any work foreign to the work itself. Thus a power granted to trustees for improving the navigation of a river, to erect wharfs for the convenience of trade, implies the power to erect sheds thereon, although such buildings interfere between the river and the re-

maining land of riparian owners. *Ho. of L.* 1855, *Wright v. Scott*, 84 *Eng. L. & Eq.* 1.

54. The maxim, *Sic utere tuo ut alienum non laedas*, *Held* to apply to persons acting under inclosure acts, and other acts of parliament of a similar nature. *V. Chan. Ct.* 1845, *Dawson v. Paver*, 4 *Eng. Railw. Cas.* 81.

55. That a bridge company may continue liable for injuries sustained through the use of their bridge in the hands of a railroad company, to whom they have leased it,—see *Peoria Bridge Association v. Loomis*, 20 *Ill.* 235.

56. Effect of non-user. Corporate property cannot be lost by non-user alone.* [6 *Cow.* 23; 1 *Hall*, 97.] *Ohio Supreme Ct.* 1838, *Webb v. Moler*, 8 *Ohio (Ham.)* 548.

57. Misapplication. Moneys authorized by statute to be raised for a specific purpose, cannot, either by the company, or by consent of a majority, or even of all the shareholders, be diverted to another purpose. *Chancery*, 1850, *Bagshaw v. Eastern Union Railway Co.* 2 *Hall & T.* 201; 3 *Macn. & G.* 889; 19 *Law J. N. S.* 410; 6 *Eng. Railw. Cas.* 169.

58. A resolution, passed by a majority of the members of a corporation, authorizing the donation of its property to a new corporation, of which the members so voting are corporators, is unauthorized, and a donation made in pursuance of it will be void. *La. Supreme Ct.* 1861, *Polar Star Lodge No. 1 v. Polar Star Lodge No. 1*, 16 *La. Ann.* 58.

59. To constitute an illegal application of the funds or money of a corporation, and to give equity jurisdiction of the wrong, it is not necessary that there should be shown any intentional wrong or actual fraud, wilful fraud or collusion on the part of the company, or its directors. Thus, where the funds of a railroad company that had been united with another under a lease, which should have been divided among the stockholders, were applied to a purpose not warranted by and not within the scope of the charter or fundamental articles of agreement, *Held*, that there was sufficient illegality to give jurisdiction to a court of equity to prevent such illegal application of the funds or profits by injunction

* The right of a county or town to property dedicated to public uses therein may be barred by the statute of limitations, or lost by lapse of time; and so may the right of the dedicators to enforce a specific execution of the purposes of the dedication. *Ohio Supreme Ct.* 1853, *Williams v. First Presbyterian Soc.* in Cincinnati, 1 *Ohio St.* 478.

and to relieve against it when committed, at the suit of such stockholders as had not assented to the agreement. *N. H. Supreme Ct.* 1862, *March v. Eastern R. R. Co.* 48 *N. H.* 515.

60. The dissolution of a corporation does not affect its grant in fee of land under water, patented to it and its assigns in fee. Even if the title of the corporation was defeasible as against the State, the grantees will continue to hold until office found. *N. Y. Supreme Ct.* 1848, *People v. Mauran*, 5 *Den.* 889.

PROPRIETARY COMPANIES.

[In the early settlements of several of the New England States, it was common for grants of large tracts of land to be made to companies of proprietors in a body, who resolved themselves into a species of corporation, held meetings, kept records, parted their lands among themselves or disposed of them to strangers, &c., and were known as proprietary companies.

The adjudications upon the organization of these companies and the conduct of their business are now, as respects most points, of but limited general interest.* We give a selection of such adjudications as bear upon the validity of titles derived from such companies. Other decisions, likely to be useful, as illustrating, by their analogy, the law applicable to other kinds of corporations are placed under the general heads or titles to which they respectively relate.]

1. Their peculiarities. Proprietary companies distinguished from other classes of corporations. Proprietors of Monumoi Great Beach *v. Rogers*, 1 *Mass.* 159.

2. Their powers. In Vermont, proprietors of common and undivided lands are by statute made a corporation for particular and limited purposes, and they must regulate their proceedings conformably to the provisions of the statute. Such proprietors cannot vote to commence suits, nor appoint an agent to commence and prosecute suits, except at a meeting legally warned for that purpose. *Vt. Supreme Ct.* 1884, *Woodbridge v. Proprietors of Addison*, 6 *Vt.* 204.

3. But votes of proprietors, which were not legal when passed, may become so by the acquiescence of the proprietors in the vote; and if they acquiesce in the doings of an agent not regularly appointed, receive the benefit of suits brought by him, knowing that they were prosecuted for their com-

* For a more extended account of this species of corporations, see *Angell & Ames on Corporations*, chap. IV.

mon benefit, and take no measures to show their dissent to his proceedings, they so far ratify his doings that they will be as binding on them as if he had been lawfully appointed. *Id.* See also *Abbott v. Mills*, 8 *Vt.* 521.

4. Power to levy a tax. A charter incorporating the proprietors of lands, and enabling them to purchase and extinguish the Indian title, to survey and make partition, and to levy taxes thereon to defray the expenses of so doing, "and all other necessary expenses of said company,"—with a further provision that "the directors shall have power to do whatever to them shall appear necessary and proper to be done for the well ordering and interest of the proprietors, not contrary to the laws of the State,"—does not authorize the corporation to tax the lands for the purpose of paying a State tax laid thereon. The words "all necessary expenses of the company" cannot be so construed as to enlarge the power to tax, which is given for specific purposes. A tax to the State is not a necessary expense of the company, within the meaning of the act. Such an expense can only result from the action of the company in the exercise of its corporate powers. And the provision, that the "directors shall have power to do whatever shall appear to them to be necessary and proper to be done for the well ordering of the interests of the proprietors, not contrary to the laws of the State," is not intended to give unlimited power, but the exercise of a discretion within the scope of the authority conferred. *U. S. Supreme Ct.* 1830, *Beatty v. Knowler*, 4 *Pet.* 152.

Compare MUNICIPAL CORPORATIONS.

5. — to sell lands for non-payment. Proprietors of a township of lands have power to sell the undivided rights of individual proprietors for the payment of taxes laid by the proprietary, but not lots holden in severalty by the assignees of individual proprietors. *Mass. Supreme Ct.* 1814, *Bott v. Perley*, 11 *Mass.* 175.

6. — to convey lands. Under authority conferred by colonial legislatures to proprietors of common and undivided lands, to manage and dispose of their estates, is included, according to the practical construction, power to sell any portion of them to strangers; and it appearing that large estates were held under such sales, the court

refused to make a different construction. *Mass. Supreme Ct.* 1807, *Rogers v. Goodwin*, 2 *Mass.* 475.

7. Proprietary companies being corporations, a deed by members conveying their interest merely makes the grantee a member; and, until partition, the title can only be enforced by the proprietary in their corporate name. *N. H. Superior Ct.* 1840, *Atkinson v. Bemis*, 11 *N. H.* 44.

8. — by vote. A vote, alone, of proprietors of common lands, if it definitely describes a lot as sold or set off by the proprietors to an individual, may operate as a conveyance. *Mass. Supreme Ct.* 1838, *Williams v. Ingell*, 21 *Pick.* 288; 1840, *Williams v. Ingell*, 2 *Metc.* 83. And see *Codman v. Winslow*, 10 *Mass.* 146; *Baker v. Fales*, 16 *Mass.* 497; *Adams v. Frothingham*, 3 *Mass.* 360; *Springfield v. Miller*, 13 *Mass.* 415; *Folger v. Mitchell*, 3 *Pick.* 396; *Green v. Putnam*, 8 *Cush.* 24; *Thorndike v. Barrett*, 8 *Me.* (3 *Greenl.*) 430; *Thorndike v. Richards*, 13 *Me.* 430; *Kidder v. Blaisdell*, 45 *Me.* 461; *Abbott v. Mills*, 8 *Vt.* 280; *Woodbridge v. Proprietors of Addison*, 6 *Vt.* 206; *Pike v. Dyke*, 2 *Me.* (2 *Greenl.*) 213; *Stiles v. Curtis*, 4 *Day*, 328.

9. In New Hampshire, proprietors of common and undivided lands have, from very early times, made partition by vote without deed, and, in some cases, have conveyed their lands in the same way; and these partitions and conveyances are now held to be valid.* *N. H. Superior Ct.* 1827, *Coburn v. Ellenwood*, 4 *N. H.* 99; 1840, *Atkinson v. Bemis*, 11 *Id.* 44.

10. A grant of land, made by a vote of the proprietors of common land, cannot be rescinded by a subsequent vote, even at an adjournment of the meeting at which such vote was passed.† *Mass. Supreme Ct.* 1822. In-

* Where, however, proprietors of a town, at a proprietors' meeting, make a division of the town into severalty, by voting certain lots to the persons claiming the different rights, in lieu of their drafts, such votes are not even *prima facie* evidence of title to such lots. The law does not authorize the proprietors to decide a question of title. *Vt. Supreme Ct.* 1824, *Smith v. Meacham*, 1 *D. Chap.* 434.

† Where the proprietors of common land, after having laid out a parcel of land to one of their number, voted that the location should be void, and that his heirs should take a new survey, and laid out the same land to another,—*Held*, it appearing that the heirs of the former had never entered, that a stranger could not contest the validity of this rescission and relay. *Mass. Supreme Ct.* 1823, *Davis v. Mason*, 4 *Pick.* 156.

habitants of Rehoboth *v.* Hunt, 1 *Pick.* 224; *Me. Supreme Ct.* 1823; Pike *v.* Dyke, 2 *Me.* (2 *Greenl.*) 218.

11. Where proprietors voted that "the income" of a piece of their land should be devoted to the support of a school in the town where it lay, the land to be leased from time to time forever by the selectmen of the town,—*Held*, that this was a grant, and that the proprietors could not rescind their vote. *Mass. Supreme Ct.* 1822, Inhabitants of Rehoboth *v.* Hunt, 1 *Pick.* 224.

12. A vote of the proprietors of common land granting merely "the herbage or feeding of land" to the use of a town does not pass the soil, so that the grantee can maintain a writ of entry against the grantor, or those claiming under a subsequent grant of the soil. *Id.*

13. Where proprietor of common land voted, that "at the request of A. B. is granted to the right of C. D. half an acre in the ten acre division," and it appeared from the proprietors' book of locations that no location had been made to A. B., and no occupancy or possession was shown in aid of his claim,—*Held*, that he could take no benefit from this vote without proof that he derived some title from C. D. *Mass. Supreme Ct.* 1888, Williams *v.* Ingell, 21 *Pick.* 288.

14. A vote of proprietors merely authorizing the clerk to convey is not, however, a conveyance by vote, but, in order to be effectual, must be followed up by a proper deed. *N. H. Superior Ct.* 1827, Coburn *v.* Ellenwood, 4 *N. H.* 99; *Me. Supreme Ct.* 1836, Thorndike *v.* Richards, 18 *Me.* (1 *Shepl.*) 430.

15. Petitions. That a division of common lands among the proprietors, although informal, may be sustained if it has been acquiesced in for fifteen years,—see Booth *v.* Adams, 11 *Vt.* 156.

16. When the records of proprietary meetings are competent evidence of the property of the proprietors,—see Goulding *v.* Clark, 34 *N. H.* 148.

17. A copy of the vote of proprietary companies making partition of lands taken from their records is presumptive evidence of title against the proprietors, and against any one who enters, as a mere trespasser, claiming no title. *N. H. Superior Ct.* 1840, Atkinson *v.* Bemis, 11 *N. H.* 44. See RECORDS.

PUBLIC CORPORATIONS.

1. Definition. Public corporations are such as are created for political purposes, with powers to be exercised for the public good. Corporations are not public because their object is of a public character. *N. J. Supreme Ct.* 1857, Tinsman *v.* Belvidere Delaware R. R. Co. 2 *Dutch.* 148. .

See MUNICIPAL CORPORATIONS.

For definition of Private Corporations, and for cases upon the Distinction between private and public corporations, see PRIVATE CORPORATIONS.

2. That corporations founded for public, though not for political or municipal purposes, the whole interest in which belongs to the government, are deemed public corporations; but if there are other and private owners of stock in them, they are private,—see Dartmouth College *v.* Woodward, 4 *Wheat.* 668.

3. That the mere fact that the government creating a corporation is the proprietor of all the capital stock, does not, if none of the incidents of sovereignty are conferred upon it, render it a public corporation,—see Bank of Alabama *v.* Gibson, 6 *Ala. N. S.* 814; State Bank *v.* Gibbs, 3 *McCord.* 377; Mahoney *v.* Bank of Arkansas, 4 *Ark.* 620; State Bank *v.* Clark, 1 *Hawks.* 86.

4. A turnpike company, in which the State held stock,—*Held*, in Pennsylvania, not to be such a public corporation as was exempt from the operation of a legislative act giving jurisdiction to the courts, upon the application of a creditor, to sequester the profits and tolls of a corporation for the payment of its debts. *Pa. Supreme Ct.* 1839, Turnpike Co. *v.* Wallace, 8 *Watts.* 316.

5. That where a corporation is composed exclusively of officers of the government, they having no personal interest in it or its concerns, and only acting as the organs of the State in effecting a great public improvement, it is a public corporation,—see Sayre *v.* Northwestern Turnpike Co. 10 *Leigh.* 454.

6. The University of North Carolina is a public institution and body politic, and, therefore, subject to the legislative control. It was not only originally the creature of the legislature, but it is absolutely dependent upon the legislative will for its continuing existence. The fact that private donations have been made to the university does not alter the nature of the foundation nor the

character of the corporation. *N. C. Supreme Ct.* 1852, *University of North Carolina v. Maulsby*, 8 *Ired. Eq.* 257.

8. P. of the University of Alabama, *Ala. Supreme Ct.* 1833, *Trustees of University of Alabama v. Winston*, 5 *Stew. & Par.* 17.

7. Trustees of public schools are public corporations, to be controlled and regulated by the legislature. [3 *Scam.* 585.] *Ill. Supreme Ct.* 1843, *Bush v. Shipman*, 4 *Scam.* 186; 1851, *Trustees of Schools v. Tatman*, 13 *Ill.* 27. But compare *State v. Springfield Township*, 6 *Ind.* 88.

8. A county is a public corporation, whose object, like all corporations, is the public good, which is created by the mere will of the legislature, and in this regard it differs from private corporations, where the legislature and parties interested contract for certain privileges on performing certain acts for the public good. Counties may be divided and their boundaries changed at the pleasure of the legislature, whereas private corporations cannot be altered but by consent of both parties. *N. C. Supreme Ct.* 1850, *Mills v. Williams*, 11 *Ired. Law*, 558.

See COUNTIES.

PROXY.

1. The right of voting by proxy is not a general right of corporators, and the party who claims it must show a special authority. *N. Y. Chancery*, 1829, *Philips v. Wickham*, 1 *Paige*, 590. And see *Brown v. Commonwealth*, 3 *Grant, Cas.* 209.

2. It is a principle of the common law, that where an election depends upon the exercise of judgment and discretion, the right cannot be deputed; and legislative sanction is necessary before any corporate body can make a by-law authorizing members to vote by proxy. *N. J. Supreme Ct.* 1884, *Taylor v. Griswold*, 2 *Green*, 222.

3. A bridge corporation has not, incidentally, nor by virtue of a general clause in its charter authorizing it to make proper by-laws not repugnant to the charter or general laws of the State, power to make a by-law conferring the right of voting by proxy; nor one imposing, as a test or qualification for office or admission, the ownership of a certain number of shares; nor one giving a vote

for every share of the stock, where the charter does not either by express terms, or reasonable implication, confer such right. *N. J. Supreme Ct.* 1824, *Taylor v. Griswold*, 2 *Green*, 222.

4. A corporation whose object is to acquire property may legally make a by-law authorizing the stockholders to vote by proxy at their meetings. Incorporated societies for the acquisition of property stand on a very different ground as to this question from those of every other kind. In corporations instituted for the public good of the State, a town or society, every vote must be given in person, but from the nature of a moneyed institution, the mere owning of shares in the stock of the corporation seems, of course, to give a right of voting. *Conn. Supreme Ct.* 1812, *State v. Tudor*, 5 *Day*, 829.

5. Under a by-law of a corporation which provided that at all future meetings of the company the vote should be determined by the majority of the shares which each vote should represent, either as his own property or as attorney for other persons,—*Held*, that the stockholders were entitled to vote by proxy. *Conn. Supreme Ct.* 1812, *State v. Tudor*, 5 *Day*, 829.

6. Interpretation. A proxy given by a member of a corporation for voting in the ordinary concerns of the corporation is no authority to vote for a fundamental change in, or surrender of, the charter of the corporation. *S. C. Chancery*, 1813, *Smith v. Smith*, 3 *Desaus.* 557.

7. Revocation. A stockholder may revoke his proxy, authorizing another to vote, though it was given for value, if necessary to prevent a fraudulent use of it. *N. Y. Chancery*, 1837, *Reed v. Bank of Newburgh*, 6 *Paige*, 337.

QUASI CORPORATIONS.

1. What are, generally. That persons may have corporate powers, *sub modo*, or for certain specific purposes only—*e. g.* loan officers, supervisors, &c.—see *Denton v. Jackson*, 2 *Johns. Ch.* 820; *Jackson v. Hartwell*, 8 *Johns.* 422.

See also INCORPORATION.

2. A public official body charged with the administration of the ministerial and financial duties of a county, such as highways,

the poor, and the taxes, and having capacity to make contracts in reference to such matters, and raise money therefore, and having perpetual succession, if not a corporation in the full sense of the term, is a *quasi* corporation, and can sue and be sued in regard to any matter in which, by law, it has rights to be enforced, or is under obligations which it refuses to fulfil. *U. S. Supreme Ct.* 1864, *Levy Court v. Coroner*, 2 *Wall.* 501.

3. The governor of a State, as the head of the executive department, is also a *quasi* corporation sole, and bonds made payable to him which are appropriate to the execution of the laws may be sued in his name for the benefit of those interested. *Tenn. Supreme Ct.* 1847, *Governor v. Allen*, 8 *Humph.* 176.

4. County superintendents of the poor are a corporation, and should sue in the corporate name, and not in their individual names, with the addition of their official description; but an error in this respect is amendable. *N. Y. Chancery*, 1840, *Pomeroy v. Wells*, 8 *Paige*, 406.

5. Though county superintendents of the poor are a corporation, and may sue in their corporate name; they may also sue in their individual names, with the addition of their name of office, for any injuries done to the property or rights of such officers, or of the bodies represented by them. [Rev. Stat. 473, art. 4.] *N. Y. Supreme Ct.* 1846, *Van Keuren v. Johnston*, 3 *Den.* 183.

6. The commissioners of a county are, in Pennsylvania, *quasi* a corporation for the purpose of suing and being sued; and, being the public agents for the county with respect to all money concerns, have power to take and hold lands for the use of the county. *Pa. Supreme Ct.* 1827, *Van Kirk v. Clark*, 16 *Serg. & R.* 286. And see *Irwin v. Commissioners of Northumberland*, 1 *Serg. & R.* 505; *Lyon v. Adams*, 4 *Id.* 443.

7. That in Ohio, county commissioners are a continuing corporation for special purposes; and the election of new ones does not change the party to a contract or suit,—see *Commissioners v. Gherky*, *Wright*, 493.

8. Commissioners of Roads in South Carolina deemed *quasi* corporations,—see *Commissioners of Roads v. McPherson*, 1 *Spear*, 218.

9. Board of annual officers. Under the charter of the city of Rochester,—*Held*, that

the Board of Education of that city is a corporation, yet only to a qualified extent. It is a corporation only for public purposes, and for the discharge of trusts purely of a public nature. It has continuity, although the commissioners who exercise its powers are changed annually; yet each separate board of commissioners should exercise its power like other public officers elected annually, and each board cannot bind its successors by continuing contracts. *N. Y. Supreme Ct.* 1860, *People v. Lathrop*, 19 *How. Pr.* 358.

10. Their liability. No action lies at common law against a town for damages sustained through defect of the highway in such town; but *quasi* corporations, created by the legislature for the purposes of public policy, are subject by the common law to an indictment for the neglect of duties enjoined on them, but are not liable to an action for such neglect, unless the action be given by some statute. *Mass. Supreme Ct.* 1812, *Mower v. Inhabitants of Leicester*, 9 *Mass.* 247.

11. An action of trespass on the case will lie against a corporation aggregate for neglect of a corporate duty by which injury is inflicted upon the plaintiff. A distinction exists between aggregate corporations, properly so called, and the inhabitants of any district who are by statute invested with particular powers without their consent, such as *quasi* corporations. Although the latter are liable to information or indictment for a neglect of a public duty imposed on them by law, yet no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute, for, without a corporate fund and the means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation, and this burden the common law will not impose but in cases where the statute is an authority, to which every man must be considered as assenting. But in regular corporations which have, or are supposed to have, a corporate fund, this reason does not apply. *Mass. Supreme Ct.* 1810, *Riddle v. Merrimack River Locks &c.* 7 *Mass.* 169.

12. That supervisors cannot be sued without express statutory provision,—see *Hastings v. City &c. of San Francisco*, 18 *Cal.* 49.

As to What bodies are or are not corporations, see INCORPORATION, 32-44.

QUORUM.

1. **Of indefinite body.** To constitute a valid corporate meeting, whose acts and resolutions shall be binding upon the corporation, the presence of a majority of all the corporators is not essential. Where the corporators are indefinite, such of them as assemble pursuant to a regular call for a meeting will constitute a quorum for the transaction of business, and a majority of such body have power to pass resolutions which will bind the corporate body itself. *So held*, in a case of an incorporated religious society. *N. Y. Superior Ct. 1867, Madison Avenue Baptist Church v. Baptist Church in Oliver Street, 5 Robert. 649.*

2. The fact that some persons were present at such meeting who were not members of the corporation will not vitiate the proceedings, unless it appears that the votes of such persons were received and influenced the passage of the resolutions complained of. *Id.*

3. **Of select body.** The general rule is, that to constitute a quorum of a select and definite body of men possessing the power to elect, a majority at least must be present, and then a majority of the quorum may decide. Thus, where the charter fixed the number of directors, and declared that the affairs of the company should be conducted by them, and that a majority present at a regular meeting should be competent to decide on all business,—*Held*, that this did not amount to declaring that a minority, however small, might act as a board. *N. Y. Supreme Ct. 1827, Exp. Willcocks, 7 Cow. 402.*

See MEETINGS; POWERS.

4. Where the commissioners for building and enlarging churches in England, appointed, pursuant to statute, twenty-six persons to be a select vestry for the care and management of a church,—*Held*, that in order to constitute a good assembly of the select vestry so appointed there must be present a majority (namely, fourteen,) of the members named in the appointment; and, therefore, that a rate for the repair of the church, made at a meeting where there were not so many, was illegal. *K. B. 1829, Blacket v. Blizard, 9 Barn. & C. 851.*

5. Under special charter provisions. Although the charter of a corporation declares that its powers shall be exercised by a board of directors consisting of a specified

number, the board may, under their power to make by-laws, delegate their authority to a quorum composed of less than a majority of the number. *N. Y. Ct. of Appeals, 1859, Hoyt v. Thompson, 19 N. Y. 207.*

6. Where the charter of a bank requires seven directors to make a quorum, and declares the president to be entitled to all the powers and privileges of a director, the president and six directors constitute a sufficient board to satisfy the requisitions of the charter. *Md. Ct. of Appeals, 1886, Bank of Maryland v. Ruff, 7 Gill & J. 448.*

7. An original charter granted by the State of Connecticut required four directors to constitute a quorum. The company was afterwards merged with a corporation chartered by Rhode Island, whose charter was silent as to the number required. By the contract of merger, which was affirmed by the Rhode Island legislature, the latter company surrendered its franchises, powers, and privileges to the Connecticut company; and the Connecticut legislature, by an act confirming the merger, declared that all the rights of the old company in this State should be preserved to the new one. *Held*, that after the merger, four only, and not a majority, were necessary for a quorum. *Conn. Supreme Ct. 1862, Lane v. Brainerd, 30 Conn. 565, 577.*

8. The charter of a municipal corporation provided that no ordinance or resolution should be passed by the common council except by a majority of all the members elected. The number elected was eight. *Held*, that an ordinance passed by a vote of four in the affirmative to three in the negative was void, a majority of the whole number originally elected not having voted in favor of its passage. *Cal. Supreme Ct. 1855, City of San Francisco v. Hazen, 5 Cal. 169. Compare Mills v. Gleason, 11 Wis. 470; Oakland v. Carpentier, 13 Cal. 540.*

9. Two of a board of trustees of schools, in Illinois, constituted by law a quorum to transact business, if concurring in opinion, may legally perform any act which the board is authorized to do, and their acts will be held valid until vacated by *certiorari*, or some other direct proceeding. *Ill. Supreme Ct. 1859, Schofield v. Watkins, 22 Ill. 66.*

10. **Quorum for "ordinary business."** A by-law of a corporation declared that five directors should be a quorum for the trans-

action of "ordinary business." *Held*, that the general business of the corporation was embraced in the authority thus delegated, including, as incident thereto, the power of pledging or assigning assets of the corporation for the purpose of securing a debt and thus obtaining forbearance. *N. Y. Ct. of Appeals*, 1859, *Hoyt v. Thompson*, 19 *N. Y.* 207.

11. The deed of a joint stock banking company required that the directors should not be less in number than *five* nor more than *seven*; that three or more should constitute a quorum for the transaction of *ordinary business*, and that the directors should have power to compromise debts, &c. Four directors, being the whole number then existing, executed a deed compromising a large debt due to the bank, taking from the debtor a large mining concern, and covenanting with him in behalf of the company to indemnify him against certain bills of exchange. In an action of covenant by the debtor for not indemnifying him,—*Held*, that the covenant did not bind the company, inasmuch as this was not *ordinary business*, and no smaller number than *five* directors were competent under the deed to transact it. *Q. B.* 1851, *Kirk v. Bell*, 12 *Eng. L. & Eq.* 885; 16 *Q. B.* 290.

12. Majority of quorum may act. That when a majority of the board of directors are declared to be a quorum to elect a president, if such majority are present to vote, a majority of the votes are enough to elect,—see *Booker v. Young*, 12 *Gratt.* 803.

13. That, wherever a power of election is vested in a definite number, *quorum* A. and B. are to be two, the presence only of A. and B., and not their assent, is requisite to make a valid election,—see *Reg. v. Bailiffs, &c. of Ipswich*, 2 *Ld. Raym.* 1282; *Cotton v. Davies*, 1 *Stra.* 53.

QUO WARRANTO.

[This title embraces only rules peculiar to *quo warranto* in favor of or against corporations, or their officers as such, which relate to the existence of the remedy and the modifications of procedure peculiar to corporation cases. Whatever relates to the nature of the right to be enforced, or the wrong to be redressed by *quo warranto*, is under the title appropriate to that right or wrong. The rules of proceeding applicable, whether the case is one affecting corporate interests or not, are not deemed within the scope of this work, but should be sought in works treating of the law of *Remedies*.]

1. By what court issued. *Quo warranto* not issuable by a court whose jurisdiction, as defined by the constitution of the State, is strictly appellate,—see *Exp. Attorney General*, 1 *Cal.* 85; *State v. Ashley*, 1 *Ark.* 279.

2. How far discretionary. Although an information in the nature of a *quo warranto* lies against persons acting as trustees of an incorporated religious society, it is within the discretion of the court to grant or refuse it according to circumstances. *Pa. Supreme Ct.* 1826, *Commonwealth v. Arrison*, 15 *Serg. & R.* 127.

3. It is within the discretion of the court to grant or refuse an information of *quo warranto* when application is made by individual members of the corporation; and, under circumstances tending to throw suspicion on the motives of the relator, the court will require additional affidavits, or will refuse such application, where the consequence will be to dissolve the corporation. *K. B.* 1819, *Rex v. Trevenen*, 2 *Barn. & Ald.* 479. See also *Rex v. Bond*, 2 *Durnf. & E.* 767.

4. Procedure generally. An application for a writ of *quo warranto* against a corporation must be commenced by a rule against the corporation to show cause why the writ should not be awarded. The application is to be made by the prosecuting attorney of the proper county for and in behalf of the State. It may be made to the supreme court sitting in any part of the State, with notice to the adverse party; but the rule must be returnable to the supreme court of the county where the party against whom it is taken resides, or is located, whether a corporation or an individual. If the writ be then awarded, the proceedings are according to the course of the common law. If the attorney, in a proper case, declines making the application, the court will peremptorily order him to make it or appoint some other person. *Ohio Supreme Ct.* 1831, *Case of Bank of Mount Pleasant*, 5 *Ohio (Ham.)* 249.

5. In whose name issued. An information in the nature of a *quo warranto* must be exhibited "in the name and by the authority of the people of the State." *Ill. Supreme Ct.* 1854, *Wight v. People*, 15 *Ill.* 417.

6. An information for the purpose of dissolving a corporation, or of seizing its franchises, cannot be prosecuted but by the

authority of the commonwealth, to be exercised by the legislature, or by the attorney or solicitor general acting under its direction or *ex officio* in its behalf. *Mass. Supreme Ct.* 1809, *Commonwealth v. Union Fire &c. Ins. Co.* 5 *Mass.* 230; *Ky. Ct. of Appeals*, 1846, *Commonwealth v. Lexington &c. Turnpike Co.* 6 *B. Monr.* 397; *N. J. Supreme Ct.* 1847, *State v. Paterson & Hamburg Turnpike Co.* 1 *Zabr.* 9.

7. By the attorney-general, when. Under the revised code of North Carolina an information in the nature of a writ of *quo warranto* against a corporation for a decree of forfeiture must be filed in the name of the attorney general of the State, and cannot be instituted in the name of a solicitor of a judicial circuit. *N. C. Supreme Ct.* 1862, *Houston v. Neuse River Nav. Co.* 8 *Jones, Law*, 476. And see *Wagner v. Vestry &c. of Christ Church*, 9 *Rich. Eq.* 155.

As to PARTIES in suits by and against corporations generally, see *SUTTS*.

8. The court will not proceed at the instance of an individual to require the attorney general to file an information.* *Mass. Supreme Ct.* 1809, *Commonwealth v. Union Ins. Co.* 5 *Mass.* 230.

9. The fact that an information was filed in the name of the attorney general without his knowledge or authority, on relation of the claimant to an office, is not necessarily ground for dismissing the information; but the relator in such a case may be permitted to withdraw from the proceeding. *Mich. Supreme Ct.* 1865, *People v. Knight*, 14 *Mich.* 230.

10. A statement in an information against a person for usurping a public office, filed by the solicitor general of Massachusetts, that he filed it in compliance with the order of a branch of the government, *e. g.* the House of Representatives, will not vitiate the

proceeding. *Mass. Supreme Ct.* 1813, *Commonwealth v. Fowler*, 10 *Mass.* 290.

11. Where an information filed by the attorney general in behalf of the State was stated to be "at the request of J. R.," a private individual, these words were rejected as surplusage. *S. C. Const. Ct.* 1817, *State v. City Council of Charleston*, *Mills*. 86.

12. By private relator, when. The statute of New Jersey (Rev. L. 206) which has substantially the same provisions as the statute of 9 Anne, ch. 20, should be construed so as to permit individuals to prosecute for usurpation of an office or franchise in a corporation, but not to file, without leave of court, an information to dissolve a corporation. *N. J. Supreme Ct.* 1847, *State v. Paterson & Hamburg Turnpike Co.* 1 *Zabr.* 9.

13. A writ of *quo warranto* to dissolve a corporation will not be maintained in the Supreme Court of Pennsylvania upon the suggestion of a mere private relator, instead of the attorney general, or some authorized agent of the State; but in questions involving merely the administration of corporate functions, or duties which touch only individual rights, such as the election of officers, or the admission of a member, the writ may issue either at the suit of the attorney general, or of any person interested in prosecuting the same.* *Pa. Supreme Ct.* 1853, *Murphy v. Farmers' Bank of Schuylkill County*, 20 *Pa. St.* 415.

14. A stranger, having no other interest in a corporation than that which is common to every citizen, is not entitled to a judgment of ouster in a writ of *quo warranto*. *Commonwealth v. Philadelphia &c. R. R. Co.* *Id.* 518.

15. Joinder of relators. No mode of election or appointment can authorize persons claiming different offices to unite their complaints and determine the title to both offices in one proceeding without a statute specially permitting such a practice. Therefore, where persons claiming to be wardens

* Under the Massachusetts practice act of 1852, § 42,—which enacts that any person whose private right or interest has been injured, or is put in hazard, by the exercise, by any private corporation or any persons claiming to be a private corporation, of a franchise or privilege not conferred by law, whether such person be a member of such corporation or not, may apply to the Supreme Judicial Court for leave to file an information in the nature of a *quo warranto*,—the rule stated in the text no longer prevails in that State. *Mass. Supreme Ct.* 1854, *Boston & Providence R. R. Co. v. Midland R. R. Co.* 1 *Gray*, 340.

A religious society is not within the meaning of this act. *Mass. Supreme Ct.* 1864, *Goddard v. Smitheth*, 8 *Gray*, 116.

* In England, where a corporation acts contrary to the franchises which have been granted to it, and invades the rights of the crown, the attorney general, of his own authority and without any application to the court for leave, may exhibit an information against them. *K. B.* 1819, *Rex v. Trevenen*, 2 *Barn. & Ald.* 479.

But an information in the nature of a *quo warranto* may be filed at the suit of a private relator against individuals assuming to act as a municipal corporation. *K. B.* 1750, *Rex v. Corporation of Carmarthen*, 2 *Burr.* 1809.

and vestrymen of a church, united as relators in the same *quo warranto* proceeding, to test thereby their rights to the respective offices against adverse parties,—*Held*, that the information was bad for misjoinder. *Mich. Supreme Ct.* 1867, *People v. De Mill*, 15 *Mich.* 164.

16. Information for unlawfully acting as a corporation. An information does not lie against persons for merely claiming a corporate franchise; therefore if an information charge the defendants with claiming, without authority, and exercising the franchise of a corporation, &c., a plea denying the user is sufficient. [1 *Ves.* 1; 5 *T. R.* 80; *Bull. N. P.* 211; 4 *East*, 337; 3 *Bac. Abr.* 645; *Willc. on Corp.* 462, pl. 254; *Ang. & A. on Corp.* 486.] *N. Y. Supreme Ct.* 1837, *People v. Thompson*, 16 *Wend.* 655.

17. An information to oust defendants from acting as a corporation, and to test the fact of their incorporation, should be filed against the individuals. *N. Y. Supreme Ct.* 1836, *People v. Saratoga & Rensselaer R. R. Co.* 15 *Wend.* 118.

18. In a proceeding in the nature of a writ of *quo warranto* against individuals, alleging that they had exercised and enjoyed, without legal authority, the franchise of being a banking corporation, it is not sufficient for the defendants merely to show that, by an act of the legislature, a banking corporation was established, of which they are members, and by virtue of which they exercise the said franchise; but they must also show that the corporation was in such a state of organization that it could use the privileges of a bank, and that they are authorized to bind the corporation by their acts done according to the terms of the charter. *Miss. Ct. of Errors*, 1857, *State v. Brown*, 33 *Miss.* 500.

19. Upon demurrer to an information to inquire into the incorporation of a railroad company, it appeared that a special charter was passed for such a company in 1849. But the associates did not accept or act upon the charter until three years afterwards. And, meantime, a new constitution of the State had been adopted, which prohibited the incorporation of such companies by special acts. *Held*, that the organization of the company was unauthorized by law, and was without color of right. *Ind. Supreme Ct.* 1861, *Gillespie v. Fort Wayne &c. R. R. Co.* 17 *Ind.* 243.

See INCORPORATION.

20. Information to procure a dissolution or decree of forfeiture. Where an information is filed against a body which is conceded to be a corporation, for the purpose of procuring its dissolution, or of restraining it from the exercise of some franchise, it should be filed against the corporation in its corporate name. *N. Y. Supreme Ct.* 1826, *People v. Bank of Hudson*, 6 *Cow.* 217; 1836, *People v. Saratoga & Rensselaer R. R. Co.* 15 *Wend.* 118; 1840, *People v. Bristol & Rensselaerville Turnp. Co.* 23 *Wend.* 222.

21. Such an information will lie for any sufficient cause of dissolution. *N. Y. Supreme Ct.* 1840, *People v. Bristol & Rensselaerville Turnp. Co.* 23 *Wend.* 222.

22. The rule that the franchise of a corporation cannot be impeached collaterally will not prevent an inquiry into the unauthorized and fraudulent acts of those claiming under the charter. *Ohio Supreme Ct.* 1852, *Bartholomew v. Bentley*, 1 *Ohio St.* 37.

23. Present insolvency alone is not sufficient ground for such an information. *Ind. Supreme Ct.* 1861, *State v. Bailey*, 16 *Ind.* 46.

24. Such an information will not be granted against a corporation for taking land without making a compensation pursuant to the statute. The remedy is an action of trespass. *N. Y. Supreme Ct.* 1807, *People v. Hillsdale & Chatham Turnpike Co.* 2 *Johns.* 190.

25. An information lies to procure judgment of ouster against individuals holding a franchise,—*e. g.* that of maintaining a toll-bridge over a navigable stream,—which was lawfully acquired, but has been forfeited by non-compliance with the conditions of the grant. *N. Y. Ct. of Errors*, 1840, *Thompson v. People*, 23 *Wend.* 537, 574; and see 21 *Id.* 285.

26. If the affidavit of the relator charge the defendant as "an incorporated bank," and the information and subpoena are against the corporation, and the subsequent pleadings conform in this respect to the affidavit and process, it is too late to question the existence of the corporation upon the ground of its non-performance of conditions precedent to its corporate existence. The State is deemed to have waived the performance of such conditions through these acts and admissions of its own officers, or to be estopped from asserting their non-performance. If such con-

ditions are to be insisted on, the proceedings should be against the usurping individuals, and should not treat them as a corporation; since this last course would be to charge them in one character and to proceed against them in another. *Miss. Ct. of Errors*, 1846, *Commercial Bank of Natchez v. State of Mississippi*, 6 *Smed. & M.* 599.

27. An information for the forfeiture of the franchise of a turnpike company contained two counts; the first of which averred, in general terms, that the corporation had, for six years previously thereto, exercised, without warrant, grant, or charter, and therefore had usurped, without right, the liberties, franchises, and privileges, and exercised the powers, including that of receiving tolls, usually exercised and enjoyed by turnpike corporations. The second count, admitting the grant of the charter, specified numerous omissions of duty as grounds of its forfeiture. The respondents demurred to the whole information. *Held*, that if the second count alleged matter enough to sustain an information, judgment must be rendered for the commonwealth. *Mass. Supreme Ct.* 1850, *Commonwealth v. Tenth Massachusetts Turnp. Corp.* 5 *Cush.* 509.

28. After the lapse of eight or nine years, from the filing of the certificate of organization of a railroad company, the State cannot proceed against it by information in the nature of *quo warranto*, on the ground that one of its termini is not definitely stated. *Ind. Supreme Ct.* 1862, *State v. Bailey*, 19 *Ind.* 452.

29. That an information to have the charter of a corporation declared forfeited must set forth a substantial cause of forfeiture,—see *Attorney General v. Petersburg & Roanoke R. R. Co.* 6 *Ired.* 450.

30. An allegation against a bank that it refused to pay its notes “on the first day of November, 1841, and on divers other days and times before and since,” was *Held*, to be a sufficiently certain allegation of a cause of forfeiture. *Miss. Ct. of Errors*, 1846, *Commercial Bank of Natchez v. State of Mississippi*, 6 *Smed. & M.* 599.

See DISSOLUTION; FORFEITURE.

31. Defences. A plea that the company has exercised the franchise for twenty years is, in Ohio, a good bar to an information in the nature of a *quo warranto* against such company for carrying on the business of

banking. *Ohio Supreme Ct.* 1841, *State v. Miami Exporting Co.* 11 *Ohio*, 126.

32. A plea to an information in the nature of *quo warranto* to dissolve a corporation which sets forth the charter shows a *prima facie* defence; the corporation being presumed to have continued to exist and perform its duties until a cause of forfeiture is shown. If in addition it goes on to state the continued existence of the corporation down to the filing of the information, or that the State is estopped from insisting upon forfeiture of the corporate franchises for causes which arose prior to a certain period, such allegations are surplusage and will be stricken out on motion. *Mich. Supreme Ct.* 1846, *Attorney General v. Michigan State Bank*, 2 *Doug.* 859.

33. The reservation in an act of incorporation of the right of the legislature to repeal the charter to a limited extent, leaving power to the corporation to wind up its concerns, does not impair the right to proceed against the corporation by *quo warranto* in case the legislature does not exercise its right. *Miss. Ct. of Errors*, 1848, *Grand Gulf Railroad & Banking Co. v. State*, 10 *Smed. & M.* 428.

34. The favorable report of commissioners to view a turnpike road under a general turnpike act, and the subsequent license of the governor to erect turnpike gates for the collection of tolls, are not a bar to an information in the nature of *quo warranto* charging a non-compliance with the act of incorporation in the original construction of the road. *N. Y. Supreme Ct.* 1840, *People v. Kingston & Middlesex Turnpike Co.* 28 *Wend.* 193. Compare *Duke v. Cahawba Nav. Co.* 10 *Ala. N. S.* 82.

35. Existence of another remedy. It is no answer to a *quo warranto* against a corporation, that the company is liable to private action, or indictment, for the act or non-feasance complained of. [12 *Mod.* 270.] *N. Y. Supreme Ct.* 1840, *People v. Bristol & Rensselaerville Turnpike Co.* 23 *Wend.* 222.

36. Nor is the fact that the charter also gives another remedy. *People v. Hilldale & Chatham Turnp. Co.* *Id.* 254.

37. Nor is the fact, that the company, pursuant to requirements of the charter, gave a special security for the fulfillment of the charter conditions, any defence. That is only a cumulative remedy. *N. Y. Ct. of*

Errors, 1840, *Thompson v. People*, 23 *Wend.* 537.

38. The judgment against a corporation for a violation of its charter must be confined to a seizure of the franchises. If it extend to a seizure of the property of the corporation, that part of the judgment will be erroneous. The corporation continues to exist until the franchises are seized on execution. *Ind. Supreme Ct.* 1823, *State Bank v. State*, 1 *Blackf.* 267.

39. Information for unlawfully exercising a corporate office. *Quo warranto* lies to restrain the appointment of professors by an incorporated college not authorized by its charter to make such appointment. *N. Y. Supreme Ct.* 1830, *People v. Trustees of Geneva College*, 5 *Wend.* 211.

40. The court will not consolidate several informations in nature of *quo warranto* against several persons for distinct offices; there must be an information against each to enable each to disclaim. *K. B.* 1813, *Rex v. Warlon*, 2 *Maule & S.* 75.

41. On a motion for an information in the nature of a *quo warranto* against a corporation, to vacate his office on the ground of his acceptance of a second and incompatible office, the relator must show a legal appointment to the second office. *K. B.* 1829, *Rex v. Day*, 9 *Barn. & C.* 702; 4 *Mann. & R.* 541.

42. Until after a regular motion from office the court will not grant a *quo warranto* to oust. *K. B.* 1788, *Rex v. Heaven*, 2 *Durnf. & E.* 772; *Rex v. Ponsonby*, 2 *Bro. P. C.* 311; *Rex v. Mayor &c. of Truro*, 3 *Barn. & Ald.* 590.

43. When the court is not judicially informed concerning the nature of an alleged office in a corporation, it must be so described as to its nature and duties as to show whether it is an office within the purview of the law relative to the usurpation of franchises. *Mich. Supreme Ct.* 1867, *People v. De Mill*, 15 *Mich.* 164.

44. Where an information in the nature of *quo warranto* charged the defendants with the intrusion into the offices of wardens and vestrymen of a certain church, which was alleged to be "a corporation created by the authority of the State,"—*Held*, that inasmuch as the court had no judicial knowledge of the existence of any such corporation, the information was defective in not setting forth such facts as, in connection

with the public statutes, of which judicial notice can be taken, would show such corporate existence. *Mich. Supreme Ct.* 1867, *People v. De Mill*, 15 *Mich.* 164.

45. Where the averments of an information in the nature of a *quo warranto* set out a continued usurpation of an office, by a loss of the qualifications necessary to the holding of it, the plea of the officer must set out expressly the continuance of every qualification down to the filing of the information, and it is not sufficient to state that the incumbent was qualified at the time of his appointment, and to rely on the presumption of the continuance of the qualifications until the loss of them is shown. *Ohio Supreme Ct.* 1846, *State v. Beecher*, 15 *Ohio*, 723.

46. That the replication may impeach a necessary qualification of the defendant to an office set forth in the plea as possessed by him,—see *Rex v. Brown*, 4 *Durnf. & E.* 276; *Rex v. Hill*, 4 *B. & C.* 443.

47. Upon such an information the State is not bound to show anything, for if the office was lawfully granted the defendant can show his warrant for exercising its duties. The defendant must disclaim or justify. If he disclaims, the State has judgment. If he justifies, he must show his title specially, and all the particulars on which it is founded. Therefore, where a writ of *quo warranto* was directed against the defendant as director of the Real Estate Bank of Arkansas,—*Held*, that the plea must allege that he was a stockholder, and that the election under which he claimed to have been chosen a director was held under, and in pursuance of, an ordinance or direction of the board of directors, fixing the time when and the place where the same should be held, agreeably to the provisions and requirements of the charter. *Ark. Supreme Ct.* 1839, *State v. Ashley*, 1 *Ark.* 513, 552. And see *People v. Utica Ins. Co.* 15 *Johns.* 358.

48. On a trial of a *quo warranto* information against the wardens and vestrymen of a religious society, in which the legality of the election is in issue, evidence may be received of conversations and transactions previous to the election, if they were connected with, and might have an influence on, the election, although no previous notice thereof has been given. *Pa. Supreme Ct.* 1817, *Commonwealth v. Woelper*, 3 *Serg. & R.* 29.

49. That the court, upon the default of a

defendant in a *quo warranto* proceeding, will give judgment of ouster, but will not determine the relator's right to the office. *Mich. Supreme Ct.* 1865, *People v. Connor*, 18 *Mich.* 283.

RAILROAD CORPORATIONS.

[Includes the law of corporations organized to maintain railroads, the mode of acquiring lands, and their rights and liabilities growing out of their peculiar franchise. Rules applicable to them, merely as one class of common carriers, are not within the scope of this work, nor are the general rules of law as to liability for negligence resulting in injury to others. These rules are fully considered here, only so far as their application involves the peculiar character of corporations, and the liabilities growing out of service by agents, officers, &c. The subjects of EMINENT DOMAIN, and COMPENSATION for lands, as well as the general powers of AGENTS, OFFICERS, and SERVANTS, and the corporate liability upon CONTRACTS and for WRONGS, are also discussed under these titles, to which reference should be had in connexion with this.]

I. ORGANIZATION AND FRANCHISES.

II. ACQUIRING LANDS.

1. *Power to take.*
2. *Compensation.*
3. *Purchase of lands.*
4. *Remedies of land-owners.*
5. *The title or easement acquired.*

III. CONSTRUCTION AND MAINTENANCE.

1. *Duty to construct.*
2. *Locating the line, Termini.*
3. *The track and connections.*
4. *Construction contracts.*
5. *Mode of construction and liability for defects.*
6. *Interference with highways, waters, &c.*
7. *Fencing, cattle guards, and crossings.*
8. *Signals and watchmen.*

IV. RAILROADS IN CITIES.

V. LEASES OF RAILROADS.

VI. BONDS AND MORTGAGES.

VII. OFFICERS AND SERVANTS.

VIII. TRAFFIC.

1. *In general.*
2. *Freight traffic.*
3. *Passenger traffic.*
4. *Connecting companies.*
5. *Contracts between different companies.*

IX. LIABILITY FOR NEGLIGENCE.

I. ORGANIZATION AND FRANCHISES.

1. *Agreement to withdraw opposition to charter.* Where opposition to the charter of a railroad, or to the modification of one already granted, is made in the legislature merely to protect a private interest, and the party is induced to withdraw that opposition in consideration of indemnity secured to him, the courts will enforce such indemnity, unless, from the peculiar circumstances of the case, the legislature was liable to be misled, and to do what it would not have done had not the transaction been concealed from its knowledge. *N. H. Supreme Ct.* 1865, *Low v. Connecticut &c. R. R. Co.* 46 *N. H.* 284.

2. *An agreement to pay for land, and the withdrawal of opposition, may be enforced.** *H. of Lords*, 1851, *Capper v. Earl of Lindsey*, 8 *H. L. Cas.* 293; 14 *Eng. L. & Eq.* 9; *V. Chan. Ct.* 1853, *Lindsay v. Great Northern Railw. Co.* 17 *Jur.* 522; 19 *Eng. L. & Eq.* 87; 1851, *Hawks v. Eastern Counties Railw. Co.* 15 *Jur.* 979; 20 *Law J. N. S. (Chan.)* 243.

To similar effect, *Lord Petre v. Eastern Counties Railw. Co.* 1 *Eng. Railw. Cas.* 462; *Stanley v. Chester & Birkenhead Railw. Co.* *Id.* 58; 9 *Sim.* 264. *Vauxhall Bridge Co. v. Earl of Spencer*, *Jac.* 64.

3. *An agreement to give a sum of money as a bribe to buy off opposition to a railway bill in Parliament cannot be enforced.* *H. of Lords*, 1859, *Scottish Northeastern Railw. Co. v. Stewart*, 8 *Maag. H. L. Cas.* 382, 408.

4. *Charter.* Although a public act must be published before it can go into effect, an act of incorporation of a private railroad is, in its nature, so far a private act as to take effect upon the performance of a condition required in the enactment, so that an instrument is valid which has been executed by the corporation after the performance of the condition—though before the publication of the act of incorporation. *Wis. Supreme Ct.* 1866, *Burhop v. City of Milwaukee*, 21 *Wis.* 257.

5. *General laws.* In many of the States, railroad companies are now formed, not by the grant of special charters, but by voluntary organization under general laws which authorize the association of individuals for the purpose. Thus, in the State of New York an act was passed in 1848 to authorize incorporation of railroad com-

* For the construction and effect of peculiar contracts for such a purpose, see also *Preston v. Liverpool &c. Railw. Co.* 35 *Eng. L. & Eq.* 12; *Edinburgh &c. Railw. Co. v. Philip*, 28 *Law Times*, 345; 30 *Eng. L. & Eq.* 41.

panies and to regulate them. *Laws of 1848*, 221, ch. 140. In 1850 that act was repealed by a new act for the same purpose (*Laws of 1850*, 211, ch. 140), which is now, with its subsequent amendment (*Laws of 1851*, 20, ch. 19; 1853, 79, ch. 53; 1854, 608, ch. 282; 1857, 871, ch. 444; 1862, 811, ch. 449; 1864, 1837, ch. 582; 1866, vol. 2, 1492, ch. 697), the general railroad law of the State.*

6. That the articles of association creating a railroad company may be in duplicate upon separate sheets, signed by different members,† —see *Lake Ontario R. R. Co. v. Mason*, 18 *N. Y.* 451. See also ARTICLES OF ASSOCIATION and SUBSCRIPTION.

7. Subscription for stock. The intent of the section of the New York general railroad act (*Laws of 1850*, ch. 140, § 4), requiring ten per cent. to be paid in at the time of subscribing for the stock is, that no subscription shall be valid until ten per cent. has been paid thereon, and not that it should be invalid if a short interval should occur between the actual subscription and the payment of the money. [25 *N. Y.* 208.] The subscription and the payment of the ten per cent. must both concur to make a valid subscription. But actual payment, even though made in part by the adjustment of an account for services, made at any period after subscription, with intent to complete the subscription, satisfies the statute. *N. Y. Ct. of Appeals*, 1864, *Beach v. Smith*, 30 *N. Y.* 116.

7. a. One who signs articles of association under the general railroad act, before the association is incorporated, is not a corporation, nor bound by his subscription, unless such articles with his signature are filed with the secretary of state pursuant to the statute. Filing a duplicate of such articles without his signature does not make him liable. [18 *Barb.* 208.] *N. Y. Supreme Ct.* 1860, *Erie & N. Y. City R. R. Co. v. Owen*, 32 *Barb.* 616.

8. Municipal subscription. Where a township, &c., through which a railroad might be

located was by a statute "authorized to subscribe to the stock of said railroad,"

—*Held*, that a subscription did not give the township a claim to control the general conduct and discretion of the directors of the railroad company in matters involving the pecuniary interests of the company to an amount far exceeding their subscription.* *Ohio Supreme Ct.* 1862, *Port Clinton R. R. Co. v. Cleveland & Toledo R. R. Co.* 13 *Ohio St.* 544.

9. What aid to a railroad company constitutes a loan within the meaning of a section of the constitution prohibiting a loan of the credit of the State in aid of corporations†† *People v. Pacheco*, 37 *Cal.* 177.

10. Description of route. A certificate of the organization of a railroad corporation described the road as commencing "at some point to be hereafter designated in the township of Hudson, in the county of Summit, passing through the county of Portage or Cuyahoga, also through the counties of Geauga and Lake, to terminate at some point to be designated in the township of Painesville, in the county of Lake." The certificate was recorded, and a copy thereof given by the secretary of state, and the company organized and acted under it. *Held*, that the instrument was not invalid for uncertainty. *Ohio Supreme Ct.* 1860, *Callender v. Painesville and Hudson R. R. Co.* 11 *Ohio St.* 516.

11. An affidavit by directors of a proposed railroad company, filed to procure incorporation under the N. Y. general act (*Laws of 1850*, 211, ch. 140, § 2), which states that the requisite sum "has been in good faith subscribed to the capital stock of said company, and that ten per cent. has been paid in cash on said subscriptions," is sufficient without stating to whom it has been paid, or that the payment was made in good faith. It is necessarily implied by such allegations that the payment has been made in good faith, and that the money has been paid to the directors or their authorized agent. *N. Y. Ct. of*

* As to effect of Ohio General Acts of 1848 and 1852, see *Painesville & Hudson R. R. Co. v. King*, 17 *Ohio St.* 584.

† A railway company projected and provisionally registered, having a provisional committee of more than seven persons, but which for want of subscribers never obtains an act of parliament, is, nevertheless, a company, or association, within the meaning of the winding-up acts. *H. of Lords*, 1852, *Bright v. Hutton*, 12 *Eng. Law & Eq.* 1.

Where the special act of incorporation of a railway company and the lands clauses act are inconsistent, the latter is to be taken to be expressly varied by the former. *Rolls Ct.* 1863, *Weid v. London & Southwestern Railw. Co.* 9 *Jur. N. S.* 510; 8 *Law Times*, *N. S.* 13; 11 *Week. Rep.* 448.

* Nor does a clause in the charter reserving to a municipal corporation the right to buy the line after a term of years. *City of Cambridge v. Cambridge R. R. Co.* 10 *Allen*, 50. As to powers of a municipal corporation in a compromise of a controversy respecting their obligation to subscribe for stock in a railroad company,—see *People v. Coon* 25 *Cal.* 685; *People v. Supervisors of San Francisco*, 27 *Cal.* 655.

† As to construction and effect of peculiar statutes giving government aid,—see *McAfee v. Southern R. R. Co.* 36 *Miss.* 669; *State v. Ashmore*, 10 *Rich. (Law)*, 248.

Appeals, 1859, Buffalo & Pittsburgh R. R. Co. v. Hatch, 20 N. Y. 157.

12. Calls. That the provision of the statute of Indiana (1 Rev. St. 412) limiting the rate of calling in subscriptions, does not apply where the contract of subscription stipulates for more immediate payment,—see *Evansville &c. R. R. Co. v. City of Evansville*, 15 Ind. 395. Consult also **ASSESSMENTS**.

13. Evidence of organization. In an action by a railroad corporation organized under the general act, to recover a subscription to its stock, evidence that the length of the road in fact differs from that stated in the articles, is not admissible to defeat the action, whether the difference arose from fraud or mistake. The corporation is formed by filing and recording the articles of association and affidavit with the secretary of state, and in private actions by or against the corporation its corporate character is to be determined thereby. *N. Y. Ct. of Appeals*, 1859, Buffalo & Pittsburgh R. R. Co. v. Hatch, 20 N. Y. 157. Compare *Portland & Oxford Central R. R. Co. v. Grand Trunk R. R. Co.* 46 Me. 69. See also **ORGANIZATION**.

14. Nature of the franchise. A railroad company is, so far as the stockholders are concerned, a private corporation,* though, as it regards the powers of the legislature to authorize the taking of private property for public use, it may be regarded as a quasi public corporation.† The stock from which an individual profit is designed to be derived is owned by the members of the corporate body; it does not become a public corporation because the public interest may be incidentally promoted by it. In principle it is like a turnpike, canal, or bridge charter. In such a corporation a majority cannot bind the minority in matters beyond and aside of their original charter of incorporation, unless it be by special agreement giving such power, which

must be part of the original association; but, in public corporations, the public good and convenience require that the voice of the majority should govern. *Vt. Chancery*, 1851, *Stevens v. Rutland & Burlington R. R. Co.* 29 Vt. 545.

15. A railroad company is liable for injuries caused by its cars, although the road is at the time operated by a receiver.* *Ind. Supreme Ct.* 1864, *McKinney v. Ohio &c. R. R. Co.* 22 Ind. 99. See also *Ohio &c. R. R. Co. v. Fitch*, 20 Id. 498.

16. Exclusive franchise. It is competent for the legislature to grant to a company, chartered for the construction of a railroad across the State, the exclusive right to maintain such a road in consideration of payments to the State. *N. J. Ct. of Appeals*, 1866, *Raritan & Delaware Bay R. R. Co. v. Delaware & Raritan Canal Co.* 18 N. J. 546.

17. A grant of the exclusive privilege is to be strictly construed as against the corporation. *U. S. Supreme Ct.* 1851, *Richmond R. R. Co. v. Louisa R. R. Co.* 13 How. 71.

18. Where a railroad company possesses, by the terms of its charter, the exclusive privilege of constructing and using a railroad between two given localities, the grant of charters to two other companies which undertake, by their union, to connect these points by railroad, becomes unconstitutional as far as it concerns the direct travel between the two points, as much so as would have been a single act of incorporation for the like purpose.† *La. Supreme Ct.* 1856, *Ponchartrain Railway v. New Orleans & Carrollton R. R. Co. & Lake Ponchartrain R. R. Co.* 11 La. Ann. 253.

19. Conditions precedent. The charter of a railway company enacted that, "from and immediately after the opening of the railway" between two given places, the company should purchase the shares in two

* To the same effect are *Trustees of the Presbyt. Society of Waterloo v. Auburn and Rochester Railway*, 8 Hill. 570; *Dartmouth Coll. v. Woodward*, 1 N. H. 116; *Eustace v. Parker*, Id. 278; *Dearborn v. Boston, C. & Montreal R. R. Co.* 4 Fosc. 190; *Ohio &c. Railroad Co. v. Ridge*, 5 Blackf. 78; *Bonaparte v. Camden and Amboy R. R.* 1 Baldu. 205, 222; *Rundle v. Delaware & Raritan Canal Co.* 1 Wall. Jr. 275; *Raleigh & Gaston R. R. Co. v. Davis*, 2 Dev. & B. 451; *Alabama &c. R. R. Co. v. Kidd*, 29 Ala. N. S. 221.

† See *Swan v. Williams*, 2 Mich. 421.

A railroad franchise may be conferred upon and exercised by individuals. *N. Y. Supreme Ct.* 1867, *New York & Harlem R. R. Co. v. The Forty-second Street R. R. Co.* 32 N. Y. Pr. 481.

* Trustees for the bondholders, while running the road, are liable as the company would be. *Vt. Supreme Ct.* 1857, *Sprague v. Smith*, 29 Vt. (3 Wms.) 421.

† A stipulation in the charter of a railroad that no other one shall be granted, from one terminus to any place within five miles of the other terminus, is not violated by the grant of a railroad from one terminus of the former one to a point coming within the space included by two straight lines drawn from the former terminus of the first road, to points five miles distant from the other terminus, upon opposite sides, but not within five miles of the actual terminus of the first road. *Mass. Supreme Ct.* 1850, *Boston & Lowell Railway v. Andover & Wilmington Railway*, 5 Cusack. 575.

canals with whose business they would compete,—*Held*, that the opening for public use of any portion of the line between the two places rendered the railway company liable to pay for the canal shares. *Exch. Cham.* 1852, Grantham Canal Co. v. Ambergate & Railway Co. 12 *Eng. L. & Eq.* 439; 21 *Law J. N. S. Q. B.* 322; 16 *Jur.* 946.

20. — subsequent. A city authorized a railroad company to construct a railroad within the corporate limits, on the condition that the company should give a bond to complete the road within a limited time. The company gave the bond, but failed to complete the road as prescribed. *Held*, that the agreement to complete the road was a condition subsequent, and that the franchise became vested in the company at the time of the grant, to be annulled only by a judicial authority. *N. Y. Supreme Ct.* 1860, Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co. 82 *Barb.* 858.

21. The limit of time, within which the company are required by their charter to construct their road, applies to the appurtenances, and if within that time they only construct a horse railroad, they cannot afterward take and hold land for engine houses, &c.* *Pa. Supreme Ct.* 1861, Plymouth R. R. Co. v. Colwell, 89 *Pa. St.* 337.

22. The company should not be restrained by injunction at the suit of a shareholder from constructing their road, after the land has been acquired, merely because the time limited in the charter for its construction has passed, especially where the shareholders complaining seem to have acquiesced. *V. Chan. Ct.* 1853, Ffooks v. London & South-western Railway Co. 17 *Jur.* 365.

23. Perversion of power. A company incorporated to build a railway and erect wharves and warehouses on a navigable river may be enjoined, at the suit of a stockholder, from applying funds to improve the navigation of the river when they contemplate applying to the legislature for authority to do so. *Rolls Ct.* 1850, Munt v.

Shrewsbury & Chester Railway Co. 13 *Beav.* 1; 15 *Jur.* 26; 20 *L. J. Chanc.* 169; 8 *Eng. L. & Eq.* 144. Compare Bateman v. Mayor &c. of Ashton-under-Lyne, 3 *Hurl. & N.* 323.

24. That a railroad corporation have not implied power to construct a canal basin. *Pa. Supreme Ct.* 1861, Plymouth R. R. Co. v. Colwell, 89 *Pa. St.* 337.

25. A railway company cannot buy shares in another independent railway company; nor, having become lawfully possessed of shares, can they legally, as against a dissentient shareholder, increase the number of such shares, or apply funds to support the second company. *Rolls Ct.* 1849, Salomons v. Laing, 12 *Beav.* 380; 14 *Jur.* 279; 19 *Law J. N. S.* 225.

26. A railway company, incorporated by act of parliament, cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign from those for which it is incorporated. *C. P.* 1851, East Anglian Railway Co. v. Eastern Counties Railway Co. 16 *Jur.* 249; 21 *Law J. N. S.* 23; 11 *C. B.* 775.

27. A stockholder may enjoin the company from constructing a very small portion of their line after the rest of the route has been found impracticable.* *Chan.* 1849, Cohen v. Wilkinson, 1 *Macn. & G.* 481; 1 *Hall & T.* 554; 14 *Jur.* 491; 5 *Eng. Railw. Cas.* 758; 18 *Law J. N. S.* 411.

28. Upon principle (though the weight of authority may be the other way) a railroad corporation may be enjoined at the suit of a dissenting stockholder from constructing an extension of a materially different character from that originally authorized, although the legislature in the charter reserved power to modify it. [Reviewing conflicting cases.] *N. J. Chan.* 1867, Zabriskie v. Hackenseck & New York R. R. Co. 18 *N. J. Eq.* (8 *C. E. Green*), 178.

29. Railway companies have no right to engage or pledge their funds, or entangle their affairs, in unauthorized transactions,

* As to the meaning of "building," "finishing" and "furnishing" the railroad, in a condition in the charter,—see *Bachelder v. Wendell*, 86 *N. H.* 204.

A statute, authorising the building of the road in sections, provided that before any part should be built the stock should be all subscribed, &c.,—*Held*, not to apply the proviso to the construction of the whole at once, as an entire route. *Boston & Providence R. R. Co. v. Midland R. R. Co.* 1 *Gray*, 840.

* A company authorized to make three lines of railway,—*Held*, not authorized not to apply their funds in making one of them, if the others were abandoned. *Rolls Ct.* 1850, Hodgson v. Earl Powis, 12 *Beav.* 392; 19 *Law J. N. S.* 357; 14 *Jur.* 906.

But that a grantor of land cannot complain of a perversion or change,—see *Louisville & Nashville R. R. Co. v. Covington*, 2 *Puch.* 594.

upon the speculation that they may afterward obtain parliamentary authority. *Rolls Ct.* 1851, *Logan v. Courtown*, 13 *Beav.* 22; 20 *L. J. Chanc.* 347.

30. A contract of a railway corporation with the municipal authorities to build a bridge or a harbor such as is not authorized by the scope of their charter, or the location of their route, is illegal and cannot be enforced. *Q. B.* 1855, *Mayor &c. of Norwich v. Norfolk Railway Co.* 30 *Eng. L. & Eq.* 120; 24 *Law J. N. S.* 105; *Ho. of L.* 1856, *Caledonian &c. Railway v. Helensburgh Harbor Trustees*, 39 *Eng. L. & Eq.* 28; 2 *Jur. N. S.* 695.

31. Steamboat connections. A railway company having a terminus at a seaport, *e. g.* upon the Irish channel, may make a contract with another person to provide a suitable steam vessel for the transportation of traffic coming by their line, and may maintain an action for the breach of such contract. *C. P.* 1861, *South Wales R. R. Co. v. Redmond*, 10 *O. B. N. S.* 675.

32. That power conferred by charter upon corporations to build a railroad does not include the right to run a line of steamboats in connection therewith. *Hoagland v. Hannibal & St. Joseph R. R. Co.* 39 *Mo.* 451; *City of St. Joseph v. Saville*, *Id.* 460.

33. Where directors of a railway company, for the purpose of increasing their traffic, proposed to guarantee certain profits, and to secure the capital of an intended steam packet company, who were to act in connection with the railway;—*Held*, that such a transaction was not within the scope of their powers, and they were restrained by injunction. *Rolls Ct.* 1846, *Colman v. Eastern Counties Railw. Co.* 10 *Beav.* 1; 16 *Law J. N. S.* 73; 11 *Jur.* 74; 4 *Eng. Railw. Cas.* 513.

34. An express power given by law to a railroad company, to "contract for the transportation and delivery of, and to transport and deliver persons and property conveyed over their road beyond its termini," carries with it the power to use the necessary and proper incidental means of exercising it; and the purchase by the company of a steamboat, designed by them in good faith for the transportation of freight and passengers by ferry from the terminus of their road to the line of another, is not *ultra vires*, and a note given by the company in consideration of such a purchase will be bind-

ing upon them. *Vt. Supreme Ct.* 1859, *Shawmut Bank v. Plattsburg &c. R. R. Co.* 31 *Vt.* 491. Compare *The Maverick*, 1 *Sprague*, 28; 5 *Low Rep.* 106.

35. Nuisance. A railroad authorized by law and lawfully operated, cannot be deemed a private nuisance. *Ohio Supreme Ct.* 1858, *Parrot v. Cincinnati, Hamilton & Dayton R. R. Co.* 10 *Ohio*, 624. *Fa. St. Supreme Ct.* 1859, *Geiger v. Filor*, 8 *Fa.* 325.

36. Where a railroad company, in building their road, transcend the authority constitutionally vested in them by the legislature, their road is a nuisance.* Every day's continuance of it is a legal wrong, for which damages are recoverable after they have accrued. And one recovery is not a bar to a second action for a subsequent period of time. *N. Y. Ct. of Appeals*, 1860, *Mahon v. N. Y. Central R. R. Co.* 24 *N. Y.* 658.

37. The court will seldom inquire into the necessity of any particular railroad. *Cal. Supreme Ct.* 1863, *Contra Costa R. R. Co. v. Moss*, 28 *Cal.* 324.

38. Foreign corporation. That a railroad company incorporated by another State, being authorized to build a part of its road in this State, may exercise the same rights and privileges as such companies incorporated by this State.—see *New York & Erie R. R. Co. v. Young*, 33 *Pa. St.* 175. See also FOREIGN CORPORATIONS.

39. Motive power. A power to construct a railway authorizes the use of locomotive engines, though they were not in use when the act was passed. *Exch.* 1843, *Bishop v. North*, 3 *Eng. Railw. Cas.* 459. See also *State v. Tupper*, *Dudl.* 135.

40. Authority to use "any mechanical power" authorizes steam power. *N. Y. Supreme Ct.* 1850, *Moshier v. Utica & Schenectady R. R. Co.* 8 *Barb.* 427.

41. Fires. The grant of a franchise to operate a railroad does not confer the right to use upon it locomotives so constructed as to throw out burning coals that may set fire to buildings along the lines. The road must be operated with engines so constructed as to cause the least danger. The fact that the building was erected after the railroad was laid out and constructed, is no impediment to relief. *N. J. Chan.* 1867,

* To similar effect is *Commonwealth v. Northeast R. R. Co.* 27 *Pa. St.* 389; *Commonwealth v. Old Colony R. R. Co.* 14 *Gray*, 98.

King v. Morris & Essex R. R. Co. 18 N. J. 397.

42. Where the charter of a railroad company prescribes no limit of approach toward buildings and bridges, the roads and stations may be located by the company upon such route and at such points as in the judgment of their directors will be beneficial to the interest of the corporation and the public. The proximity of the station and of the line of the road to a structure cannot, therefore, be considered in itself a ground of legal liability, but an element only in ascertaining the degree of reasonable care required, it being the duty of such a company, in running their engines close to buildings, to use the utmost vigilance and foresight to avoid injury, looking to their careful control and the adoption of known safeguards and approved inventions to lessen the danger of their use.* *Pa. Supreme Ct. 1867, Frankford & Bristol Turnpike Co. v. Philadelphia & Trenton R. R. Co. 54 Pa. St. 845.*

*The general rule, independent of express statutes, is, that the owners of locomotive engines are guilty of negligence, for which they are answerable in damages to the injured party, if they do not adopt such precautions as might reasonably prevent firing adjacent property by sparks. *C. P. 1846, Piggott v. Eastern Counties Railw. Co. 3 C. B. 229; Pa. Supreme Ct. 1854, Huyett v. Philadelphia & Reading R. R. Co. 28 Pa. St. 873; 1866, Lackawanna & Bloomsburg R. R. Co. v. Doak, 52 Id. 879; Ill. Supreme Ct. 1862, Bass v. Chicago, Burlington & R. R. Co. 28 Ill. 9; 1866, St. Louis, Alton & R. R. Co. v. Gilham, 39 Id. 455. And see Freeman v. London & Northwestern Railw. Co. 10 C. B. N. S. 89; 31 Law J. C. P. 13; 2 Fost. & F. 387.*

But if they have taken every precaution in their power, and adopted every known means to prevent an injury from fire, and are not guilty of negligence in the management of the engine, they are not liable. *Esch. Ch. 1860, Vaughan v. Taff Valley Railw. Co. 5 Hurl. & N. 679; N. Y. Supreme Ct. 1854, Rood v. N. Y. & Erie R. R. Co. 18 Barb. 50; Pa. Supreme Ct. 1867, Frankford & Turnpike Co. v. Philadelphia & Trenton R. R. Co. 54 Pa. St. 845. To similar effect see Baltimore & R. R. Co. v. Woodruff, 4 Md. 242; Burroughs v. Houston & R. R. Co. 15 Conn. 124; McCready v. South Carolina R. R. Co. 2 Siroda. Law, 356.*

What is negligence in emission of sparks? *Great Western R. R. Co. v. Haworth, 39 Ill. 846; Fero v. Buffalo & State Line R. R. Co. 23 N. Y. 209.* And what is contributing negligence on the owners' part? *Fero v. Buffalo & State Line R. R. Co. 23 N. Y. 209; Macon & R. R. Co. v. McConnell, 27 Ga. 481; Great Western R. R. Co. v. Haworth, 39 Ill. 846; Hammon v. Southeastern Railw. Co. Wolf on Railw. 184, note. Rules of evidence in such cases. Piggott v. Eastern Counties Railw. Co. 3 C. B. 229; Aldridge v. Great Western Railw. Co. 3 Mann. & G. 515; 2 Eng. Railw. Cas. 552; St. Louis, Alton & R. R. Co. v. Gilham, 39 Ill. 445; The same v. Montgomery, 39 Id. 335; Lackawanna & Bloomsburg R. R. Co. v. Doak, 52 Pa. St. 879; Baltimore & Susquehanna R. R. Co. v. Woodruff, 4 Md. 242. The following cases turn on the construction of local statutes imposing liability for fires: As to the character of the property insured, Pratt v. Atlantic & R. R. Co.*

43. Police. A provision for the appointment of a police force during the construction of the works, to be paid by the company,—*Held*, to continue so long as workmen were employed in completing any of the works. *H. of Lords, 1848, North British Railw. Co. v. Horne, 5 Eng. Railw. Cas. 231.*

44. Branches. A reservation in the charter of a right to authorize other railroad corporations to enter upon and use this railroad, applies to a branch railroad purchased from another corporation whose charter contained no such reservation. *Mass. Supreme Ct. 1859, Lexington & R. R. Co. v. Fitchburg R. R. Co. 14 Gray, 266.*

45. Exemption from burdens. A clause in a charter exempting the company from anything to detract from or affect their profits, will not exempt them from the operation of the statutes rendering railroad corporations liable to fence or to pay for cattle killed by them. *Ind. Supreme Ct. 1861, Indianapolis & R. R. Co. v. Kercheval, 16 Ind. 84.*

46. Fixing tolls. The power given in the charter of a railroad company to fix their own tolls,—*Held*, not to preclude the exercise of a power also reserved to the legislature to regulate the amount of tolls to be paid by a connecting road which should use the track of the company. *Vermont and Massachusetts R. R. Co. v. Fitchburg R. R. Co. 9 Cush. (Mass.) 869.*

47. Negotiable paper. A railroad company has power to take a promissory note and negotiate it in the ordinary course of business. This is a power incident to all such corporations. *Ill. Supreme Ct. 1860, Frye v. Tucker, 24 Ill. 180. Compare Came v. Brigham, 30 Me. 35; Bateman v. Midland Wales Railw. Co. 1 Law Rep. C. P. 499; 35 Law J. N. S. 205.*

48. A railroad corporation has a legal residence in any county in which it exercises corporate powers and privileges, and hence it may be sued in the county where its chief business office is located, though no part of its road lies within such county. *Ill. Supreme Ct. 1854, Bristol v. The Chicago & Aurora R. R. Co. 15 Ill. 436. And see Androscoggin*

43 Me. 572; Chapman v. Atlantic & St. Lawrence R. R. Co. 37 Id. 92; Ross v. Boston & Worcester R. R. Co. 6 Allen, 87. As to the fire being communicated immediately. Hart v. Western R. R. Co. 13 Metc. 99; Hooksett v. Concord R. R. Co. 38 N. H. 942.

& Kennebec R. R. Co. v. Stevens, 28 Me. 484.

49. Sale or transfer of franchise, &c. A railroad is not in all respects a highway *publici juris*, but it is the subject of private property, and is liable to be sold in that character, unless the sale be forbidden by the legislature; not the franchise, but the land itself constituting the road. *N. C. Supreme Ct.* 1844, State v. Rives, 5 Ired. 297. Compare Bank of Middlebury v. Edgerton, 80 Vt. 182.

50. The franchise in a railroad, built by a railroad corporation, cannot be sold or assigned without the assent of the power which granted it; it is a mere easement, not the subject of sale. The franchise will not pass by a sale of the road itself, nor is the corporation thereby dissolved, although it might be ground of forfeiture. *Miss. Ct. of Errors*, 1848, Arthur v. Commercial & R. R. Bank, 9 Smed. & M. 394.

51. A railroad corporation is not dissolved by sale upon execution of a part or of the whole of their road. *N. C. Supreme Ct.* 1844, State v. Rives, 5 Ired. 297; *S. P. Mass. Supreme Ct.* 1850, Commonwealth v. Tenth Massachusetts Turnp. Corp. 5 Cush. 509; *S. P. Ill. Supreme Ct.* 1861, Bruffet v. Great Western R. R. Co. 25 Ill. 353.

Nor by a lease of the road for the term of the charter. *N. Y. Supreme Ct.* 1854, Troy & Rutland R. R. Co. v. Kerr, 17 Barb. 581.

52. Where the charter of a corporation authorized it to purchase the lands necessary for the site of a railroad, and the requisite depots, stations and buildings, and to possess and hold the same in fee simple,—*Held*, that the estate in such lands was subject to sale on execution, and might be assigned by the corporation. *Miss. Ct. of Errors*, 1848, Arthur v. Commercial & Railroad Bank, 9 Smed. & M. 394.

53. A railroad corporation is not authorized to give up the management of its line to another company. *V. Chan. Ct.* 1851, Beman v. Rufford, 6 Eng. L. & Eq. 106; 15 Jur. 914; 1 Sim. N. S. 550.

54. Conveyance by president of a railroad corporation, authorized by vote of the company to execute deed of surrender of the property of the road to trustees for the benefit of bondholders,—*Held*, good, as against subsequent attaching creditors, although the

trustees continued the employment of the persons who had been employed by the company. *Mass. Supreme Ct.* 1858, Henshaw v. Bank of Bellows Falls, 10 Gray, 568.

55. Attachment on personal property.* The doctrine that the property of a railroad company necessary to operate the road cannot be attached, if it be sound, does not apply where the attachment is to enforce a specific lien, which accrued by mortgage or by statute, upon the acquisition of the property by the company without payment. *Wis. Supreme Ct.* 1860, Hill v. La Crosse & C. R. R. Co. 11 Wis. 214. Compare Coe v. Columbus, Piqua & Indiana R. R. Co. 10 Ohio St. 372.

56. Equity will interfere, at the suit of the trustee under a mortgage of the road and its revenues, to enjoin creditors subsequent to the mortgage from garnisheeing the revenues. [Redfon Railw. 582, 1 John's Ch. 615.] *Io. Supreme Ct.* 1863, Dunham v. Isett, 15 Io. 284.

57. Consolidation. A State statute which authorizes connecting railroad corporations to merge and consolidate their stock, and make one joint company of the roads thus connected, causes, when the consolidation is effected, a dissolution of the previously existing companies, and creates a new corporation, with new liabilities derived from those which have passed out of existence. [16 Ind. 172.] *U. S. Supreme Ct.* 1863, Clearwater v. Meredith, 1 Wall. 25.

II. ACQUIRING LANDS.

1. Power to take.

58. Public lands. Where the legislature authorized a company to construct a railroad between two designated points,—*Held*, that the corporation had the right to occupy any land of the State between those points on the authorized route which might be necessary for their purpose. *Ind. Supreme Ct.* 1852, Indiana Central R. R. Co. v. State, 3 Ind. 421. See also as to county property, Free-

* Tank-house, locomotive and cars, deemed part of realty. *Titus v. Glinheimer*, 27 Ill. 463; *S. P. Titus v. Mabey*, 25 Id. 257.

Rolling stock upon a railroad, although a statute has declared it taxable as realty, is not a fixture in such sense of the word as to be exempt from seizure and sale for delinquent taxes, and on this ground a court of equity will not restrain by injunction such threatened sale. *Wis. Supreme Ct.* 1866, Chicago & N. W. Railw. Co. v. Borough of Ft. Howard, 21 Wis. 44.

holders of Monmouth v. Redbank &c. Turnpike Co. 18 N. J. 91.

59. Right of way over public land's granted. Conditions prescribed. Act of Congress, Aug. 4, 1852, § 1, 10, U. S. Stat at L. 28; Act of July 15, 1862, § 1, 12 *Id.* 577.

60. A State, by virtue of its right of eminent domain, may authorize the construction of railroads through land owned but not occupied by the United States.* *Ct. of Claims*, 1857; *Illinois Central R. R. Co. v. United States*, 10 *Law Rep. N. S.* 680. And see *Attorney General v. Detroit & Erie Plank Road Co.* 2 *Mich.* 138.

As to the right of EMINENT DOMAIN, and the COMPENSATION of private owners generally, see those titles.†

61. Conditions precedent. The right of persons associated as a railroad corporation to appropriate, by right of eminent domain, private property for the purposes of the railroad depends on the legal sufficiency and validity of the certificate and public record of organization from which they have their corporate powers. *Ohio Supreme Ct.* 1855, *Atlantic & Ohio R. R. Co. v. Sullivan*, 5 *Ohio St.* 276.

62. To sustain a proceeding for appropriating land, a railroad company must show the certificate and public record of organization to be strictly in conformity

with all the requisitions of the law. *Ohio Supreme Ct.* 1855, *Atlantic and Ohio R. R. Co. v. Sullivan*, 5 *Ohio St.* 276; 1864, *Atkinson v. Marietta & Cincinnati R. R. Co.* 15 *Id.* 21.

63. When the power of fully completing a railway, according to the intention of the legislature, depends on the voluntary consent of individuals having property on the proposed line, such consent ought to be obtained by the company before they proceed in the undertaking. *Rolls Ct.* 1846, *Gray v. Liverpool & Bury Railway Co.* 9 *Beav.* 391; 4 *Eng. Railw. Cas.* 285; 10 *Jur.* 364.

64. Where the charter of a railroad company authorizes an entry on land for the purpose of locating the road, and directs the location to be made and a survey of the route of the road to be deposited in the office of the secretary of state, the location and deposit of the survey are conditions precedent to their authority to enter for the purpose of constructing the road.* *Circ. U. S. Ct. (N. J.)*, 1830, *Bonaparte v. Camden & Amboy R. R. Co.* 1 *Baldw.* 218.

65. Stations, &c. A railroad corporation authorized to take any lands, or right of way, required by the company for the purpose of constructing their road, at a valuation, may take land at the terminus for the purpose of a depot. *Tenn. Supreme Ct.* 1850, *Nashville & Chattanooga R. R. v. Cowardin*, 11 *Humph.* 348.

To similar effect, *Chancery*, 1848, *Cother v. Midland Railw. Co.* 17 *Law J. N. S.* 285; 2 *Phill. Ch.* 469; 5 *Eng. Railw. Cas.* 187; *Ohio Supreme Ct.* 1854, *Giesy v. Cincinnati &c. R. R. Co.* 4 *Ohio St.* 308.

66. A grant to a railroad company, to construct a road with such appendages as may be deemed necessary for the convenient use of the same, authorizes taking land compulsorily for workshops. This power is not exhausted by the apparent completion of the road, if an increase of business requires other appendages, or more room for tracks. *III.*

* As to effect of Congressional grants of land to a State for railroad purposes.—see *Baker v. Gee*, 1 *Wall.* 333.

† The following cases turn on peculiar statutory requirements as to the mode of procedure:—

Notice of amount required not to be countermanded. *Tawney v. Lynn & Ely Railw. Co.* 16 *Law J. N. S. Chan.* 252; 4 *Eng. Railw. Cas.* 615. Requisites of petition. *Contra Costa &c. R. R. Co. v. Moss*, 28 *Cal.* 328; *Troy & Rutland R. R. Co. v. Cleveland*, 6 *How. Pr.* 288. Proof of joint interest. *Ashby v. Eastern R. R. Co.* 5 *Meck.* 363; 1 *Am. Railw. Cas.* 356. Objections how taken. *Church v. Northern &c. R. R. Co.* 45 *Pa. St.* 339. Jurisdiction of court. *Hughes v. Lake Erie &c. R. R. Co.* 21 *Ind.* 175. Regularity of proceedings. *Hitchkiss v. Auburn & Rochester R. R. Co.* 26 *Darb.* 600. Warrant for jury. *Cassidy v. Kennebec & Portland R. R. Co.* 45 *Me.* 263. Requisites of Report. *Pennsylvania R. R. Co. v. Bruner*, 55 *Pa. St.* 318. Amendments allowed. *Boyd v. Negley*, 40 *Pa. St.* 377; *Contra Costa &c. R. R. Co. v. Moss*, 28 *Cal.* 328. Payment into court. *Doe v. The Manchester &c. Railw. Co.* 14 *Mees.* 67. Sheriff's return. *Harper v. Lexington & Ohio R. R. Co.* 2 *Dana*, 227. Confirming report. *Rochester & Genesee R. R. Co. v. Beckwith*, 10 *How. Pr.* 168. Appeal when allowed. *Boyd v. Negley*, 40 *Pa. St.* 377; *Church v. Northern &c. R. R. Co.* 45 *Id.* 339. What objections may be taken on appeal. *Buffalo &c. R. R. Co. v. Brainard*, 9 *N. Y. (5 Seld.)*, 100. Power of appellate tribunal. *N. Y. & Erie R. R. Co. v. Coburn*, 6 *How. Pr.* 228; *The Same v. Corey*, 5 *Id.* 177; *Rochester & Genesee R. R. Co. v. Beckwith*, 10 *Id.* 168.

* A statement of the commencement of the road, the different stations made at the time of the survey, the course and distance between the stations to the termination, is a survey within the meaning of the charter of a railroad company providing that it shall be lawful for the company to take possession of the lands when a survey of the route located shall have been filed in the office of the secretary of state. *N. J. Chancery*, 1831, *Attorney General v. Stevens*, *Sact.* 369.

Compare *Baker v. Gee*, 1 *Wall.* 333.

Supreme Ct. 1855, Chicago, Burlington & Quincy R. R. Co. v. Wilson, 17 *Ill.* 123.

67. A railroad company, under the right of eminent domain, may appropriate property for its side-tracks and engine-houses; and it is no objection to the exercise of such rights that the land so taken constitutes a private way of the company not used by the public. It is not the special use made of the property taken which characterizes it, but its convenient necessity to that part which is for public use.* *Pa. Supreme Ct.* 1867, Philadelphia & C. R. R. Co. v. Williams, 54 *Pa. St.* 108.

68. The manufacture of railroad cars is not so necessarily connected with the management of a railroad as to authorize a railroad company, by virtue of the right of eminent domain, to take lands compulsorily for the purpose of erecting such a manufactory thereon. So also in respect to dwelling-houses to rent to the employees of the company. But otherwise as to the land taken for storing temporarily lumber used on the road. See *Eldridge v. Smith*, 84 *Vt.* (5 *Shaw*) 484.

69. Branches. A railway company having opened their main line for traffic, but not having completed the stations and works, are entitled under the railways clauses act, 8 Vict. c. 20, § 16, making it lawful for the company to take land, &c., for the purpose of constructing the railway or the accommodation-works connected therewith, to take

* Under the provisions of a railroad charter authorizing the company to take land contiguous to the line of their road for depots, shops, &c. provided the amount so taken does not exceed five acres, the company cannot take without the consent of the owner, as a site for a warehouse, a parcel of land four hundred yards from the line of their road, and build a narrow track from their road to such parcel of land, although the whole quantity required for the site of the warehouse, and the road leading to it, would not exceed five acres. *S. C. Ct. of Appeals*, 1855, *Eld v. Wilmington & Manchester R. R. Co.* 8 *Nich. (Eq.)*, 46.

Under the power conferred upon a railroad corporation only "to enter upon any land, to survey, lay down and construct its road;" "to locate and construct branch roads from the main road to any town or places in the several counties through which the said road may pass;" to appropriate land for "necessary side tracks," and "a right of way over adjacent lands sufficient to enable such company to construct and repair its road," such company having located and being engaged in the construction of its permanent main road along the north side of a town, is not authorized to appropriate a temporary right of way, for a term of three years, along the south side of the town, to be used as a substitute for the main track while the same is in course of construction. *Ohio Supreme Ct.* 1880, *Currier v. Marietta & Cincinnati & C. R. Co.* 11 *Ohio St.* 228.

compulsorily, within the time for completing the railway and works, any lands situate within the limits of deviation for the purpose of making a branch railway. *Exch.* 1851, *Sadd v. Maldon & C. Railw. Co.* 2 *Eng. L. & Eq.* 410; 20 *Law J. N. S.* 102.

70. Interference with other lines. The right of a railway company to make a junction with a pre-existing railway does not imply the power to take the title to any of the lands of such railway, unless that is indispensable to effect the junction, but only to enter upon such lands by way of easement, for the purpose of effecting the junction. *V. Ch. Ct.* 1852, *Oxford & C. Railw. Co. v. South Staffordshire Railw. Co.* 19 *Eng. Law & Eq.* 131; 1 *Drewry*, 255.

71. The mere crossing of the track of a horse railroad company by the track and cars of a similar company (both being authorized to lay rails on the same place by the legislature, and both running on a public highway,) is not an appropriation of the property of the former company, but only a mode of exercising the public right of transit on the highway. *N. Y. Supreme Ct.* 1861, *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.* 83 *Barb.* 420.

72. House. In a statute that no corporation should take any meeting-house, dwelling-house, or public or private burying-ground, without the consent of the owners thereof, the term dwelling-house refers only to the house, and is designed to include no part of the garden, orchard, or curtilage.* *Me. Supreme Ct.* 1860, *Wells v. Somerset & Kennebec R. R. Co.* 47 *Me.* 845.

73. Receiver. That a railway company will be restrained from taking proceedings without the leave of the court under the lands clauses consolidation act, to take possession of lands in the possession of a receiver under the court. See *Tink v. Rundle*, 10 *Beav.* 818.

* That a statute which forbids a railroad company from "invading the dwelling-house of any free person, or any space within sixty feet thereof, without the consent of the owner," will not be construed to prohibit a railroad company from laying out its road, on its own land, within sixty feet of a dwelling-house on the land of another.—see *Richmond & York River R. R. Co. v. Wicker*, 18 *Gratt.* 875.

That to entitle the owner of a house to oblige a company to take a house and premises by reason of the company requiring a portion of the adjoining land, the land should be appurtenant to the house at the time of the notice to treat.—see *Chambers v. London, Chatham & Dover Railw. Co.* 11 *Week. Rep.* 479.

74. **Underground.** Proceedings may be had against the owner of a stratum of coal, as contradistinguished from the proprietor of the surface, to obtain from him an underground right of way. *Pa. Supreme Ct.* 1862, *Brown v. Corey*, 43 *Pa. St.* 495.

75. **Entry.** Where a railroad company are authorized by charter they are not liable for entering upon the adjoining lands and occupying the same with temporary dwellings, stables, and blacksmith shops, provided no more is taken than is necessary for that purpose. *Pa. Supreme Ct.* 1845, *Lauderbrun v. Duffy*, 2 *Pa. St.* 898. Compare *Standish v. Mayor of Liverpool*, 1 *Drew.* 1; 15 *Eng. L. & Eq.* 255.

76. That the necessity of appropriating any particular piece of land is committed to the discretion of the company, and not a matter for judicial review, except in gross cases.* [2 *N. Y.* 595.] *Ford v. Chicago & C. R. R. Co.* 14 *Wis.* 609; *Eldridge v. Smith*, 34 *Vt.* (5 *Shaw*), 484.

77. A bond filed by a railroad company, when locating their road, is a security for all damages that may occur from the construction also; both are but one injury, and a bond filed for one is therefore a security for all. *Pa. Supreme Ct.* 1862, *Wadhams v. Lackawanna & Bloomsburg R. R. Co.* 42 *Pa. St.* 308.

78. The offer of a bond by a railroad company is an assertion by one of the parties that they cannot agree upon the damages caused to the property of the landowner, and the action of the court approving the sureties and directing the bond to be filed involves an adjudication that everything had been done to entitle the company to have the bond filed. *Id.*

79. **Covenants of seizin and warranty,**

* Under a statute authorizing a company to take such lands as they think necessary for the purposes of the act, a landowner may have an injunction restraining the company from taking his land if not apparently necessary, unless the company show the necessity which they rely upon. A general affidavit of their engineer that the lands are or will be required is not sufficient. *V. Chan. Ct.* 1865, *Flower v. London & C. R. R. Co.* 2 *Drew. & S.* 393; 34 *Law J. N. S.* 540.

It has been held that the exercise of the right of eminent domain authorized by public necessity does not extend to cases of mere public convenience, hence a statute authorizing a railroad company to appropriate lands upon which to erect freight sheds and branch railways, for the purpose of convenience, will be void. *Tenn. Supreme Ct.* 1867, *Memphis Freight Co. v. Mayor & C. of Memphis*, 4 *Coldw.* 419.

though running with the land, do not estop from an entry on the land to build a railroad under the statute. All private contracts are subordinate to the right of eminent domain. *Pa. Supreme Ct.* 1862, *Brown v. Corey*, 43 *Pa. St.* 495.

80. **Effect of expiration of corporate powers.** After the expiration of the time within which a railroad company are required by charter to complete their road, they have no authority to take additional lands for the extension of their road, unless by the landowner's consent. *Me. Supreme Ct.* 1849, *Peavey v. Calais R. R. Co.* 1 *Am. Railw. Cas.* 147; 30 *Me.* 498.

81. Where a railway company are entitled to retain the possession of lands which they have taken, they must also be entitled under their compulsory powers to perfect their title. *V. Chan. Ct.* 1851, *Sparrow v. Oxford, Worcester & C. Railw. Co.* 12 *Eng. L. & Eq.* 249; 9 *Hare*, 436.

82. **Possession.** A railroad corporation, under the Maine statutes, as soon as their track has been located, may take immediate possession. The owner of land taken for the road by such location, failing to agree with the company as to his damages, may, at any time within three years, apply to the county commissioners, who shall estimate his damages, and, if requested, require the corporation to give security for their payment. But where no application has been made to the commissioners to estimate the damages, an action of trespass, brought within three years after the location, against the company or its agent cannot be maintained. *Me. Supreme Ct.* 1859, *Davis v. Russell*, 47 *Me.* 443.

83. In the case of a temporary occupation by a railroad company,—*Held*, that two years was not, under the circumstances of the case, an unreasonable time. *Nichols v. Somerset & Kennebec R. R. Co.* 43 *Me.* 356.

84. Where the language of the statute (Iowa act of 1853, c. 31) authorizes the company to enter upon the land if they shall first pay the compensation assessed, payment is a condition precedent to the right of entry, and the company are trespassers if they enter pending an appeal from the assessment, and before payment. *Iowa Supreme Ct.* 1860, *Henry v. Dubuque & C. R. R. Co.* 10 *Iowa* (2 *With.*), 540. Compare *Lang-*

ford v. Brighton &c. Railw. Co. 4 *Eng. Railw. Cas.* 69.

85. Where a railway company have complied with the provisions of section 85 of the Land Clauses Consolidated Act, and entered upon and taken land within the prescribed period for exercising their compulsory powers, their continuance in possession after the prescribed period, without having the compensation assessed, and the land conveyed to them, is not unlawful, and an ejectment cannot be maintained against them under such circumstances. *Q. B.* 1851, *Armistead v. North Staffordshire Railw. Co.* 15 *Jur.* 944; 4 *Eng. L. & Eq.* 216; 20 *Law J. N. S.* 249; *Worsley v. South Devon Railway Co.* 15 *Jur.* 970; 20 *Law J. N. S.* 254; 4 *Eng. L. & Eq.* 223.

2. Compensation.

86. A statute authorizing a railroad to take land *in invitum*, by making compensation therefor, is constitutional. *Ill. Supreme Ct.* 1859, *Johnson v. Joliet & Chicago R. R. Co.* 23 *Ill.* 202; *Cal. Supreme Ct.* 1863, *Contra Costa &c. R. R. Co. v. Moss*, 23 *Cal.* 323. To similar effect *Concord Railway v. Greely*, 17 *N. H.* 47; *Louisville R. R. Co. v. Chappell*, 1 *Rice*, 383.

87. Before the public can, against the will of the owner, acquire the right to enter upon and permanently occupy his land, needed for public use, the value must be ascertained by legal and proper process, and be paid; or, otherwise, an adequate and safe fund must be provided for his future compensation.* *Wis. Supreme Ct.* 1860, *Powers v. Bears*, 12 *Wis.* 218.

88. A private corporation so taking land must tender in money to the owner, or person interested, the amount of the ascertained damages, or compensation with expenses, and, upon his refusal to receive it, should deposit it with some proper officer, or person, to be held for the owner's good, until legal settlement, or his readiness to accept it. *Ib.*

89. An act amending the charter of a railway company is void in so far as it authorizes the taking of private property without providing the means of obtaining compen-

sation. The owner of land taken for public use is not to be driven to his common-law remedy by suit.* *Wis. Supreme Ct.* 1853, *Shepardson v. Milwaukee & Beloit R. R. Co.* 6 *Wis.* 605.

90. Arbitrators. A provision in the charter of a railroad corporation, that the proprietor of lands proposed to be taken for the use of such corporation shall, if he claims damages for appropriation, file with the company his claim therefor; that the company shall appoint disinterested men to award them, and that if either party is dissatisfied with the award such party may appeal to a jury, affords reasonable opportunity to the land owner to obtain compensation, and is, except as to non-residents and persons under a disability, constitutional. *Ind. Supreme Ct.* 1855, *Albany & New Salem R. R. Co. v. Connelly*, 7 *Ind.* 32.

91. A statute authorizing the compensation to be determined by the agent of the company, and two disinterested freeholders chosen by him, they acting *ex parte* and in private, is unconstitutional. *Wis. Supreme Ct.* 1860, *Powers v. Bears*, 12 *Wis.* 213.

92. The right to damages for land taken for public use accrues and takes effect at the time of taking, though it may be ascertained and declared afterwards. That time, in the case of railroads, is *prima facie* the time of filing the location. *Mass. Supreme Ct.* 1843, *Charlestown Branch Railw. Co. v. County Commissioners of Middlesex*, 1 *Am. Railw. Cas.* 383; 7 *Metc.* 78; 1849, *Davidson v. Boston & Maine R. R. Co.* 1 *Am. Railw. Cas.* 534; 3 *Cush.* 91; *Boynnton v. Peterborough & Shirley R. R. Co.* 1 *Am. Railw. Cas.* 595; 4 *Cush.* 467. See, also, *Meacham v. Fitchburg R. R. Co.* 4 *Cush.* 291; *Boston & Providence R. R. Co. v. Midland Railw. Co.* 1 *Gray*, 360.

93. Proof of a deed of land with a privilege in an adjacent canal to the grantee and his heirs and assigns forever, is *prima facie*

* Whether the compensation must be paid *first* see *Shute v. Chicago &c. R. R. Co.* 26 *Ill.* 436; *Somerville & Easton R. R. Co.* 3 *Halet. Ch.* 51.

* An act of the legislature, which provides that the consequential damages occasioned to the property of individuals by the construction or continuance of bridges, heretofore erected by a railroad company over their road, at its intersection with highways, for which no liability was imposed upon the company by charter, may be assessed upon the petition of such individuals, providing no compensation has been received therefor, is within the constitutional provision prohibiting the passage of retrospective laws, and is therefore void. *N. H. Superior Ct.* 1861, *Towle v. Eastern Railroad*, 18 *N. H.* 547.

evidence of his title, and, in the absence of any controlling evidence, authorizes him to recover damages for the destruction of the permanent easement by the construction of a railroad by which the canal is filled up. *Mass. Supreme Ct.* 1861, *Whitman v. Boston &c. R. R.* 8 *Allen*, 183.

94. One who purchases land on a railroad takes it *cum onere*, and cannot recover for the original taking; nor is a relaying of the track a taking of his property within the constitutional provision, so as to entitle him to compensation. *N. Y. Supreme Ct. Sp. T.* 1852, *Hentz v. Long Island R. R. Co.* 18 *Barb.* 646.

95. Questions of title. Where the land is taken for a railroad, the commissioners, appointed merely "to ascertain the compensation," are not required to pass on questions of title, or to apportion the amount of damages among several claimants of the property taken. *Cal. Supreme Ct.* 1868, *Spring Valley Waterworks v. San Francisco*, 22 *Cal.* 424.

96. Infants. Where a railroad corporation takes the private property of infant owners for public use, it is excused from demanding a relinquishment from such owners or from offering to them compensation, although such demand and offer be ordinarily required by their charter to precede such taking of individual property; and if the company have taken possession without unnecessary damage or encroachment, the infants are confined to the statutory remedy and cannot maintain an action. *Ind. Supreme Ct.* 1862, *Indiana &c. R. Co. v. Oakes*, 20 *Ind.* 9.

97. Measure of Compensation. Statutory provisions for the assessment of damages occasioned to a landowner by the taking of land for a railroad extend to the injury occasioned by the interruption of the proprietor's passage from one part of his land to another, as well as to any other injury which may be caused by the construction and use of the road; and when such damages as may be anticipated from its future construction, if it has not been made, are assessed, they are made up of the whole injury done or expected to be done, including not only the loss of the use of the land produced by the road, but the probable expense of fences and the diminution of the value of the land by a separation from each other of different parts. *Me. Supreme Ct.* 1850,

Mason v. Kennebec & Portland R. R. Co. 31 *Me.* 215.

98. Under the Iowa statutes, the right of way, not the fee, is to be appropriated and compensated for. *Iowa Supreme Ct.* 1855, *Henry v. Dubuque & Pacific R. R. Co.* 2 *Clarke*, 288.

99. Interpretation of statute. Where the words of a railway company's act are capable of two interpretations, but the general intent of the legislature is complete indemnification to the party whose land is taken by the company, the court will incline to that construction of the words which will make them consistent with the general intent. *Chancery*, 1850, *Eton College Exp.* 15 *Jur.* 45; 20 *Law J. N. S.* 1.

100. The jury are to take into consideration the injury to the lands not taken, to the owner's dwelling-house on the estate, the subjection of his family to danger, his buildings to risk of fire, the inconvenience caused by embankments and excavations, and deterioration of his lands for agricultural purposes or for building lots. *N. J. Supreme Ct.* 1850, *Somerville & Easton R. R. Co. v. Doughty*, 2 *Zabr.* 495.

101. The amount paid to a landowner as compensation for land taken for a railway and for injury to his remaining estate, in pursuance of an award, covers all damage, known or contingent, by the construction of the railway on the lands purchased, and all other damage from the construction of the railway at other places, which is apparent and capable of being ascertained and estimated when the compensation is awarded; but it does not include any contingent and possible damage which may arise afterwards by the works of the company at other places which can not be foreseen by the arbitrator. *Q. B.* 1851, *Lawrence v. Northern Railw. Co.* 4 *Eng. L. & Eq.* 265; 20 *Law J. N. S.* 293; 6 *Eng. Railw. Cas.* 656; 16 *Q. B.* 648. Compare *infra*, 855, &c.

102. Where the waters, on certain lowlands, were flowed back upon the plaintiff's land, by reason of insufficient openings in a railway constructed across such lowlands, *held*, that the company were liable to make good the damages sustained by plaintiff, although no statute required them to make the openings, and they could not be compelled to do so by writ of mandamus. *Q. B.* 1851, *Lawrence v. Great Northern Rail-*

way, 4 *Eng. L. & Eq.* 265; 16 *Q. B.* 648; 6 *Eng. Railw. Cas.* 356; 20 *Law. J. N. S.* 293.

103. In estimating the "loss or damage" occasioned to a land-owner by a railroad company whose charter requires compensation to be paid for damages and benefits, in taking the right of way, the jury may estimate the value of the land taken by the company; the deterioration of the parcels isolated; the alteration of arrangement required about the homestead; the loss of time and expenditures caused by any increase of care or distance which had been occasioned; and the injury to the value of the place as a stand for a public house. *S. C. Ct. of Appeals*, 1852, *White v. Charlotte & South Carolina R. R. Co.* 6 *Rich. (Law)* 47.

104. Where the arbitrators, appointed to assess damages for land taken by a railroad, are required to take into consideration the advantages to be derived by the owner, such damages must be assessed as are the direct and immediate consequence of the road, to the whole tract through which it passes. The exclusive appropriation of a part, the inconvenience arising from a division of the property, or from increased difficulty of access, and the cost of additional necessary fencing, are alike the direct and immediate result of such construction. *Pa. Supreme Ct.* 1860, *Watson v. Pittsburgh & Connellville R. R. Co.* 37 *Pa. St.* 469.

105. The market value of the land taken is the proper standard to be adopted in estimating the damages occasioned to a land-owner by the construction of a railroad through his property. In addition to this, the jury may allow for the disadvantages to the land from the manner in which it may be cut by the road as projected or constructed. This is always done, unless the advantages to the whole property outweigh it; in such case the amount of the preponderating advantages will stand against the value of the property taken, or other specific injury done. *Pa. Supreme Ct.* 1864, *East Pennsylvania R. R. Co. v. Hottenstine*, 47 *Pa. St.* 28.

106. Evidence is also admissible, in such a proceeding, as to what the property would have sold for before and after the road was made and in suc-

cessful operation; and such difference in value is a measure of damages.* *Ib.*

107. Fences and crossings. Where the law casts the duty of maintaining fences, crossings, &c., upon the adjacent land-owner, the expense of doing so is an important consideration, in estimating damages for the land taken; and this expense should be borne by the company, in addition to paying the value of the land, for otherwise the land is taken without an equivalent. *Vt. Supreme Ct.* 1851, *Quimby v. Vermont Central R. R. Co.* 23 *Vt.* 387; *N. Y. Chancery*, 1847, *Kyle v. Auburn & Rochester R. R. Co.* 2 *Barb. Ch.* 489.

108. When suitable crossings over its road between the different parts of an owner's land are made by the company, the jury, in assessing land damages, should not allow the expense of making crossings to the land-owner. *N. H. Superior Ct.* 1849, *March v. Portsmouth & Concord R. R. Co.* 19 *N. H.* 372. To the same effect see *Philadelphia & C. R. R. Co. v. Trimble*, 2 *Am. Railw. Cas.* 245; 4 *Whart.* 47.

109. A jury, in assessing damages to a land-owner for land taken by a railroad company, may allow the actual damages incident to taking the road, arising from inconvenience in crossing the railroad, and interference with crossings already established, which the land-owner has sustained, together with damages for the failure or neglect of the company to build the crossings as required by law, but not for making the crossings themselves; the latter being a duty of the corporation. *Pa. Supreme Ct.* 1861, *East Pennsylvania Railroad v. Heister*, 40 *Pa. St.* 58.

110. Right of crossing track. The compensation when given, fixes the rights of the

* On the trial of an appeal from the award of damages by appraisers for land taken by a railroad company, in the construction of their road, evidence of the price paid, or amount received for land in the neighborhood, in particular instances, is inadmissible; the only proper test is the opinion of witnesses as to the value of the land taken, in view of its location and productiveness, or other uses, not speculative, or its market value, or the general selling price of land in the neighborhood. *Pa. Supreme Ct.* 1861, *East Pennsylvania Railroad v. Heister*, 40 *Pa. St.* 58. But compare *Shattuck v. Stoneham Branch R. R. Co.* 6 *Allen*, 115.

The opinion of witnesses, in regard to the extent of damages which a land-owner will sustain, by the appropriation of a part of his land for the construction of a railway over it, are not admissible; but they may express their opinion of the value of the land. *Ohio Supreme Ct.* 1855, *Atlantic & Great Western R. R. Co. v. Campbell*, 4 *Ohio St.* 568; 1865, *Cleveland & Pittsburgh R. R. Co. v. Ball*, 6 *Ohio St.* 383.

parties, upon the basis of its estimation, and, therefore, when an estimation is had upon the footing of an entire severance of the land, and compensation has been paid for the want of such communication, the land-owner has no right to cross the track. *Each*. 1848, *Manning v. Eastern Counties Railway Co.* 12 *Moss. & W.* 278.

111. **Fences.** In assessing damages for land taken for a railroad, in the absence of statutory provision, the owner is entitled to an allowance for one-half of the expense of making and maintaining the partition fence between his remaining land and the railroad. *N. Y. Chancery*, 1884, *Matter of the Rensselaer & Saratoga R. R. Co.* 4 *Paige*, 553.

112. Under a statute,—*e.g.* 1 *N. Y. Rev. Stat.* 512, art. 4,—providing for damages to the owner of the land through which the road is laid out,—an owner along whose line a highway is laid out, without taking his land, is not entitled to consequential damages for the expense of maintaining a fence, which no longer will be shared with him by his neighbor. *N. Y. Supreme Ct.* 1838, *People v. Supervisors of Oneida*, 19 *Wend.* 102.

113. As damages incident to the taking of the land, the party is entitled to an allowance for erecting and keeping in repair fences along the road, over and above the value of the land. *Wis. Supreme Ct.* 1851, *Milwaukee & Mississippi R. R. Co. v. Eble*, 4 *Chand.* 72; *Pa. Supreme Ct.* 1852, *Plank Road Co. v. Ramage*, 20 *Pa. St.* 95; *Cal. Supreme Ct.* 1856, *Sacramento Valley R. R. Co. v. Moffatt*, 6 *Cal.* 74. *Ind. Supreme Ct.* 1858, *Evansville &c. R. R. Co. v. Fitzpatrick*, 10 *Ind.* 120; *Same v. Stringer*, 10 *Ind.* 551; *Same v. Cochran*, 10 *Ind.* 560.

To the contrary are, *Henry v. Dubuque & Pacific R. R. Co.* 2 *Clarke*, 288; *Kennedy v. Dubuque & Pacific R. R. Co.* 2 *Clarke*, 521; *Kennett's Petition*, 4 *Post.* 189.

114. **Private way.** Under a statute providing remedies for injuries occasioned by railroads in obstructing highways, bridges and private ways, an owner cannot be deemed to have a private way through his own land, independent of his right to the land. So, where a railroad company, in constructing their road, obstructed a pathway which the owner had made for his own use,—*Held*, that these matters were not the subject of action, but that such obstruction must have been taken into consideration by the commission-

ers in making their award. *N. H. Superior Ct.* 1851, *Clark v. Boston & Montreal R. R.* 4 *Post.* 114.

115. Where the plaintiff had no access to his land except over the land of his grantor,—*Held*, that he had a way, by necessity, across such land, and that he was entitled to maintain an action against a railway company for obstructing it. *N. H. Superior Ct.* 1858, *Kimball v. Cochecho R. R.* 7 *Post.* 448.

116. One who has a right of way across a street, not a public way, by grant from the owner of the fee, cannot recover damages of a railroad company who duly locate their road over and along said street and over said right of way. *Mass. Supreme Ct.* 1858, *Boston and Worcester R. R. Corporation v. Old Colony R. R. Corporation*, 12 *Cush.* 605.

117. **Severing property.** Where a strip of land is severed from the rest of the owner's land in laying out a railroad, not only the abstract worth of the land is to be estimated, but compensation will be given for the effect of the severance from the remainder of the property, and for loss of value caused by the appropriation for the special use for which it is taken. *Ohio Supreme Ct.* 1856, *Cleveland & Pittsburgh R. R. Co. v. Ball*, 5 *Ohio St.* 568.

118. Where railroad corporations have an absolute right, under authority given them by statute, to take land for the use of a railroad without any exigency to erect high fences along the margin of their track on both sides so as to prevent the passage of the adjoining land-owner to and from the different portions of his estate, the land-owner cannot rely upon such anticipated obstruction as a ground of damage against the company for taking his land. *Mass. Supreme Ct.* 1853, *Boston & Worcester R. R. Corporation v. Old Colony R. R. Co.* 12 *Cush.* 605.

119. A land-owner may be entitled to damage for destroying the symmetry of his fields if the change in their shape produced real injury to the farm. *Pa. Supreme Ct.* 1852, *Plank Road Co. v. Ramage*, 20 *Pa. St.* 95.

120. **Blasting.** The damages occasioned by laying out and making a railroad, and which the commissioners are bound to estimate, include injuries which are done by a railroad corporation to buildings near the line of the road by means of blasting, in a

proper manner, a ledge of rocks through which the railroad passes. *Mass. Supreme Ct.* 1841, *Dodge v. County Commissioners of Essex*, 8 *Meta.* 380. *S. P. Vt. Supreme Ct.* 1853, *Sabin v. Vermont Central R. R. Co.* 25 *Vt.* 363.

121. **Incidental injuries.** Under the general statute with regard to railroads, which provides that railroad companies shall pay all damages caused by laying out and making their roads, the incidental injury to land adjacent to that taken and belonging to the same proprietor, is to be considered in assessing damages. *Conn. Supreme Ct.* 1857, *Imlay v. Union Branch R. R. Co.* 26 *Conn.* 249.

122. The charter of a railroad company provided that the viewers should award compensation to those whose land was taken "for the damages done or likely to be done, or that have been or may be sustained." *Held*, that such remote and contingent future damage as accidental fire from locomotives, was not intended to be estimated or paid for. The phrase "damages likely to be done" provides for any damage, direct or consequential, but does not imply that which is speculative and imaginary. *Pa. Supreme Ct.* 1856, *Sunbury & Erie R. R. Co. v. Hummell*, 27 *Pa. St.* 99; 1857, *Lehigh Valley R. R. Co. v. Lazarus*, 28 *Pa. St.* 203.

123. Railroad companies are liable at common law for the damages done by fire, occasioned by the negligent management of their locomotive engines; and for the risk of such damage, no compensation can be allowed at the taking of the land for the construction of the road.* *Id.*

124. An owner of land through which a railroad passes is not entitled to damages for being deprived of the advantage of keeping off others from his neighborhood, and thus saving himself from the risk and annoyance of their proximity, nor by reason of the inconvenience and delay occasioned by having to convey his manufactured articles across the railroad, and of the obstruction by trains passing along it. *Pa. Supreme Ct.* 1859, *Patten v. Northern Central Railway Co.* 33: *Pa. St.* 426.

125. An individual is not entitled to compensation under section 68 of the lands

clauses act, 1845, providing for compensation to owners of land which is injuriously affected, for injury occasioned to his lands lying near a railway line by persons in the trains overlooking the grounds, thus rendering them less comfortable and secluded, for the walks of the family and visitors; nor can the party claim compensation for vibration of the ground, caused by the use of the road, the statute only extending to damages, caused by the construction of the works.* *Q. B.* 1857, *Regina v. Southeastern Railway Co.* 29 *Law Times*, 124. To nearly same effect is *Re Penny*, 7 *Ell. & B.* 660.

126. The owner of a house, none of whose lands have been taken for the purposes of the railway, can recover, against the company who constructed the railway, compensation under §§ 6 and 16 of the railways clauses consolidation act, 1845, in respect of injury to the house (which, though not structural, depreciates its value), caused by vibration, smoke, and noise, in running locomotives, by another company, with trains in the ordinary manner after the construction of the railway. *Each. Chan.* 1867, *Brand v. Hammersmith & City Railw. Co.* 2 *Law Rep. Q. B.* 223; 36 *Law J. N. S. Q. B.* 139

127. An individual cannot claim damage of a railway company, in respect of his lands being injuriously affected, by reason of their track crossing a public highway, near his dwelling, upon a level, the highway being the principal approach to his grounds. *H. of Lords*, 1855, *Caledonian Railw. Co. v. Ogilvy*, 29 *Eng. L. & Eq.* 22.

128. The owner of land through which a railroad passes is not entitled to damages for the increased rate of insurance which he may have to pay because of the danger to his property from locomotives. *Pa. Supreme Ct.* 1859, *Patten v. Northern Central Railw. Co.* 33 *Pa. St.* 426.

129. The owner of a tavern, none of whose land is taken by the railway, is entitled to compensation for the diversion of the highway from his premises, and for prospective profits from unfinished houses. *Each. Ch.* 1868, *Chamberlain v. West End Railw. Co.* &c. 11 *Week. Rep.* 472.

130. The fact that the works of the railway company rendered a passage, which

* An appraisal of land damages is a bar to claims for injuries by fire from the engines of the company. *Pa. Supreme Ct.* 1848, *Railroad Co. v. Yeiser*, 2 *Am. Estab. Cas.* 325; 8 *Pa. St.* 366.

* As to injury from vibration, &c., long after the construction of the works, compare *Re Penny*, 7 *Ellis & B.* 660; and *Croft v. London & North Western Railw. Co.* 17 *Law J. N. S. Q. B.* 1.

passed plaintiff's house of refreshment, less convenient for the public, by which plaintiff, a lessee, lost customers, is not a ground for compensation under section 68 of lands clauses consolidation act. *Exch. Ch.* 1865, *Rickets v. Metropolitan Railw. Co.* 11 *Jur. N. S.* 260; 84 *Law J. N. S. Q. B.* 257; 13 *Week. Rep.* 455.

Compare *London & North Western Railw. Co. v. Bradley*, 6 *Eng. Railw. Cas.* 551.

131. A railroad company, which constructs a crossing in conformity with the orders of commissioners, whose decision is final by statute, is not liable to one whose land abuts on the road, for direct damage, nor by reason of a change of grade made by the town in consequence. Such an owner cannot maintain an action for the land of the highway. *Me. Supreme Ct.* 1854, *Whittier v. Portland &c. Kennebec R. R. Co.* 38 *Me.* 26.

132. Use of highway. Where a railroad company removed a track, already existing in a public street, nearer to a land-holder's lot so that it came over his line which extended to the middle of the street, this was not such a taking of his land as to entitle him to damages. *Pa. Supreme Ct.* 1867, *Snyder v. The Pennsylvania R. R. Co.* 55 *Pa. St.* 340; and see *Farrand v. Chicago & N. W. Railw. Co.* 21 *Wis.* 435.

133. Lands injuriously affected. In England, where railway companies are, by statute (8 & 9 *V. ct.* ch. 8, § 68) made liable to the owner of all lands "injuriously affected" by their railways, it has been—*Held*, that if the company do any act which would be an actionable injury without the protection of their special act, they are liable under the general statute. *Q. B.* 1851, *Glover v. North Staffordshire Railw. Co.* 5 *Eng. L. & Eq.* 335; 15 *Jur.* 673; 20 *Law J. N. S.* 876; *Q. B.* 1841, *Queen v. Eastern Counties Railw. Co.* 2 *Q. B.* 347.

134. The words "injuriously affected" in section 68 of the lands clauses consolidation act, 8 *Vict. c.* 18, comprehend cases of injury independent of taking land, and are not limited to damage sustained by persons whose lands or a part of whose lands are taken, used, or directly interfered with, and the right to compensation extends to and may be asserted in respect of consequential damage. *Chancery*, 1850, *East &c. Railw. Co. v. Gattke*, 15 *Jur.* 261; 20 *Law J. N. S.* 217; 3 *Macn. & G.* 155; 1851, *London &*

Northwestern Railw. Co. v. Bradley, 15 *Jur.* 689; 3 *Macn. & G.* 336.

135. Benefit. From the value of the land taken for a railroad, and the damages incident to the taking, should be deducted the benefits accruing to the owner from "the construction of the road." The phrase "the construction of the road," as used in the charter, does not mean the completion of the whole work, but the construction of that particular portion which runs through the party's land. *Wis. Supreme Ct.* 1851, *Milwaukee & Mississippi R. R. Co. v. Eble*, 4 *Chand.* 72. Compare *Vicksburg &c. R. R. Co. v. Calderwood*, 15 *La. Ann.* 481.

136. In assessing the value of land taken by a railroad company for the purposes of their road, the commissioners or jury, in estimating the "benefit or advantage" to the owner, should take into consideration the speculative or salable increase in the value of the land attributable to the construction of the road. The owner is to be assessed for any benefit, without exception, that he may receive from the construction of the road. And in estimating the "loss or damage," the expense of fencing along the line of the road, where it passes through fields, should be considered, and also the incidental depreciation of the value of the tract by reason of the road passing through it. *S. C. Ct. of Appeals*, 1852, *Greenville & Columbia R. R. Co. v. Partlow*, 5 *Rich. (Law)*, 428.

137. Outlying lots. Land appropriated by a railroad company under an implied right derived from their charter and the provisions of a general railroad law, and used as a place of deposit for stone and earth, is a proper subject for compensation, although lying beyond the legal boundaries of the roadway, if necessary to the construction of the road. *Pa. Supreme Ct.* 1867, *East Pennsylvania R. R. Co. v. Schollenberger*, 54 *Pa. St.* 144.

138. Minerals. Where a railway company, under sections 77, 78, and 79 of the railways clauses consolidation act, 1845 (8 & 9 *Vict. ch.* 20),—which provide that the owner of a mine under land on which a railway is constructed, desirous of working his mine, should give the company thirty days' notice of his intention; and, that the company, if their railway is likely to be injured thereby, may prevent the working of the mine by making the owner compensation—purchases land

for the purposes of the road, and after notice of the owner's intention to work the minerals under the road, refuses to compensate him therefor, the owner is entitled to get the minerals, although thereby the surface should be caused to settle; and where, under such circumstances, the company has given notice that such working will cause the surface to settle, the owner may recover the value of the minerals. *Each. Cham.* 1860, Great Western Railw. Co. v. Fletcher, 5 *Hurl. & N.* 689; S. P. II. of *Lords*, 1867, Great Western Railw. Co. v. Bennett, 86 *Law J. N. S. Q. B.* 188; 2 *Law Rep. H. of L.* 27.

139. The act of congress granting a right of way to the Central Pacific Railroad Co. includes a right of way over mineral lands; although mineral lands are excepted from the grant of alternate sections. *Cal. Supreme Ct.* 1864, *Doran v. Central &c. R. R. Co.* 24 *Cal.* 245.

140. A railway company which has been condemned to pay for land, the owner reserving the minerals, are not liable to the land-owner by reason of his inability to work a mine which he has discovered under the railway. The conveyance of the surface of the land gives to the grantee an implied right of support, sufficient for the object contemplated, from the soil of the grantor adjacent as well as subjacent. *H. of Lords*, 1856, *Caledonian Railw. Co. v. Sprot*, 39 *Eng. L. & Eq.* 16; 2 *Jur. N. S.* 628; 2 *Macq. H. L. Cas.* 449. Compare *Midland Railw. Co. v. Checkly*, *Law R. 4 Eq. Cas.* 19; 86 *Law J. N. S.* 380.

141. The measure of damages in a case where land in a coal mine has been taken for an underground railroad, is the injury done to the tract, as a whole, or the difference between its value at the time of the entry and its value after the completion of the railroad. *Pa. Supreme Ct.* 1862, *Brown v. Corey*, 43 *Pa. St.* 495.

142. The owner of a tide mill, who is also the riparian proprietor of flats, from which the tide wholly ebbs, between his mill and navigable water, has no right, either as against conterminous proprietors or the public, to have his flats kept open and unobstructed for the free flow and reflow of the tide water for the use of his mill or for navigation purposes. The adjoining proprietors may build solid structures to a certain extent, and thereby obstruct the ebb and flow of the tide,

if in so doing they do not wholly obstruct the access of other proprietors to their houses and lands; and if the mill owner and other proprietors suffer damage therefrom, it is *damnum absque injuria*. Therefore, so far as a railroad erected by the legislature affects the right of the claimants to pass and repass to and from their lands and wharves with vessels, it is a mere regulation of a public right and not a taking of private property for a public use, and gives no claim for damages. *Mass. Supreme Ct.* 1849, *Davidson v. Boston & Maine R. R.* 1 *Am. Railw. Cas.* 534; 3 *Cush.* 91.

143. The owner of wharves, in front of which a railroad is located according to law, cannot recover of the railroad company, as damages, the anticipated depreciation of the wharf property because the access thereto is made dangerous and inconvenient. *Mass. Supreme Ct.* 1858, *Boston & Worcester R. R. Corporation v. Old Colony R. R. Corporation*, 12 *Cush.* 605.

144. Interference with navigation. In the case of compensation claimed for the building of a railroad between a navigable river and coal mines, whereby the river transportation was injured or cut off, to reduce damages, the railroad company may show that the river transportation had lessened in value, by the facilities for transportation furnished by the railroad. *Ohio Supreme Ct.* 1856, *Cleveland & Pittsburgh R. R. Co. v. Ball*, 5 *Ohio St.* 568.

145. —with track of other company. In an application by one railroad company against another company for damages caused by taking the petitioners' land under legislative authority, it is not a proper consideration for enhancing the damages, that the petitioners own a railroad extending far into the interior, and are doing a large and profitable business, which would be incommoded by the track and conveniences of the respondents. But the fact of the proximity of the railroad communication with tide-waters and a harbor, and the consequent increased value of the property for any and all useful business purposes, are proper considerations in estimating the damages. *Mass. Supreme Ct.* 1858, *Boston & Worcester R. R. Corporation v. Old Colony R. R. Corporation*, 12 *Cush.* 605.

146. —with turnpike road. In ascertaining what compensation ought justly to be

made to a turnpike company for granting to a railroad company an easement or right of way across their road, it should be assumed that the railroad company would, as required by law, restore the turnpike to such state as not unnecessarily to impair its usefulness. The consideration that the business of the turnpike would be diminished by the construction of a railroad along the same general line of travel, should be disregarded. Every public improvement, from the necessity of the case, must affect some property favorably and some unfavorably. When this effect is merely consequential, the injury is *damnum absque injuria*. If no vested rights have been violated, and the turnpike company still enjoy all the rights and privileges secured to them by their charter, the depreciation of their property does not furnish a legal ground of remuneration. *N. Y. Supreme Ct.* 1852, *Troy & Boston R. R. Co. v. Northern Turnpike Co.* 16 *Barb.* 100; *S. P. Matter of Hamilton Avenue*, 14 *Id.* 405. But compare *Matter of Flatbush Avenue*, 1 *Barb.* 286.

147. **Occupants of public lands.** The act of Congress of August, 1853, giving railroad companies certain rights of way over public lands, refers only to such lands as are vacant, and relinquishes to the company any claim for compensation that might belong to the United States as proprietor, under any proceeding under the state law to appropriate the land for public use; but any one in actual possession of such land, though with no other title or right than that of bare occupancy, is still entitled to recover from the company damages for the land taken from him. *Cal. Supreme Ct.* 1862, *California Northern R. R. Co. v. Gould*, 21 *Cal.* 254.

148. **Second claim.** A land-owner, who has received under arbitration prior to the passage of the lands clauses act, compensation for land, and "in respect of damages which might be sustained by reason of making a railway," is not precluded from insisting on a further compensation for future unforeseen damages subsequently sustained. *Rolls Court*, 1851, *Lancashire & Yorkshire Railw. Co. v. Evans*, 19 *Eng. L. & Eq.* 295; 15 *Beav.* 322.

149. **Alteration of location.** An inquest of damages for the location of a railroad, precludes the owner of the land from claiming additional damages for the same original

location, upon the occasion of a change in the location. But he can recover damages for the alteration, notwithstanding the legislature authorized the alteration, if any actual damage or injury has been sustained thereby, to the extent of such additional injury, and no more. *Md. Ct. of Appeals*, 1844, *Baltimore & Susquehanna R. R. Co. v. Compton*, 2 *Gill.* 20.

150. Where a railroad company, upon an award of commissioners, have recorded the order and deposited the money as required by section eighteen of the act of 1850, the title becomes wholly vested in the company, and no longer remains in the former owner. Hence the company cannot, by changing the route of their road, as they are authorized to do by section twenty-three, avoid paying such compensation, on the ground that the premises are not necessary for them. *N. Y. Supreme Ct. (Sp. T. 1854?) Crouner v. Wattertown & Rome R. R. Co.* 9 *How. Pr.* 457.

151. **Release of damages.** The right of passage which a railroad corporation acquires across the land of private individuals is an interest in the land, and must be derived either by a private purchase or by the exercise of the power of eminent domain, vested in them by the state. In the former mode of acquisition, the price agreed upon must be paid; in the latter, the damages must be assessed according to the provisions of law. But if the company allege that the damages have been released, and the right of way surrendered as a gratuity, the evidence relied on, to such end, should be clear, definite, and uncontradicted. *Pa. Supreme Ct.* 1867, *East Pennsylvania R. R. Co. v. Schollenberger*, 54 *Pa. St.* 144.

152. **Effect of payment.** After a railroad has lawfully taken lands under their charter, and the damages have been duly assessed by the commissioners, and, upon appeal, the assessment has been confirmed and the amount received by the owner, he is estopped from setting up any claim against the company's possession, while the lands are used for any of the purposes authorized by the charter. *Wis. Supreme Ct.* 1857, *Dodge v. Burns*, 6 *Wis.* 514.

153. **Evidence.** Where damages sustained by persons from the construction of a railroad over their land are to be assessed by a jury, the plans and estimates of the company for that portion of the road are admissible in evi-

dence. *Ill. Supreme Ct.* 1859, Jacksonville & Savanna R. R. Co. v. Kidder, 21 *Ill.* 131.

154. Although a railroad company, in proceedings before a jury summoned to assess damages for land taken by their road, will not be bound by the verbal representations and promises of the engineers and others, such officers may be examined for the purpose of explaining the plans and estimates. *Ill. Supreme Ct.* 1859, Jacksonville & Savanna R. R. Co. v. Kidder, 21 *Ill.* 131.

155. A duly attested copy of the report and estimate of county commissioners, on an application for damages occasioned by taking the petitioner's land for a railroad, is admissible in evidence for the respondents, on a hearing before a sheriff's jury, to estimate the petitioner's damages. *Mass. Supreme Ct.* 1850, White v. Boston & Providence Railroad Corporation, 6 *Cush.* 420.

156. In such case, it is no objection to a witness that he had been a viewer to appraise damages. *Id.*

157. On a hearing before a sheriff's jury, to estimate the damages of an owner's land taken for a railroad, the order of the county commissioners, estimating the damages, and directing the making of a passage-way for draining the petitioner's premises, the wetting of which was one principal ground of his claim for damages, may properly go to the jury with other papers in the case. *Mass. Supreme Ct.* 1850, Chapin v. Boston & Providence Railroad Co. 6 *Cush.* 423.

158. On a hearing before a sheriff's jury, for an assessment of damages for land taken by a railroad, the respondents may prove that, since the hearing began, they have located a passenger station near the petitioner's land, over which the railroad crossed. *Mass. Supreme Ct.* 1863, Shattuck v. Stoneham Branch &c. Railroad, 6 *Allen*, 115.

3. Purchase of Lands.

159. Cannot purchase before statute. A railway company who are promoting in Parliament a bill for the extension of their line, which, if made, will pass through certain lands, cannot make an absolute contract for the purchase of such lands, until the bill is passed. Such a contract would be *ultra vires*.*

* As to what contract is conditional on the making of the railroad, see *Preston v. Liverpool &c. Railw. Co.* 35 *Eng. L. & Eq.* 92; *Edinburgh &c. Railw. Co. v. Phillips*, 39 *Id.* 41; 28 *Law Times*, 845.

Q. B. 1852, Gage v. Newmarket Railway Co. 18 *Q. B.* 457; 14 *Eng. L. & Eq.* 57; 21 *Law J. N. S.* 898.

160. Arbitration. After disagreement with an owner, and the commencement of proceedings against him for appraisalment, it is competent for the company to agree with him to submit the question of value and damages to arbitration. An award under such a submission, performed, would be a purchase within the statute.* *N. Y. Ct. of Appeals*, 1853, Wood v. Auburn & Rochester R. R. Co. 8 *N. Y. (4 Seld.)*, 160.

161. Purchase of bridge. A railroad company, authorized by its charter to take lands necessary for its purposes, and whose route crosses a stream, may purchase a private bridge within such limits, if it will answer the corporate ends; but they will take it subject to any restrictions in respect to allowing free passage over it to the injury of a neighboring toll-bridge, under which the private owners held it. *N. Y. A. V. Chan. Ct.* 1846, Thompson v. N. Y. & Harlem R. R. Co. 3 *Sandf. Ch.* 625.

162. — of gravel beds. A railroad corporation may enter into a contract to sell lands which they have purchased for the purpose of having gravel dug therefrom, and transported, at a certain rate of freight, over their road, to be delivered to, and used by a third party, and may enforce specific performance in equity. Such a purchase is proper as a means of carrying on the objects of their business. *Mass. Supreme Ct.* 1856, Old Colony R. Co. v. Evans, 6 *Gray*, 25.

163. — of unnecessary lands. A railroad company has no power to buy and hold lands situated at a distance from its road, which it does not want and cannot possibly use in constructing or operating its road. *Wis. Supreme Ct.* 1861, Waldo v. Chicago &c. R. R. Co. 14 *Wis.* 575.

164. Fraud. Representations of the agents and promoters that the company will make crossings, etc., by which a land-owner is induced to grant a right of way without compensation, are admissible, in connection with the company's refusal to fulfill such promises,

* A contract to sell a railroad company "the land they take" from a designated tract at so much per foot so taken by said company. *Held* to import a taking by the company, under their compulsory powers. *Mass. Supreme Ct.* 1863, Boston & Maine R. R. v. Babcock, 3 *Wash.* 223; 1 *Am. Railw.* C. 561.

as evidence that the grant was obtained by fraud. Upon a bill in equity the court may set aside the deed, and cause compensation to be assessed by a jury. *Ga. Supreme Ct.* 1867, *Atlanta & West Point R. R. Co. v. Hodnett*, 36 *Ga.* 669. But compare *Western Railway v. Babcock*, 6 *Metc. (Mass.)* 346; 1 *Am. Railw. Cas.* 365.

165. Effect of deed. A grant of land to a railroad company by deed, containing the usual covenants and a provision that the corporation should make a culvert or pass-way for cattle under the road, will not justify the company in digging a ditch in the adjoining land of the grantor to drain the pass-way. *N. H. Superior Ct.* 1846, *Hill v. Boston & Maine R. R. Co.* 18 *N. H.* 179. But compare, to the contrary, *Babcock v. Western R. R. Co.* 9 *Metc.* 553.

166. A condition in a conveyance of land to a railroad corporation, that they shall construct the road on such lands within a limited time, is a condition subsequent; and the title vests in the corporation immediately on the execution and delivery of the deed. The right to enter and construct the road implies ownership. *Ct. of Appeals*, 1854, *Nicoll v. N. Y. & Erie R. R. Co.* 13 *N. Y. (3 Kern.)* 121. Compare *Douglass v. N. Y. & Erie R. R. Co.* *Clarke*, 174.

167. Where a corporation obtains a concession to enter on condition of refraining from a particular injury which is in its nature irreparable, a violation of the condition works a forfeiture of the license, and the corporation will be restrained till equity is done. Hence, where a railroad company claimed a right to construct their road without first making compensation or giving security to the land owner, alleging that he had given them license to do so, provided they would "go—high enough to save his water-power," upon a breach of the condition as to the height of the grade, the corporation was restrained by injunction from proceeding with their road, until they had given security for the payment of damages or for the observance of the condition. *Pa. Supreme Ct.* 1867, *Unanget's Appeal*, 55 *Pa. St.* 128.

168. Price includes damages. Where a railroad company purchase land which they might take by compulsion, it will be presumed that contingent damages are taken into account. *Vt. Supreme Ct.* 1855, *Norris v. Vermont Central R. R. Co.* 28 *Vt.* 99.

169. A stipulation of a railroad company to restore the surface of the adjoining land,—*Held*, to contemplate a restoration available for all purposes for which the land could be used, not merely for the purposes of the then existing occupancy. *Harby v. The East & W. I. Docks & Co.* 1 *De Gex M. & G.* 290.

170. Where a contract of purchase entered into by a railway company and a land owner omitted to name any time for completion,—*Held*, that the contract was to be performed within a reasonable time, as between two private persons. *Rolls Ct.* 1862, *Baker v. Metropolitan Railw. Co.* 32 *Law J. N. S.* 7; 9 *Jur. N. S.* 61; 7 *Law Times, N. S.* 494; 11 *Week. Rep.* 18.

171. A recital in a contract that the company desire to purchase for the purpose of constructing a railroad according to a designated plan does not bind them to construct it according to such plan. *Chan.* 1846, *Breynton v. London & North Western Railw. Co.* 3 *Coop. Ch. Cas.* 198; 11 *Jur.* 28.

172. Entry. Proof that the owner of the land had agreed to sell, but had refused to convey, although the company had tendered the price, does not justify their subsequent entry, so as to defeat the owner's claim to an award of compensation under the statute. *Mass. Supreme Ct.* 1861, *Whitman v. Boston & Me. R. R.* 8 *Allen* 133.

173. But even a very short period of clear acquiescence, fairly leading the company to infer that he intends to waive present payment, will conclude the owner from afterward stopping the company in the progress of their works or the running of the road. *Vt. Supreme Ct.* 1860, *McAulay v. Western & C. R. R. Co.* 33 *Vt.* 311. See also *Hudson v. Leeds & Bradford Railw. Co.* 15 *Jur.* 946; 20 *Law J. N. S.* 486.

174. The company should not be enjoined from running its track over the plaintiff's land before compensation is made, if it appear that they laid the track over his land at his request and upon his promise to give them a right of way, although the promise was not in a form to be binding at law or as the ground for decreeing specific performance. *Wis. Supreme Ct.* 1861, *Pettibone v. La Crosse & C. R. R. Co.* 14 *Wis.* 448. And see *Doe v. North Staffordshire Railw. Co.* 15 *Jur.* 944; 20 *Law J. N. S.* 249.

175. Forfeiture. Where land is conveyed to a railroad company upon the condition

that the road shall be maintained, the grantor cannot insist on a forfeiture because merely of a change in the ownership of the road; but a conveyance of the land by the company to others, for private uses wholly incompatible with the use as a railroad, and the consequent non-user, will work a forfeiture. *Ky. Ct. of Appeals*, 1866, *Hall v. Hiles*, 2 *Bush*, 582.

176. Where the owner of land and the company agree that the company may enter, and that the compensation should be determined by award, within a fixed time, and if not paid, the license to enter should cease and the works of the company remain the property of the land owner as if the company had entered in its own wrong, the court will not interpose by injunction against the company to enforce such a forfeiture. *Ohio Supreme Ct.* 1850, *Coe v. Columbus, Piqua & Indiana R. R. Co.* 10 *Ohio St.* 372, 411.

177. Forfeiture may be waived by delay and by requiring the company to fence. *N. Y. Supreme Ct.* 1852, *Ludlow v. N. Y. & Harlem R. R. Co.* 12 *Barb.* 440.

178. One who purchased land-subject to the company's right of way over a part of it, after a part had been overflowed in consequence of their building embankment,—*Held*, not entitled to maintain an action for the injury to the healthiness of his dwelling, it not appearing that the dwelling was erected before he purchased the land. *Ill. Supreme Ct.* 1866, *Illinois Central R. R. Co. v. Allen*, 39 *Ill.* 205.

4. Remedies of land-owners.

179. Cumulative Remedy. The charter of a railroad company required them to build certain bridges and ways, and provided that, in case of omission of this duty, the land-owner might build the bridges and recover their value,—*Held*, that such remedy was merely cumulative, and did not affect the liability of the company to an action of tort. *N. Y. Supreme Ct.* 1854, *Green v. Morris & Essex R. R. Co.* 4 *Zabr.* 486.

180. In a suit by the proprietor of an abutting lot for damages done by a railroad company laying their track in the public street, without making compensation to plaintiff, the past damages may be assessed, but the permanent damages to accrue from the continued use of the land by the company can be ascertained only in the statutory

mode. *Wis. Supreme Ct.* 1861, *Ford v. Chicago & C. R. R. Co.* 14 *Wis.* 609.

181. Actions. A railway company is liable, by action, for doing what their act of incorporation does not authorize, or doing what it does authorize, improperly. *Exch.* 1842, *Turner v. Sheffield & Rotherham Railw. Co.* 10 *Mees. & W.* 425. And see *Turner v. Sheffield & C. Railw. Co.* 10 *Mees. & W.* 435; 3 *Eng. Railw. Cas.* 222.

182. If a railroad company takes land without the consent of, or compensation to, the owner, they are liable in trespass for the taking. But only the then owner of the land taken, and not a subsequent purchaser, can maintain the action. *N. J. Supreme Ct.* 1861, *Central R. R. Co. v. Hetfield*, 5 *Dutch.* 206.

183. If a private way be obstructed, the remedy is to sue for penalty under the railways clauses consolidation act, or to bring an action under the statute for special damage. But an action upon the case for the obstruction cannot be maintained except in the case of special damage, which is expressly saved by the statute. *Q. B.* 1851, *Watkins v. Great Northern Railw. Co.* 6 *Eng. L. & Eq.* 179; 20 *Law J. N. S.* 391.

184. Damage arising from the improper user of land taken by a railway company, i. e. negligence in the care and management of the line, not in the construction of the works,—is properly the subject of an action, and not of a proceeding under the railways clauses compensation act. *Exch. Cham.* 1862, *Bagnall v. London & North Western Railw. Co.* 9 *Jur. N. S.* 254; 1 *Hurl. & C.* 544; 9 *Law Times N. S.* 419.

185. The owner of the fee of a highway may maintain ejectment to recover the street, against a railroad company who, without making compensation, use the street for their roadway. [16 *N. Y.* 97; 24 *Id.* 655; *Id.* 658.] *N. Y. Ct. of Appeals*, 1862, *Wager v. Troy Union R. R. Co.* 25 *N. Y.* 526. Compare *Lozier v. N. Y. Central R. R. Co.* 43 *Barb.* 465.

186. Evidence. In an action of trespass, brought by a landowner against a railroad corporation for constructing a road on his land, the onus is upon the company to justify by showing that the land is covered by the authorized location. The location filed by the company is conclusive evidence

of the land taken, but a plan or map, made a part of the description and filed with the location, may be referred to for explanation merely. *Mass. Supreme Ct.* 1854, *Hazen v. The Boston & Maine Railroad*, 2 *Gray*, 574.

187. A company who enter upon land to construct their road before the time for filing the location of their line, are liable as trespassers, if the location when filed does not cover the land so entered upon. *Id.*

188. Defective construction. The rule that the assessment of compensation for land taken for a railway is deemed to cover all damages whether foreseen or not, and whether actually estimated or not, which result from the proper construction of the road, does not prevent holding a railroad company liable to an action for damages resulting from the defective construction of their road,—*e. g.* where the plaintiff's meadows were injured, in consequence of the insufficient culverts in the defendant's road, there being no impediment to the construction of proper ones. Stuitable bridges and culverts to convey the water across the railway, at or near the places where it naturally flows, are necessary to the proper construction of the road, except where they cannot be made, or where the expense of making them is greatly disproportionate to the interest to be preserved by them. *N. H. Supreme Ct.* 1857, *Johnson v. Atlantic & St. Lawrence R. R. Co.* 35 *N. H.* 569.

189. Blasting. A railroad company is liable to an adjoining proprietor for injury occasioned to his property by blasting, done under the supervision of its contractors, while engaged in the performance of their contract in the manner stipulated. *Ohio Supreme Ct.* 1854, *Carman v. Steubenville & Indiana R. R. Co.* 4 *Ohio St.* 399.

190. Although a railroad corporation have a right to throw stones, by blasting in a proper manner, upon adjoining lands, still, it is their duty to remove the stones thus thrown upon the adjoining lands, in a reasonable time; and if they fail so to remove them, they will be liable for the damage or injury that the owner of the land sustains in consequence of such neglect of removal. *Vt. Supreme Ct.* 1853, *Sabin v. Vermont Central R. R. Co.* 25 *Vt.* 363.

191. Where the damage done, by blasting rocks, or in any similar mode, in the course

of the construction of a railway, is done to land, a portion of which is taken by the company, under compulsory powers, this damage will not lay the foundation of an action in any form, as it should be taken into account, in estimating the compensation to the land-owner, for the portion of land taken. [3 *Metc.* 380] *Mass. Supreme Ct.* 1855, *Brown v. Prov. &c. R. R. Co.* 5 *Gray*, 85.

192. Consequential damage. In the absence of special laws, corporations acting within their powers of taking land, and with due care, are not liable for consequential damage. *Vt. Supreme Ct.* 1855, *Hatch v. Vermont Central R. R. Co.* 28 *Vt.* 142. See also *Monongahela Nav. Co. v. Coon*, 6 *Watts & S.* 101.

193. Where a railroad company, in the course of the construction of the road, turned a stream of water, which by their charter they might do, restoring it to its former state, as near as practicable, and the new channel was properly guarded, so far as could be perceived, at the time of turning it,—*Held*, that the company were not obliged thereafter to watch the operation of the water, and take precautions to prevent its encroaching upon the adjoining lands. *Vt. Supreme Ct.* 1855, *Norris v. Vermont Central R. R. Co.* 28 *Vt.* 99.

194. And the rights and duties of the company, in such case, are precisely the same as if the land had been condemned, by proceedings in *inuitum*, under the statute. *Id.*

195. The damages which commissioners are to appraise in the construction of a railroad, are those arising to the land-holder from a proper construction of the road in a prudent manner; these must be deemed to have been taken into account in the assessment of his land damages, and cannot be made the ground of recovery in a subsequent action. But, if the company, in the construction of their road, are negligent in the exercise of the rights conferred upon them, whereby a land-owner is injured, it is not to be presumed, in the absence of proof, that the damages thus occasioned were taken into consideration by the commissioners; and if it is not shown that such damages were allowed, they should go to a jury for settlement. *Vt. Supreme Ct.* 1855, *Clark v. Vermont & Canada R. R. Co.* 28 *Vt.* 103.

196. A railway company being about to construct their line over certain land of A., it was by agreement referred to an arbitrator to fix the amount of money to be paid by them to A., as the price of the land to be purchased, as well as for the injury done to his remaining estate by severance or otherwise, and to determine what bridges, arches, culverts, &c., should be made: *Held*, that the compensation awarded under such reference related only to damage, known or contingent, by reason of the construction of the railway on the lands purchased, and to other damage arising from the construction of the railway at other places, which was apparent and capable of being ascertained and estimated at the time when the compensation was awarded, and did not embrace also all contingent and possible damages which might arise afterwards, by the works of the company at other places. *Q. B.* 1851, *Lawrence v. Great Northern Railway Co.* 15 *Jur.* 652; 20 *Law J. N. S.* 293.

197. Time of valuation. In estimating the damages to a land-owner, sustained by reason of the location of a railroad over a portion of his land, the value at the time when the land was taken is to be regarded; and if payment is delayed, interest from that time may be added. [4 *Cush.* 201; 15 *Pick.* 128; 18 *Gray*, 546;] *Mass. Supreme Ct.* 1863, *Whitman v. Boston & Maine Railroad*, 7 *Allen*, 813.

198. Injunction against taking private property. Where a company are authorized to construct corporate works and to take private property upon the performance of certain conditions precedent, their entry, for such purpose, is a proper subject for an injunction, if the condition is not performed. And it is no objection to granting an injunction, that the defendant acts under the authority of a law, if he exceeds or abuses his power, or if the law is unconstitutional. But the writ will not be granted if there is a reasonable doubt of the validity of the law, or of the proper exercise of the power it confers; nor where there is a discretionary power given and exercised with judgment, and within the line prescribed. In such cases, a party complaining will be referred to his remedy at law, or to the special tribunal created by the law which gives the authority to do the act. *Third Circ. (N. J.)* 1830, *Bonaparte v. Camden & Amboy R. R. Co.* *Baldw.* 205.

199. An injunction will lie to restrain a

railroad company from making a permanent appropriation of the plaintiff's land, as by the erection of a warehouse, &c., thereon, not authorized by their charter.* *S. C. Ct. of Appeals*, 1855, *Birch v. Wilmington & Manchester R. R. Co.* 8 *Rich. (Eq.)* 46.

200. Other remedy. A court of equity will not restrain a company from constructing their works upon the plaintiff's land, when the charter provides a mode for the land-owner to obtain an appraisal of compensation, and he has not resorted to it. *Ind. Supreme Ct.* 1855, *New Albany & Salem R. Co. v. Connelly*, 7 *Ind.* 32.

201. Where a mere question of title was in dispute, and it was not shown that the plaintiff might not have remedy by ejectment, *Held*, that he was not entitled to an injunction. *V. Ch. Ct.* 1851, *Webster v. South Eastern Railway Co.* 6 *Eng. Railw. Cas.* 698; 20 *Law J. N. S.* 194; 1 *Sim. N. S.* 272.

202. After a railroad has been constructed over the plaintiff's land, although possession was obtained by fraud, injunction is not the proper remedy, but if the company are trespassers in using the right of way, the remedy is at law. *Chanc.* 1836, *Deere v. Guest*, 1 *Mylne & C.* 516.

5. The title or easement acquired.

203. The tenure of railroad corporations in the lands taken for the construction of their roads, is in the nature of a trust for public use, subject to the supervision of the government. *Mich. Supreme Ct.* 1852, *Swan v. Williams*, 2 *Mich.* 424.

204. Exclusive right. A railway company have the right at all times to the exclusive occupancy of the land taken for their road, and the right to exclude all concurrent occupancy by the former owners, in any mode and for any purpose.† *Vt. Supreme Ct.* 1853,

* See also *Stone v. Commercial Railway Co.* 1 *Eng. Railw. Cas.* 375; 9 *Sim.* 621; *London & Birmingham Railway Co. v. Grand Junction Canal Co.* 1 *Eng. Railw. Cas.* 224; *Priestley v. Manchester & Leeds Railway Co.* 2 *Id.* 194; *Webb v. Manchester & Leeds Railway Co.* 1 *Id.* 576; 4 *Myl. & C.* 116. Compare *Gordon v. Cheltenham & C. Railw. Co.* 3 *Eng. Railw. Cas.* 800.

† An injunction was granted, at the suit of a State, to restrain a railroad company from filling up a part of a canal belonging to the State, and erecting an arch over it which would obstruct its use, although it appeared that this portion of the canal had lain in a state of abandonment for many years. *Pa. Supreme Ct.* 1854, *Commonwealth v. Pittsburgh & Connellsville R. R. Co.* 24 *Pa. St.* 159.

† A railroad corporation is not a necessary or proper party to a process for partition in consequence merely of

Jackson v. Rutland & Burlington R. R. Co. 25 *Vermont* (2 *Deane*), 150; *Hurd v. The Same, Id.* 116. But compare, as to use of common in a city, *Alleghany v. Ohio & Pennsylvania R. R. Co.* 26 *Pa.* 855.

205. The general principle that a railroad company has a right to the exclusive use of its track and is not liable for injuries to cattle on the track without permission, occurring through the fault or negligence of its servants, will not be applied to excuse gross negligence or wanton malfeasance on the part of the company's employees. *Wis. Supreme Ct.* 1858, *Pritchard v. La Crosse & Milwaukee R. R. Co.* 7 *Wis.* 232.

206. Permission granted by a railroad company to its employees to live within the enclosure of their road is not to be construed as permission to any others to walk upon the track in coming to the homes of such servants instead of coming by the usual crossing. *Ill. Supreme Ct.* 1858, *Galena &c. R. R. Co. v. Jacobs*, 20 *Ill.* 478.

207. A charter which only provides that the company shall be "seized and possessed" of the land taken does not give them the fee, but only seizin for the necessary easement,—the right of way,—and leaves the burden of fencing upon the company; and if they omit to do it, the mere fact that cattle get upon the road from lots adjoining is not ground of imputing negligence to the owners. *Vt. Supreme Ct.* 1851, *Quimby v. Vermont Central R. R. Co.* 28 *Vt.* 393; *Trow v. Vermont Central R. R. Co.* 24 *Vt.* 487.

208. Extraneous uses. A railroad company cannot occupy lands within the limits of their right of way, for purposes not necessarily connected with the use of their franchise. *Pa. Supreme Ct.* 1867, *Lance's Appeal*, 55 *Pa. St.* 16.

209. Trees. The proprietors of a railroad have a right to cut the trees growing on the strip of land which they have taken for their road, whether such trees are for shade, ornament, or fruit. This is a continuing right to be exercised from time to time, and they are the judges of the necessity of its exercise. *Mass. Supreme Ct.* 1852, *Brainard v. Clapp*,

10 *Cush.* 6. See also *Preston v. Dubuque &c. R. R. Co.* 11 *Iowa*, 15.

210. Right of land-owner to cross. Where a railroad runs through a farm, dividing it into two parts, so that the owner cannot pass from one part to the other without crossing the track, he has a right to cross, and is not necessarily a trespasser when his cattle are on the track. Although a railroad company is absolute owner of its roadway, as against third persons, yet the right to cross the road is not inconsistent with this ownership, and the company are liable for cattle killed when crossing in the reasonable exercise of such right. *Conn. Supreme Ct.* 1854, *Housatonic R. R. Co. v. Waterbury*, 28 *Conn.* 101.

211. The owner of cattle is not liable in trespass for allowing them to go upon a railroad track where it is unfenced, at private crossings or at other places where a general usage to do so exists, and there is an implied assent on the part of the company resulting from their clear knowledge of such usage, and their failure to object. *Iowa Supreme Ct.* 1866, *Evans v. Burlington &c. R. R. Co.* 21 *Iowa* 374.

212. A driver of a wagon who occupies the track of a horse railroad, and does not turn off at the request of the conductor of a car, so as to obstruct the passage of the car at its usual speed, is liable to indictment under a statute prohibiting the unlawful and malicious obstruction of the road, although he did not get upon the track with the intent of obstructing it.* *Mass. Supreme Ct.* 1859, *Commonwealth v. Temple*, 14 *Gray*, 69.

213. Defect in title. The existence of a mortgage which is a lien upon land taken and used by a railroad company for the purpose of constructing and operating its road, is a defect in the title, within the meaning of section twenty-one of the N. Y. act of 1850, authorizing the company to proceed anew in such case. *N. Y. Supreme Ct.* 1854, *Matter of N. Y. Central R. R. Co.* 20 *Barb.* 419.

214. A railroad company who have appropriated lands which are subject to a mortgage, have a right to redeem their lands from the lien of the mortgage by paying a ratable proportion of the mortgage-debt, and this

having laid out and constructed its road over lands owned by tenants in common. By laying out their road an easement and not a title to such lands was acquired. *Mass. Supreme Ct.* 1848, *Weston v. Foster*, 7 *Metc.* 297.

* As to the requisites of an indictment for obstructing a track, and the necessary evidence, see *Regina v. Bowray*, 10 *Jur.* 311; *Commonwealth v. Hicks*, 7 *Allen*, 573; *McCarty v. State*, 37 *Mass.* 411; *State v. Wentworth*, 37 *N. H.* 196.

they must do to the full value of the property (if need be), irrespective of the improvements put thereon by the company. *N. Y. Supreme Ct. Sp. T. 1858, Dows v. Congdon, 16 How. Pr. 571.*

215. Termination of franchise. Railroads made by authority of the commonwealth upon lands taken under her right of eminent domain, and established by her laws as thoroughfares of commerce, are her highways. The corporation has no property in them, though it has franchises connected with them. And the repeal of the charter of the corporation is not a confiscation of its property, but the franchises of the corporation are resumed by the State, and the railway remains public property, subject to the management and control of the State. *Pa. Supreme Ct. 1856, Erie & North East R. R. Co. v. Casey, 26 Pa. St. 287.* Compare *Haward v. Mayor &c. of N. Y. 7 N. Y. (3 Seld.) 814; Rexford v. Knight, 11 N. Y. (1 Kern.) 308.*

III. CONSTRUCTION AND MAINTENANCE.

1. Duty to construct.

216. When obligatory. A charter may be regarded as imposing upon the company the obligation of constructing the road, if it contains express words of obligation, but the duty will not be raised by implication from words of permission only, unless upon a view of the whole statute it was clearly intended to impose such obligation. Railway charters are not to be regarded as contracts with the public, but as a grant of powers to be exercised, if at all, upon the conditions fixed. *Exch. Ch. 1853, York & North Midland R. R. Co. v. Regina, 18 Eng. L. & Eq. 199; 22 Law J. N. S. 225; 17 Jur. 690; 1 El. & Bl. 858.*

217. Where, upon a view of the whole statute, it appears that it was optional with the company to construct a road, and they construct one part and abandon the scheme as to another part, because it is found that the traffic does not demand it, the work is not to be regarded as having become obligatory as to the whole scheme, by the part performance; and a mandamus should not be granted to compel its completion.* *Id. S. P. Great Western R. R. Co. v. Regina, 18 Eng. L. & Eq. 211; 17 Jur. 695.*

* As to the remedy of a land owner, by mandamus, to compel the company to proceed and take the land, see *Regina v. York &c. Railw. Co. 6 Eng. Law & Eq. 269; 15*

Compare *Regina v. Eastern Counties Railw. Co. 10 Ad. & El. 531; 2 Per. & D. 648; 1 Eng. Railw. Cas. 509; Hodgson v. Earl Powis, 12 Beav. 529; 19 Law J. N. S. 856; 14 Jur. 906; King v. Severn Wye Railw. Co. 1 Eng. Railw. Cas. 541; 2 Barn. Ad. 646.*

218. That, although a railway company are not bound to be carriers on their own railway, they are bound to work the line;—see *Winch v. Birkenhead &c. Railw. Co. 13 Eng. L. & Eq. 506.*

219. In New York, a railroad corporation organized under the general act, cannot be compelled at the suit of the attorney-general, in the name of the people of the State, in the nature of an action for specific performance, to re-open and operate a portion of their road which they have abandoned. It is true that a franchise to maintain a railroad upon a fixed route, and between places named in the charter, is an entire thing, and can only be legally exercised by the corporation operating its entire road. But the only remedy for disusing a part of the road is by an action to vacate the charter, or annul the existence of the corporation. *N. Y. Ct. of Appeals, 1861, People v. Albany & Vermont R. R. Co. 24 N. Y. 261.* But compare *State v. Hartford & New Haven R. R. Co. 29 Conn. 538.*

220. A plaintiff cannot sue as one of the public, to restrain a company from closing their railway. *Rolls Ct. 1850, Thorne v. Taw Vale Railway & Dock Company, 13 Beav. 10.*

221. Supervisors of a township in Pennsylvania, may apply for a *mandamus* commanding a railroad company to make a road for public accommodation, required by their charter. *Pa. Supreme Ct. 1845, Whitemarsh Township v. Philadelphia &c. R. R. Co. 8 Watts & S. 865.*

222. Shareholders' remedy. Where an act of Parliament has been obtained by a company for constructing a line of railway, and funds have been subscribed for that purpose, the court will, on the application of a single shareholder, restrain the company from applying those funds, or any part thereof, in the construction of a railway on

Jur. 904; 20 Law J. N. S. 508; Regina v. Lancashire & Yorkshire Railw. Co. 6 Eng. L. & Eq. 265; 15 Jur. 904, 906; The same v. The same, 1 El. & B. 228; 17 Jur. 68; 16 Eng. L. & Eq. 827; Regina v. London & North Western Railw. Co. 6 Eng. L. & Eq. 290; 20 Law J. N. S. 399; 15 Jur. 878; Birmingham & Oxford Junction Railw. Co. v. Regina, 4 Eng. L. & Eq. 276; 20 Law J. N. S. 304.

a portion only of the line, or otherwise than for the purpose of completing the line. *Chancery*, 1849, *Cohen v. Wilkinson*, 1 *Hall & Tw.* 554; 1 *Macn. & G.* 481.

223. A railway company is not like a partnership for general trading purposes, in which one portion of the business may be abandoned; but it is a partnership for a public purpose, for effecting a work which it is a duty to complete. The obligation to complete the work is co-extensive with the authority to make it. *Id.*

224. Where a railway company has undertaken to complete a line, or any series of lines, they are bound to complete the whole line or series of lines, and are not, without parliamentary authority, at liberty to abandon any portion of their undertaking. *Rolls Ct.* 1850, *Graham v. Birkenhead &c. Railway Co.* 13 *Beav.* 460.

225. Existing contracts for making part of the line are no answer to an application to prevent a railway company from making a portion of the line with an intention of completing less than the whole. *Rolls Ct.* 1850, *Graham v. Birkenhead &c. Railway Co.* 13 *Beav.* 460.

226. The directors of a railway company, with the concurrence of a majority of the shareholders, on finding the original undertaking impracticable, proceeded to construct a small portion only of the works. On an application by an individual shareholder on behalf of himself and the other shareholders,—*Held*, that the court would not grant an injunction to restrain the proceeding, it appearing that the plaintiff had acquiesced in the scheme, and also that the other shareholders had, for eighteen months previous to the filing of the bill, known, or had the means of knowing, the acts complained of. *Chancery*, 1850, *Graham v. Birkenhead &c. Railway Co.* 2 *Hall & Tw.* 450; 2 *Macn. & G.* 146; 20 *Law J. N. S.* 445; 14 *Jur.* 494.

227. Maintenance of public works purchased. Where a railroad company purchased of the State its canals and public works, subject to all contracts theretofore made by the legislature in respect to them, and were required "to carry out the same with all persons interested therein in the same manner as the State were required to do by law,"—*Held*, that it was bound to repair the bridges over the canal, which the

State had formerly built and maintained. *Pa. Supreme Ct.* 1863, *Pennsylvania R. R. Co. v. Duquesne Borough*, 46 *Pa. St.* 223.

228. Whenever a corporation, which is bound to repair a public highway, refuses to do so, when necessary, upon notice from the proper public officers having the general oversight of such matters, the latter may make the necessary repairs, and recover the expense thereof in an action of assumpsit. *Id.*

2. Locating the line. Termini.

229. Discretion of the company. A court of equity will not control a railroad corporation in exercising, within the general scope of their authority, the discretionary power given to them with regard to the location of the road within the appointed termini.* *Ohio Supreme Ct.* 1837, *Walker v. Mad River Lake Erie R. R. Co.* 8 *Ohio* 38.

230. Where a railroad company are entrusted with the location of their road, in an action against the company for injuries occasioned by the construction of their road, it should not be left to the jury whether, without unreasonable expense or undue injury to the road, the company could not have so located as to avoid the injury. *Pa. Supreme Ct.* 1859, *N. York & Erie R. R. Co. v. Young*, 38 *Pa. St.* 175. And see *Cleveland & Pittsburgh R. R. Co. v. Stackhouse*, 10 *Ohio St.* 567; *Southern &c. R. R. Co. v. Stoddard*, 6 *Minn.* 150.

231. Change of borough boundaries. If the charter of a railroad limit the line of construction by the boundaries of a borough, the subsequent extension of such boundaries will not alter the right of the company in regard to the location of their road. *Pa. Supreme Ct.* 1856, *Commonwealth v. Erie & North East R.R. Co.* 27 *Pa. St.* 339. So also of the terminus. *La. Supreme Ct.* 1855, *Pontchartrain R. R. Co. v. Lafayette &c. R. R. Co.* 10 *La. Ann.* 341.

232. Where the location of the track is left to the discretion of the agents of the corporation, the location will not be lightly interfered with; and certainly not after a

* A charter of a railroad corporation allowing the company to extend their line to a certain point, "thence running through" several towns named, does not necessarily oblige the company to locate their road through these towns, in the order named in the charter. *Mass. Supreme Ct.* 1851, *Commonwealth v. Fitchburg R. R. Co.* 8 *Wells.* 240. Compare *State v. Wilton R. R. Co.* 19 *N. H.* 531.

long enjoyment of the actual location by the company and acquiescence therein on the part of the public. *N. Y. Supreme Ct. Sp. T.* 1852, *Hentz v. Long Island R. R. Co.* 13 *Barb.* 646.

233. Surveys. That railroad companies may make experimental surveys at pleasure before finally locating their route,—see *Neal v. Pittsburg & c. R. R. Co.* 2 *Grant's Cas.* 137.

234. Mode of fixing route. A railroad company about to build its road, and proceeding to condemn the land under its charter for the use of the road, should define with precision the location and the quantity required, to show the land-owner the extent of the claim made; but after the road has been located, a description of the land in the report of the commissioners and an accompanying diagram are sufficiently precise, though no actual survey by courses and distances is made. *Wis. Supreme Ct.* 1863, *Strang v. Beloit & Madison R. R. Co.* 16 *Wis.* 635.

235. A map of a railroad, professing to be a map only of a portion thereof, filed by the company in a county clerk's office, cannot restrict the company to the construction of so much of the road only as is marked out upon such map, when the articles of association require it to be extended further. Even if the company has treated such map as a map of the whole road, yet the articles of association are superior to it, and cannot be controlled by it. *N. Y. Supreme Ct.* 1861, *Mason v. Brooklyn & Newtown R. R. Co.* 35 *Barb.* 373.

236. The fact that a railroad was constructed, and has ever since been used, and that its location is on the town records, is sufficient proof of a location; and a certified copy from the records, of what purports to be a location in that town, is admissible to show that such a paper was on record. *Vt. Supreme Ct.* 1855, *Hatch v. Vermont Central R. R. Co.* 28 *Vt.* 142.

237. Stations. A provision in the act of incorporation of a railway company prohibited the company from building a station within three miles of a certain place,—*Held*, not to preclude them from taking up and setting down passengers within that distance, and renting rooms in a public house for the convenience of such passengers. *Chancery*, 1839, *Eaton College v. Great*

Western Railw. Co. 1 *Eng. Railw. Cas.* 200.

238. Interference with other lines. The general railroad law gives no right to one railroad to use any land previously located and appropriated by another company, except for the purpose of crossing, particularly when the second company is proceeding in good faith and with reasonable diligence to construct its road; even though the line lies through a narrow pass through which two roads cannot be built. *Cal. Supreme Ct.* 1863, *Contra Costa & c. R. R. Co. v. Moss*, 23 *Cal.* 323.

239. Where two railroad companies were incorporated, to complete independent lines across the State, only the *termini* of either being prescribed, there being no apparent or necessary conflict of the routes,—*Held*, that the company which first surveyed and adopted a route, and filed the survey in the proper office, were entitled to hold it, without reference to the date of the charters, both being granted at the same session of the legislature. *N. J. Ct. of Errors*, 1854, *Morris & Essex R. R. Co. v. Blair*, 1 *Stockt. Ch.* 635.

240. The mere experimental survey of a route does not confer any vested right. *Id.*

241. On a bill by one railroad company to enjoin a rival company from crossing their track,—*Held*, that the defendant's right to cross being established, the court would retain the bill for the purpose of regulating the manner of effecting the crossing. *S. C. Ct. of Appeals*, 1867, *South Carolina R. R. Co. v. Columbia & Augusta R. R. Co.* 13 *Bick. Eq.* 339.

242. Right to change route. After the railroad company have located and constructed their road between the *termini* fixed by the charter, their power of selecting the location is exhausted, and they have no right to take land for an extension, even such as they might originally have adopted.* *Mass. Supreme Ct.* 1861, *Brigham v. Agricul-*

* A railroad company was incorporated by a charter which authorized it to construct a railroad commencing at an eligible point in the city of Brooklyn and extending to Jamaica. The company fixed the western terminus in Brooklyn, and adhered to the particular location originally selected for that terminus, for several years. *Held*, that this selection concluded the company, and that they had no franchise to extend the road through other streets in Brooklyn, which they could assign to another company. *N. Y. Supreme Ct.* 1860, *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.* 23 *Barb.* 353.

tural &c. R. R. Co. 1 *Allen*, 316. To similar effect, *N. Y. Chancery*, 1841, Hudson & Delaware Canal Co. v. N. Y. & Erie R. R. Co. 9 *Paige*, 828. Compare Boston, Providence &c. R. R. Co. v. Midland R. R. Co. 1 *Gray*, 840; *Exp.* South Carolina R. R. Co. 2 *Rich.* 484.

243. It makes no difference that the change they seek to make is not to appropriate the land of an individual, but to use a highway. *Ohio Supreme Ct.* 1853, Little Miami R. R. v. Naylor, 2 *Ohio St.* 235.

244. Where the act of incorporation, or articles of association, prescribe the limits within which a railroad company shall construct its road, it cannot, even under section 23 of the N. Y. general railroad act,—which authorizes railroad companies to change their routes,—alter or change the route, after it has been located, so as to transcend those limits; at least not without releasing previous subscribers for stock who have not consented to such change. By making such change, previous subscribers are released. [18 Barb. 312.] *N. Y. Supreme Ct.* 1856, Buffalo, Corning & N. Y. R. R. Co. v. Pottle, 23 *Barb.* 21.

245. An amendment to the charter of a railroad company, giving it power to extend the line of the road, does not authorize a departure from the main line at the middle, or from any other part of it except its original terminus. *U. S. Circ. Ct. (Ohio)*, 1853, Works v. Junction R. R. 5 *McLean*, 425.

246. The power to "maintain" as well as construct a railroad does not imply a power to change the location after it has been constructed. *Ohio Supreme Ct.* 1848, Moorhead v. Little Miami R. R. Co. 17 *Ohio*, 340.

247. A statute subsequent to the charter of a corporation, providing that the road should be divided into two sections, naming an intermediate point as their common terminus, the statute being enacted for the purpose of authorizing the company to build one section without undertaking the other, is not to be construed as intended to modify the route authorized by the original charter. *Mass. Supreme Ct.* 1852, Hastings v. Amherst &c. Railroad Co. 9 *Cush.* 596.

248. Express power to change. A railroad company had authority to vary the route and change the location of its road, if it should find any obstacle in continuing its first location, either by the difficulty of construction or procuring the right of way, or

whenever a better and cheaper route could be had. *Held*, that this did not authorize the company to re-locate, because a particular town, on the selected route, would not contribute to the road, or to abandon and disregard the points named in the charter, but only to change the route which they had selected for the causes stated. *U. S. Circ. Ct. (Ohio)*, 1853, Works v. Junction R. R. 5 *McLean*, 425.

A similar power held not to authorize a change after the road was built. Moorhead v. Little Miami R. R. Co. 17 *Ohio*, 340.

249. The power of a railroad company to re-locate their track upon another line, on account of difficulty of construction, or other causes specified in the charter, may be invoked until the construction of the road upon the original location has been completed. *Ohio Supreme Ct.* 1864, Atkinson v. Marietta & Cincinnati R. R. Co. 15 *Ohio St.* 21.

250. Remedy for a divergence. Under a charter to construct a railroad from C. to A., with liberty to make a lateral road to B., and no route designated between C. and A., an injunction will not be granted merely because the main road goes through B.; although B. is not on the most direct route between the two places first named. If a railroad corporation has encroached on any public right, or usurped a franchise at a place not authorized by the charter, it is a proper case for interference on behalf of the State, by indictment or *quo warranto* in a State court. But an individual is not entitled to an injunction against the taking his land for the road, if, by any reasonable construction of the charter, there is a power to locate the road through it. *U. S. Circ. Ct. (N. J.)*, 1830, Bonaparte v. Camden & Amboy R. R. Co. *Baldw.* 205. Compare Wrigley v. Lancashire &c. Railw. Co. 4 *Giff.* 352.

251. In trespass, brought by the owner of land against a railroad corporation, for entering upon his land and there constructing their road, the burden of showing that the land is included in the authorized location of their road, is upon the defendants. *Mass. Supreme Ct.* 1854, Hazen v. Boston & Maine R. Co. 2 *Gray.* 574.

252. Termini. The words "from a town or city," used in a charter granted to a railroad company, are to be taken inclusively; and in the construction of the road the company may enter the corporate limits of such

town or city. [27 Pa. St. 339.] *Tenn. Supreme Ct.* 1859, *Tennessee & Alabama R. R. Co. v. Adams*, 3 *Head.* 596. To the contrary, *S. C. Ct. of Appeals*, 1855, *North Eastern R. R. Co. v. Payne*, 8 *Rich. (Law)*, 177.

253. "To." Where a railroad company, by its charter, is authorized to bring its road to a city, and acquire property within it, the right to enter the city, is also conferred. *Ill. Supreme Ct.* 1859, *Moses v. Pittsburg &c. R. R. Co.* 21 *Ill.* 516.

254. "Into." Under a charter of a railroad company, authorizing them to continue their road "into" a village, much is left to the discretion of those who manage its concerns, in respect to the location of the terminus, and unless they have clearly erred, their selection ought not to be disturbed. *N. Y. Supreme Ct. Sp. T.* 1852, *Hentz v. Long Island R. R. Co.* 13 *Barb.* 646.

255. "At or near." A charter requiring that a railroad should commence near or at a city bounded northerly by the centre of a river, and run thence on the north side of the river, gives authority to commence it in the city and to carry it across the river by a bridge.* *N. Y. Chancery*, 1837, *Mohawk Bridge Co. v. Utica & Schenectady R. R. Co.* 6 *Paige*, 554.

*The articles of association of a railroad company declared that it was organized to construct a railroad in the counties of Kings and Queens, to commence at Brooklyn, and "terminate at Newtown, Queens county," and to be about 95 miles long. The town of Newtown borders upon the city of Brooklyn, but the village of that name (included in the town) is some miles from the boundary, and 25 miles from the starting point of the road. Held, that the articles contemplated the construction of a road running into the town of Newtown, and not merely to its boundary. *N. Y. Supreme Ct.* 1861, *Mason v. Brooklyn & Newtown R. R. Co.* 35 *Barb.* 373.

Under a charter which fixes one terminus of a railroad at or near a specified point, a large discretion is conferred upon the railroad company in locating the terminus, the exercise of which will not be impugned by the court, unless they have clearly exceeded its just limits, or acted in bad faith. Thus under a charter for a railroad "from a point at or near the present terminus of its track in Fall River, in a southerly direction to, &c., to connect with a railroad there to be constructed, a location starting at a point 2,475 feet, by the line of the railroad, northerly from the termination of the old track is authorized. *Mass. Supreme Ct.* 1863, *Fall River &c. Co. v. Old Colony &c. R. R. Co.* 5 *Allen* 231.

Under a statute authorizing a company to construct a railroad to connect with any railroad constructed or to be constructed at any point on the northern boundary of a certain county, the corporation have power to terminate the road at any point in the boundary named, in their discretion, and are not restricted, in relation to the selection of a terminus for the road, to another railroad. *Pa. Supreme*

256. Branches. A railroad company was authorized "to construct branched roads from the main line to other towns or places in the several counties through which said road may pass." Held, that the branches must proceed from the line of the main road, and terminate at towns or places in the same county with the point of departure. *U. S. Circ. Ct. (Ohio)*, 1853, *Works v. Junction Railroad*, 5 *McLean*, 425.

257. Stipulating with a town or city for adequate consideration, to terminate their route at a point beneficial to such town or city, will not preclude the company from forming connections with other routes, by land or water, at the same point. *Va. Ct. of Appeals*, 1855, *Baltimore & Ohio R. R. Co. v. City of Wheeling*, 13 *Gratt.* 40. Compare *Chapman v. Mad River R. R. Co.* 6 *Ohio St.* 119.

8. The track and connections.

258. Gauge. A railway company which is authorized by act of parliament to construct a railway on a broad gauge, is not prevented from laying down rails of the narrow gauge also.* *Chan. Ct.* 1851, *Beman v. Rufford*, 15 *Jur.* 914; 20 *Law J. N. S.* 537; 1 *Sim. N. S.* 550; 6 *Eng. L. & Eq.* 105.

259. Side tracks, extensions, &c. An authority conferred upon a railroad company by charter, to construct a road with one or more tracks, and to make and erect such warehouses, &c., and all such works and appendages as are necessary for the convenience of the company for the use of their road, carries with it the right to construct sidings, turnouts, stations, engine-houses, and all works

Ct. 1866, *Commonwealth v. Cross Cut R. R. Co.* 53 *Pa. St.* 62.

The charter of a horse-railroad company authorized them "to survey, lay out, and construct a railroad, from some suitable point in the township of O. to some suitable point in O. street, or some street north of said street or south of M. street, in the city of N. Held, that this provision referred, not to the route, but to the termination of the road, and did not exclude a location of the road in or through M. street. *N. J. Chancery*, 1860, *McFarland v. Orange &c. R. R. Co.* 2 *Beach.* 17.

*The power of railroad companies in Ohio, under the general railroad act of that State, to agree with each other for a uniform gauge, and for a guaranty of interest coupons issued by each other—considered. *Connecticut Mutual Life Ins. Co. v. Cleveland R. R. Co.* 41 *Barb.* 9; 26 *How. Pr.* 225.

Injunction granted, to prevent a change of the gauge of a railroad. *Columbus &c. R. R. Co. v. Indianapolis &c. R. R. Co.* 5 *McLean*, 450.

and appendages usual in the convenient operation of a railroad. *Pa. Supreme Ct. 1867, Philadelphia &c. R. R. Co. v. Williams, 54 Pa. St. 103; Ind. Supreme Ct. 1857, Protzman v. Indianapolis &c. R. R. Co. 9 Ind. 467.*

260. The expression "as soon as they conveniently can locate and construct" contained in such a power, is not a limitation upon the power, compelling the company to exercise their whole authority in the very beginning, when the demands of business are few; and the charter cannot be construed to require provision to be made for future unknown wants. *Pa. Supreme Ct. 1867, Philadelphia &c. R. R. Co. v. Williams, 54 Pa. St. 103.*

261. A railroad corporation may lay side-tracks for its convenience over any land it may own in fee, or over which it may obtain the legal consent of the owner to lay a track, if no public interest or private right is affected. *Me. Supreme Ct. 1859, Bangor &c. R. R. Co. v. Smith, 47 Me. 84.*

262. The mere existence and use, for seventeen years, of a turn-out from the main track of a railroad, taken in connection with the receipts for mending the siding, and the expense of the castings, &c., do not give an absolute and irrevocable license to maintain a private switch and frogs, in the track of a railroad chartered for general railroad purposes. Such a company is a trustee of the right of way for the State, for the use of her citizens, and cannot grant such a privilege for all time, and without compensation or control. *Pa. Supreme Ct. 1866, Heyl v. Philadelphia &c. R. R. Co. 51 Pa. St. 469.*

263. What is connection. Under the Pennsylvania statute of April 23, 1861 (*Pamph. L. 410*), conferring power upon railroad companies to contract for the use and lease of each other's roads, provided that the roads of the companies so contracting or leasing, should be directly, or by means of intervening railroads, connected with each other,—a connection, within the meaning of the statute, is made, notwithstanding the diversity of gauges prevents the running of common cars. A "railroad connection," where no supplementary terms are used, is such a union of tracks as to admit the passage of cars from one road to the other, or such intersection of roads as to admit the convenient interchange of freight and passengers at the point of intersection. *Pa. Supreme Ct. 1866, Philadelphia & Erie R. R. Co. v. Catawissa R. R. Co. 53 Pa. St. 20.*

264. A statute authorizing a company to construct a railway terminating by a junction with another railway, and authorizing both to make arrangements for the management of the traffic, empowers the former to carry its line beyond the junction and take land for a station there, to be used by both companies. A notice to a land-owner that his land is wanted for the railway to pass through, is sufficient, although it is wanted for the station. *C. P. 1860, Wood v. Epsom &c. R. Co. 8 C. B. N. S. 731.*

265. Where the act of incorporation gave a railroad company the right to construct a road on a particular line, and also required them to purchase a former railroad along the same route, and gave them the right to connect "their road with any road legally authorized to come within the limits of the city of Erie," *Held*, that this right extended equally to the road purchased, or built, by them, and that they had the right to connect with any other railroad in the actual use of another company in Erie, without inquiry, whether such company were in the legal use of their franchises, at the time, or not; that being a question which cannot be inquired into collaterally. *Pa. Supreme Ct. 1856, Cleveland &c. R. R. Co. v. City of Erie, 27 Pa. St. 380.*

266. A provision in the charter of a railroad company, giving it a right to extend to and unite with any other railroad in the state, gives a general authority to extend to any other road within the state, although beyond the prescribed termini of the road. *Ill. Supreme Ct. 1854, Belleville R. R. Co. v. Gregory, 15 Ill. 20.*

267. A provision in the charter of a railroad company giving them a right to make a road across another road with which a connection is sought, will not take away their right to make such connection; but such right is lost by actual construction and operation of their road across the other. *Me. Supreme Ct. 1858, Portland & Oxford Central R. R. Co. v. Grand Trunk Railway Co. 46 Me. 69.*

268. Equity may interfere between two railway companies entitled to the joint use of a station, by prescribing regulations for its management; but such interference ought not to take place without grave occasion. The court may also direct a partition of the station, and appoint a receiver if necessary. But where provisions exist for the settlement of disputes on the above subjects by arbitra-

tion, the court will withhold its interposition until the remedy thus provided has been resorted to. *Chancery*, 1858, Shrewsbury & Birmingham Railw. Co. v. Stour Valley Railw. Co. 21 *Eng. L. & Eq.* 628; 2 *De Gaz. M. & G.* 866.

269. A statute which gives a penalty for one company running its engines upon the track of another company, without first obtaining an approval of the engines by the second company, does not necessarily take away the common law right of seizing the engines, while upon their track, damage feasant. And having distrained the engine, while so unlawfully on their track, a demand for its surrender, with the declared purpose of using it again in the same way, is illegal, and the defendants are justified in not acceding to it. *Q. B.* 1858, Ambergate &c. Railw. Co. v. Midland Railw. Co. 22 *Eng. L. & Eq.* 289; 2 *Ell. & B.* 798; 18 *Jur.* 242; 23 *Law J. N. S.* 17.

4. Construction contracts.

270. Under an unambiguous contract to build a railroad for a certain sum per mile of road, although parol evidence of what was said at the time of making the contract is inadmissible, subsequent acts of the parties are admissible to show how they understood it,—e.g. that side tracks were not considered computable as road, but were included in the general allowance.* *Vt. Supreme Ct.* 1855, Barker v. Troy & Rutland R. R. Co. 27 *Vt.* 766.

271. Under a contract to deliver a quantity of sleepers within a specified time,

* Interpretation of a peculiar agreement with a bridge company. *Niagara Falls International Bridge Co. v. Great Western R. R. Co.* 89 *Bayb.* 212.

Interpretation of ambiguous language as to price of excavation and wall. *Wood v. Vermont Central R. R. Co.* 24 *Vt.* 608.

Effect of a peculiar agreement to suspend work under a construction contract pending a question as to change of location. *Fowler v. Kennebec & Portland R. R. Co.* 81 *Me.* 197.

Effect of parol modification of contract, and of monthly and final estimates. *Baltimore & Ohio R. R. Co. v. Resley*, 7 *Md.* 297.

Rules as to construing covenants to be dependent or otherwise, stated; and certain special covenants and stipulations construed and applied. *Philadelphia &c. R. R. Co. v. Howard*, 18 *How.* 307.

Construction and effect of peculiar stipulations as to making payment in stock of the corporation. *McMahon v. N. Y. & Erie R. R. Co.* 20 *N. Y.* 463; *Myers v. N. Y. & Cumberland R. R. Co.* 2 *Curt. C. C.* 28; *Barker v. Troy & Rutland R. R. Co.* 27 *Vt.* 766.

"as, and when, and in such quantities, and in such manner" as the engineer of the company, by order in writing, should, at any time within the period mentioned, require,—*Held*, that an order by the engineer was a condition precedent to an obligation to deliver. *Exch. Ch.* 1852, Great Northern Railw. Co. v. Harrison, 14 *Eng. L. & Eq.* 188; 22 *Law J. N. S. C. P.* 49; 16 *Jur.* 565.

272. Performance. In the construction of road beds for a railway a substantial *bona fide* compliance with the terms of the contract in the execution of the work should be insisted on, and it is no excuse for a deficient performance that the uncompleted portion may be executed at a trifling expense.* *Fa. Supreme Ct.* 1859, Finegan v. L'Engle, 8 *Fa.* 418.

273. Contract silent as to time of payment. Under a contract with a railroad company to build bridges on the company's road, at a certain sum per foot, to be paid part in cash and part in stock, the contract being entirely silent as to the time or place of payment, the contractor cannot call for payment, either of the cash or stock, until a complete performance of the contract on his part, or, at any rate, before or any oftener than a bridge is fully completed; nor can he then sue and recover for the stock without proof of a special request and a refusal to deliver it. *U. S. Circ. Ct.* 1858, Boody v. Rutland &c. R. R. Co. 24 *Vt.* (1 *Deane*), 660.

274. But it further appearing in this case that the company were in the custom of making monthly payments to their contractors for work done on their road upon estimates made by the engineer at the end of each month, and that custom having been adopted under this contract,—*Held*, that this must be considered the rule of payment under the contract. *Id.*

275. The estimates and decisions of an engineer of a railroad company are not conclusive in cases of dispute between the contractors and the company, unless there is

* Mode of estimating work done on railroads,—under a peculiar statute. *Cal. Northern R. R. Co. v. Butte Co.* 18 *Cal.* 671.

Injunction allowed to prevent the company, pending an arbitration, from appropriating the plant, &c., of a contractor in default, under authority reserved to them in the contract. *Garrett v. Salisbury &c. Railw. Co.* 2 *Law Rep. Eq. Cas.* 358; 12 *Jur. N. S.* 495; 14 *Law Times N. S.* 698.

a positive stipulation in the contract to that effect. When the contract contains no express recognition of their conclusiveness they are to be tested by their correctness. Hence, in an action against a company by a contractor to recover a balance due for work, the engineer's final estimate may be relied on, unless shown to be erroneous.* *Pa. Supreme Ct. 1864, Memphis &c. R. R. Co. v. Wilcox, 48 Pa. St. 161.*

276. Where a contractor of a railroad company enters into an agreement, during the progress of his work, to be released, and is therefore dismissed, and the work taken off his hands, the company are not thereby released from paying, for the work already done, as stipulated in the supplemental agreement, what it was fairly worth. Nor can his claim be restricted to what was coming to him under the final estimate of the engineer; nor, after their agreement to pay, can the company claim to set off against any balance due the contractor, the expense incurred in completing his unfinished work. *Id. Compare Ricker v. Fairbanks, 40 Me. 48.*

277. The provision in a contract with a railroad company, for the construction of their road to the satisfaction and acceptance of their engineer, has reference as to its final acceptance, and to the chief engineer. It is not to be taken to mean a resident engineer; and if, at and subsequent to the time when the contractors claim to have finished the work, the company had no engineer, this will excuse the contractors from obtaining an award of acceptance. *Vt. Supreme Ct. 1855, Barker v. Troy & Rutland R. R. Co. 27 Vt. 766.*

278. Engineer's proceedings. Where in a contract for work upon a railway it was stipulated that the work should be measured by defendant's engineer or agent, which should be final and conclusive,—*Held*, that such person could not delegate his authority, but that it was indispensable that he should himself make the admeasurement. In making the admeasurement, however, it is not necessary that he should give previous notice to

the parties to enable them to be present. *Md. Ct. of Appeals, 1839, Wilson v. York &c. R. R. Co. 11 Gill & J. 58.*

279. But if such agent is to make an estimate of certain expenses, to be allowed the plaintiff, and he proceeds to do so, in the absence of plaintiff and without notice to him, he will not be bound by the estimate. Such estimate will not be affected by the inadequacy of the amount, or the omission to resort to the usual means for ascertaining facts, if the umpire act *bona fide*, which is a fact to be determined by the jury. *Id.*

280. Powers of contractors. The power which a railroad company have, by charter, to take the land and other materials adjoining the line of the road, for the purpose of constructing their road, is as necessary to exist in, and be exercised, by all the contractors on the road as by the corporation. This power, to be exercised within reasonable limits and in a proper manner, is necessarily delegated from the corporation to the contractor, and for this purpose the contractor is the agent of the corporation, and the corporation is liable to the land-owner, for the damages occasioned by the exercise of this power on the part of the contractor. *Vt. Supreme Ct. 1850, Vermont Central R. R. Co. v. Baxter, 22 Vt. 365.*

281. The liability of the corporation to the land-owner in such case, is not affected by any stipulation in the agreement between the corporation and the contractor. *Id.*

282. Extra work. Where the contract contains express provisions that no allowance shall be made against the company for extra work, unless directed in writing under the hand of the engineer or some other person designated, or unless some other requisite formality be complied with, the party who performs extra work upon the assurance of any agent of the company, that it will be allowed by the company, without the requisite formality, cannot recover of the company, either at law or in equity. *Chancery, 1846, Kirk v. Guardians of Bromley Union, 2 Phill. Ch. 640; S. P. Vt. Supreme Ct. 1852, Thayer v. Vermont Central R. R. Co. 24 Vt. 440; Vanderwerker v. The same, 27 Vt. 125; Herrick v. Belknap, Id. 673.*

283. Mode of payment for extra work. Where the plaintiff, by special contract, agreed to build certain bridges and depots for the defendant corporation, for which he

* See also *Finegan v. L'Engle, 8 Fa. 418*. Whether an engineer who is also a stockholder is disqualified from determining the contractor's rights, under such a stipulation, compare *Milner v. Georgia R. R. & Banking Co. 4 Ga. 386; Parkes v. Great Western Railw. Co. 3 Eng. Railw. Cas. 17, 298; 37 Eng. L. & Eq. 35.*

was to be paid partly in cash and partly in shares of their capital stock, and in the progress of the enterprise it became necessary to do much extra work, and furnish materials not provided for in the special contract; *Held*, that the plaintiff was entitled to recover the whole value of the extra work and materials thus furnished, in money, upon an implied assumpsit, and that the agreement to take pay in shares did not extend to this part of the work. *U. S. Circ. Ct. (Me.)*, 1857, *Childs v. Somerset & Kennebec R. R. Co.* 10 *Law Rep. N. S.* 561.

284. Where a contract to pay for work partly in stock of the company and partly in cash, is modified by substituting a more expensive material for a part of the work, at a specified rate in addition to a former proposal, but with no stipulation as to mode of payment, the additional expense is payable in the mode fixed by the contract. Where the parties deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as work wholly extra, and out of the scope of the contract, and may be recovered for as such. But it is otherwise, if the original terms be not inapplicable, and there be evidence from which it may be inferred that it was the intention of the parties that the new work should be subject to those terms. *U. S. Circ. Ct. (Vt.)* 1853, *Boody v. Rutland & Burlington R. R. Co.* 24 *Vt.* 660.

285. Sub-contracts. Where a sub-contractor, upon the request of a sub-engineer of the company, who had no authority to bind the corporation, and upon his promise that the company would pay for it, did extra work which the company might have required the original contractor to do under his contract,—*held* that he could not recover for it from the company. Such a third person cannot set up an independent contract made with a sub-engineer, to do work let to the general contractor with the company. *Vt. Supreme Ct.* 1852, *Thayer v. Vt. Central R. R. Co.* 24 *Vt.* 440. Approved and followed in *Herrick v. Belknap*, 27 *Vt.* 678.

286. If both contracts provide that extra work shall only be allowed for if ordered by the engineer in writing, the sub-contractor, having done the work at the verbal request

of the engineer, cannot recover from the company, but must look to the general contractor; and cannot, it *seems*, recover, even from him, for what is extra work. *Vt. Supreme Ct.* 1855, *Vanderwerker v. Vt. Central R. R.* 27 *Vt.* 125; *Barker v. Troy & Rutland R. R. Co.* *Id.* 766.

287. The fact that the company have paid similar claims to other persons, will not bind them unless that fact was known to the plaintiffs at the time of doing the work, and operated to induce them to confide in the authority of the agent. *Vt. Supreme Ct.* 1855, *Vanderwerker v. Vt. Central R. R. Co.* 27 *Vt.* 125.

288. The custom of railroad companies to allow their contractors the free use of their own roads, cannot be extended so as to bind a company to pay the expenses of its contractors on a road belonging to another corporation. *S. C. Ct. of Appeals*, 1847, *Colcock v. Louisville & C. R. R. Co.* 1 *Strobh.* 829.

289. Statutes giving workmen employed by sub-contractors a remedy against the corporation may be applied to companies organized, and to contracts made by them, previously to the passage of the law; for this does not impair the obligation of contracts. *Mo. Supreme Ct.* 1860, *Grannahan v. Hannibal & St. Josephs R. R. Co.* 30 *Mo.* 546.

290. Although a public railway may come within the literal import of the terms used in a statute, to secure material-men, and laborers, by what is denominated a mechanic's lien, upon "buildings or other improvements," yet the public have such an interest in public works of this character, that it cannot reasonably be presumed that such terms were intended to include the bridges and culverts upon the line of the road. *Mo. Supreme Ct.* 1857, *Dunn v. North Missouri Railroad*, 24 *Mo.* 493.

291. Under section sixty of the general railroad law, of Vermont (*Comp. Stat.* 203, ch. 26),—which provides for the liability of railroad corporations to day laborers employed by contractors in constructing their roads,—a railroad company is liable to day laborers employed by sub-contractors, as well as to those employed by persons who contract directly with the corporation. The term "contractors" in the statute, includes sub-contractors. *Vt. Supreme Ct.* 1858, *Branin v. Connecticut & C. R. R. Co.* 31 *Vt.* 214.

292. Under the Vermont statute Comp. Stat. 208 § 60, which makes the company liable to day laborers "for labor actually performed on their road," a day laborer may recover of the corporation, not only for his own personal labor, but also for the use of his horse and cart, with which he worked in the construction of the railroad. *Id.*

5. Mode of construction.

293. The incidental use of a railroad embankment, as a dam, by the agreement of the agent of the corporation, is not such a deviation from its strict uses, as gives notice to all, of the agent's want of authority; and they are liable for resulting damages. *Vt. Supreme Ct. 1855, Jones v. Western Vermont R. R. Co. 1 Williams (27 Vt.), 399.*

294. The general provisions of the railways clauses consolidation act, that in the exercise of their powers, the company shall do as little damage as possible, and shall make satisfaction, to all parties interested, for all damages sustained by them, does not extend to the form of constructing the railway. It does not apply to what is done, but to the manner of doing it. Hence, if by other sections of the statute, the company are required to build bridges in a particular form, they may still do so, notwithstanding it may cause more damage to the owners of land, than to build them in some other form. *Q. B. 1853, Regina v. East & West India Docks &c. Railway, 22 Eng. L. & Eq. 113; 2 Ell. & B. 466; 22 Law J. N. S. Q. B. 380; 17 Jur. 1181.*

295. Where a tunnel is marked upon the plans referred to in the company's clauses consolidation act, it must be made in the exact position indicated, and the general right of deviation does not apply; and a company having wrongfully deviated cannot be compelled to construct the tunnel on the deviating line.* *C. P. 1852, Little v. Newport &c. Railw. Co. 14 Eng. L. & Eq. 309; 22 Law J. N. S. 89; 17 Jur. 209.*

296. Access. The owners of railroads which are public highways, are bound to

make such landings or places of access to their roads, as are necessary for the public accommodation, and to keep them in a suitable and safe state for the accommodation of the persons who may be reasonably expected to use them; but they are under no obligation to do anything, either for the convenience or safety of passengers, at points where none are expected to pass to and from the track. *N. H. Superior Ct. 1854, Murch v. Concord R. R. Corp. 9 Fost. 9.*

297. Negligence of laborers. Where work is done for a railway company under a contract (parol or otherwise), the company are not responsible for injury resulting to a third person from the negligent manner of doing the work, though they employ their own surveyor to superintend it, and to direct what shall be done. *C. P. 1855, Steel v. South-eastern Railw. Co. 32 Eng. L. & Eq. 366; 16 C. B. 550. But compare Veazie v. Penobscot R. R. Co. 49 Me. 119.*

298. Temporary guards. A corporation, which was authorized to construct a railroad, had occasion, in so doing, to cut through a highway situated in the plaintiffs' town, and which the latter were bound to keep in repair. In the progress of the work it became necessary, to prevent travelers from falling into the deep cut at the intersection of the highway, to raise barriers, which, though voluntarily erected by the company, were afterwards approved and adopted by the selectmen of the town. Subsequently, for the purpose of removing stone and rubbish from the cut, the barriers were taken down by persons in the defendants' employ, and in consequence of the negligence of the workmen to replace them, at night, when leaving the works, a traveler sustained an injury. Under the provisions of a statute, double damages were recovered against the plaintiff therefor. *Held*, that the company was bound to cause the barriers to be replaced at night, although no such duty was enjoined by their charter; as otherwise an accident might have happened before the town had notice, actual or constructive, and no one would have been responsible for the damages. *Mass. Supreme Ct. 1839, Inhabitants of Lowell v. Boston & Lowell R. R. Corp. 23 Pick. 24.*

299. In such case an action might be maintained by the town, against the corporation, for indemnity, the parties not being *in pari delicto*; but the corporation is not

* Courts of equity, in England, will not undertake to determine questions of engineering, and take the construction of a railway under their own control, in order to keep them within their powers, but will refer such questions to a disinterested engineer. In such case the court will base its order upon the report of such engineer. *Chan. 1839, Webb v. Manchester & Leeds Railw. Co. 1 Eng. Eccles. Cas. 516; 4 Mylne &c. 116.*

liable for the costs and expenses of the action brought against the town by such traveler, it not appearing that the action against the town was defended at the request of the railroad corporation or for its benefit. *Ib.* Compare *Veazie v. Penobscot R. R. Co.* 49 *Me.* 119.

800. Where a railroad corporation was liable for damages paid by a town for a defect in a road built by the corporation in lieu of an old road taken for the railroad,—*Held*, that the town might also recover of the railroad the costs and expenses incurred in defending the suit against them for such damages, the railroad having been notified and declined to interfere. *Vt. Supreme Ct.* 1854, *Duxbury v. Vermont Central R. R. Co.* 26 *Vt.* 751.

801. Bridges. A railroad company may be sued for damages sustained by the breaking down of a bridge, notwithstanding it was built by a competent engineer, if the jury are of the opinion that it was not constructed with sufficient skill and care and of reasonably proper strength with regard to the purposes for which it was made.* *Exch.* 1848, *Grote v. Chester & Holyhead Railw. Co.* 2 *Exch.* 251; 5 *Eng. Railw. Cas.* 649.

802. That acts of parliament, giving railway companies power to build bridges, must be expounded with reference to the peculiar mode of construction of bridges on railways. *Exch.* 1840, *Priestley v. Manchester & Leeds Railway Co.* 4 *You. & C.* 63; 2 *Eng. Railw. Cas.* 134.

803. Culverts. Railroad corporations must provide suitable bridges and culverts for the natural flow of water crossed by their roads. *N. H. Superior Ct.* 1849, *March v. Portsmouth & Concord R. R. Co.* 19 *N. H.* 372.

804. Consequential damages. A railroad corporation is not liable for injuries resulting to the land of adjoining owners, by reason of excavations necessary to the construction of its road bed, and made in pursuance of its charter. *Me. Supreme Ct.* 1862, *Boothby v.*

Androscoggin & Kennebec R. R. Co. 51 *Me.* 318.

But compare *Lawrence v. Great Northern Railw. Co.* 15 *Jur.* 652; 2 *Law J. N. S.* 293; *Evansville & Crawfordsville R. R. Co. v. Dick*, 9 *Ind.* 433; *Warburton v. London & Blackwall R. R. Co.* 1 *Eng. Railw. Cas.* 409; *Commonwealth v. Boston & Maine R. R. Co.* 3 *Cush.* 25; 1 *Am. Railw. Cas.* 482; *Towle v. Eastern R. R. Co.* 17 *N. H.* 519.

805. Where the right of way is granted to a railroad company, and it is necessary to render it practicable for the purposes of the road, to dig a deep cut through the ground, they are not bound to build walls to prevent the banks from falling in, and for the protection of the adjoining property. *Ky. Ct. of Appeals*, 1857, *Hortaman v. Covington & Lexington R. R. Co.* 18 *B. Monr.* 218. But compare *Richardson v. Vermont Central R. R. Co.* 25 *Vt.* 465.

806. Overflowing lands. A railroad company, sued for damages resulting from overflowing plaintiff's land in consequence of their works, must show that all due and reasonable precautions were taken in the construction,* and that nothing was done wantonly or carelessly to cause unnecessary damages to plaintiff's property, in order to confine the plaintiff to the statute remedy for compensation. If they do not show this, the action at law lies. *Mass. Supreme Ct.* 1855, *S. P. N. H. Supreme Ct.* 1857, *Mellen v. Western Railroad*, 4 *Gray*, 301; *Johnson v. Atlantic & C. R. R. Co.* 35 *N. H.* 569. But compare *Robinson v. N. Y. and Erie R. R. Co.* 27 *Barb.* 512; *Chase v. N. Y. Central R. R. Co.* 24 *Id.* 278.

807. Under a charter providing that, if necessary to intersect or cross any water-course or highway, the corporation may con-

* Where the expense of keeping a bridge in repair is imposed by statute upon several towns and a railroad company jointly, with a provision that the municipal authorities of one of the towns shall have the care and superintendence of it, and shall employ all services necessary in the care thereof, no action lies against such town, in favor of the railroad company, to recover for damages sustained by the latter in consequence of a defect in the bridge. *Mass. Supreme Ct.* 1864, *Malden & Melrose R. R. Co. v. City of Charlestown*, 8 *Allen*, 245.

* Where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *prima facie* evidence of its insufficiency; and this evidence may become conclusive, from the absence of any proof on the part of the company to rebut it. The amount of precaution which ought to be taken in the construction of such works to guard against external violations cannot be the subject of any precise rule, but must vary according to the varying local circumstances. *Privy Council*, 1863, *Great Western Railway of Canada Company v. Fawcett*, 1 *Moore, P. C. C. N. S.* 101; 9 *Jur. N. S.* 339; 11 *Weekly R.* 444; 8 *Law J. N. S.* 81. Compare *Withers v. North Kent Railway Co.* 21 *Law J. N. S. Exch.* 417. 8 *C.* at *Nisi Prius*, *sub. nom.* *Withers v. Great Northern Railway Co.* 1 *F. & F.* 165; *Wyborn v. Same*, 1 *F. & F.* 162; *Euck v. Williams*, 21 *Law J. N. S. Exch.* 357.

struct their road across or upon the same, but in such a way as not to impair its usefulness, the company are liable for damage to plaintiff's lands situated on a stream, occasioned by an overflow of water, caused by the construction of the road over the stream and through its banks. [16 Ad. & El. 648.] *N. Y. Ct. of Appeals*, 1855, *Brown v. Cayuga & Suequehanna R. R. Co.* 12 *N. Y. (3 Kern.)*, 486.

308. That a riparian proprietor, whose lands had been gradually washed away by a change in the course of the current of the stream, occasioned by necessary erections made above him in the stream by a railway company, has no claim for damages against the company, whether such erections have been made in a careless and unskillful manner or not,—see *Henry v. Vermont Central R. R. Co.* 30 *Vt.* 638.

309. Defect in station. To establish a case of negligence against a railway company, and consequent liability for damage for injury happening in consequence of an alleged defectiveness in an erection for the use of their passengers, it must be proved that the erection was an improper one for its purpose, and it is not sufficient to show that by some alterations it might have been made more safe. *C. P.* 1866, *Crafter v. Metropolitan Railway Co.* 35 *Law J. N. S.* 132; 1 *H. & R.* 164; 1 *Law R. C. P.* 800; 12 *Jur. N. S.* 272; 14 *Weekly R.* 334; *S. P. C. P.* 1857, *Tooney v. London & C. Railway Co.* 30 *Law Times*, 185; 27 *Law J. N. S.* 39.

310. Crossings. The owner of land adjoining a railroad track has no right to build a farm-crossing at any other point than at the one fixed by the commissioners, or agreed upon with the railroad company; nor to cross the track at any other point than the established crossing.* *Vt. Supreme*

* By the railways clauses consolidation act (8 & 9 *Vict.* ch. 90, § 40) it is made the duty of railway companies in England, before they use land for any of their purposes, to fence it and make convenient passes for the owner, which, if the parties do not agree, are to be determined by two magistrates. *Held*, that under such statutes the railway was not excused from making the necessary accommodations to keep up communication, to the owner, between different parts of lands intersected by the line of a railway, because these were not defined in the arbitrators' award of land damages. *Chancery*, 1843, *Skerratt v. North Staffordshire Railway Co.* 5 *Eng. Railw. Cas.* 166.

Where land was deeded to a railroad corporation upon the condition that the company should fence the land and prepare a crossing with cattle-guards at the present

Ct. 1859, *Connecticut & C. R. R. Co. v. Holton*, 32 *Vt.* 43. But compare to the contrary, *Wheeler v. Rochester & C. R. R. Co.* 13 *Barb.* 227.

311. Under sections 44 and 50 of the *N. Y.* general railroad act, companies are bound to make the land crossings as well on a village lot as on a farm, and as well where their right was obtained by agreement with the owners as where it was acquired by compulsory proceedings. *N. Y. Supreme Ct.* 1854, *Clarke v. Rochester & C. R. R. Co.* 18 *Barb.* 350. And see *Bradley v. Buffalo & C. R. R. Co.* 34 *N. Y.* 427. Compare *Horne v. Atlantic & St. Lawrence R. R. Co.* 36 *N. H.* 440.

312. Whether railroad companies are or are not bound to furnish suitable crossings between different parts of one owner's land intersected by the road, if they do provide them, they become the property of the land-owner, and cannot be removed by the corporation, except when it becomes necessary to do so for the improvement of the road. *N. H. Superior Ct.* 1849, *March v. Portsmouth & Concord R. R. Co.* 19 *N. H.* 372.

313. A provision of law allowing land occupiers to make crossings over the railway may be regarded as intended for the benefit of all those who may be at any future time occupiers. *H. of Lords.* 1842, *Monkland & Kir. Railway v. Dixon*, 3 *Eng. Railw. Cas.* 273.

314. Courts of equity will decree specific performance of contracts entered into between a railway company and a land-owner, in regard to farm-crossings, and such like works, upon the lands of the company, in which the land-owner has an interest so material that

traveled path, on a level with the track, and it appeared that the railroad divided the plaintiff's pasture into two, in one of which there was no water, and that the crossing connected the two.—*Held*, that the clause in the deed was not a settlement between the parties in relation to the crossings required by law, and that the legal position of the parties was not changed thereby; and that when the plaintiff turned his cattle loose into one of the pastures, and they were subsequently killed in attempting to cross the track, the defendants were liable for the damage, unless it should appear that it was done by accident, or by some fault of the plaintiff. *N. H. Superior Ct.* 1855, *White v. Concord R. R.* 10 *Pbst.* 83. And see *Horn v. Atlantic & St. Lawrence R. R. Co.* 35 *N. H.* 169.

A contract between an owner of land and a company, that the latter should "construct and maintain good and sufficient fences on each side of the track, and also two crossings for teams," and making no provision for gates,—*Held*, not to relieve the company from its statutory obligations to maintain gates. *N. Y. Ct. of Appeals*, 1857, *Poler v. N. Y. Central R. R. Co.* 16 *N. Y.* 476.

the non-performance cannot be adequately compensated at law. *Vice Chancery*, 1842, *Storer v. Great Western Railway Co.* 3 *Eng. Railw. Cas.* 106.

6. *Interference with highways, waters, &c.*

§15. That the legislature have the right to provide for such alterations in the highways as the public good may require, by reason of the construction of a railroad; and the railroad cannot be held liable as a wrongdoer, for having made such alterations according to the requirements of its charter. See *Towle v. Eastern Railroad*, 17 *N. H.* 519.

§16. The power conferred. An act of the legislature, which authorizes the construction of a railroad between certain *termini*, without prescribing its precise course and direction, does not *prima facie* confer power to lay out the road on and along an existing public highway. But it is competent for the legislature, under the right of eminent domain, to grant such authority, either by express words, or by necessary implication;* and such implication may result either from the language of the act, or from its being shown, by an application of the act to the subject matter, that the railroad cannot, by reasonable intendment, be laid in any other line. *Mass. Supreme Ct.* 1849, *Springfield v. Connecticut River R. R. Co.* 4 *Cush.* 68; 1 *Am. Railw. Cas.* 572.

§17. If the charter of a railroad company gives them the right to construct the same on a street so as to cause as little obstruction as possible, it also empowers them to use the same when built, and no obstruction caused thereby is a violation of the charter unless it might have been avoided by a different construction of the road. If the obstruction is caused by negligence, the company is liable in damages or by indictment. *Pa. Supreme Ct.* 1856, *Commonwealth v. Erie & North East R. R. Co.* 27 *Pa. St.* 389.

§18. A provision in the charter of a railroad company authorizing them to construct their track upon and across a highway, is not to be construed as intended to authorize them to appropriate the interest of the owner of the fee. *N. Y. Supreme Ct.* 1842, *Presbyte-*

rian Society in Waterloo v. Auburn & Rochester R. R. Co. 3 *Hill*, 567; 1855, *Ellicottville &c. Plank Road Co. v. Buffalo &c. R. R. Co.* 20 *Barb.* 644. And see *Fletcher v. Auburn & Syracuse R. R. Co.* 25 *Wend.* 462.

§19. A statute forbidding railroads to cross highways without consent of municipal authorities, although it is applicable to existing railroads, cannot be construed to require railroads whose location has been completed and duly filed, and the construction begun under a binding contract, to locate anew in order to comply with its provisions. *Ms. Supreme Ct.* 1861, *Veazie v. Mayo*, 49 *Ms.* 156.

§20. A charter incorporating into itself by words of reference, the provisions of general statutes, as to the mode of crossing roads and construction of bridges, &c., includes, by implication, the clauses enacting penalties for not repairing the roads and bridges, and providing the remedy for enforcing the penalties. *C. P.* 1862, *The Bristol &c. Railway Company v. Tucker*, 13 *C. B. N. S.* 207.

§21. The obstruction of a highway by the construction of a railroad across it in a manner not authorized by law, is a nuisance, and renders the corporation liable to indictment.* *Mass. Supreme Ct.* 1854, *Commonwealth v. Nashua & Lowell R. R. Corp.* 2 *Gray*, 54; 1855, *Commonwealth v. Vermont & Mass. R. R. Corp.* 4 *Gray*, 22; *Pa. Supreme Ct.* 1856, *Commonwealth v. Erie & North East R. R. Co.* 29 *Pa. St.* 389.

§22. The "charter of a railroad company provided that the railroad should be constructed so as not to obstruct or impede the free use of any public road, street, lane, or bridge." *Held*, that assuming that this clause does not entirely forbid the company from building their road on any street, and that a railroad can be so constructed on a public street that it will not be a material obstruction to its free use, yet all impediments not absolutely necessary to the use of the railroad are unlawful. If the railroad renders it es-

* An act authorizing any railroad company "to raise or lower any turnpike, plank-road, or other way, for the purpose of having their railroad pass over, or under the same," *Held* to give a right not only to cross at grade, but to run lengthwise upon the road so taken. *Io. Supreme Ct.* 1861, *Milburn v. Cedar Rapids*, 12 *Iowa* (4 *Wilk.*), 246.

* Where a railroad corporation claims to maintain their road upon a public highway, the town within which the highway is situated, may sustain a bill in equity, for the purpose of trying the question of the right of the company, under their charter, to maintain their road in that place. *Mass. Supreme Ct.* 1849, *Springfield v. Connecticut River R. R. Co.* 4 *Cush.* 68; 1 *Am. Railw. Cas.* 572. That the *leveling* of a street, preparatory to laying the structure of a railway, is not an obstruction, see *McLaughlin v. Charlotte & S. C. Railway*, 5 *Blach.* 523; *Benedict v. Oak*, 2 *Barb.* 459.

essential that the rest of the street should be graded in order to be used by the public, this must be done. *Pa. Supreme Ct.* 1856, *Commonwealth v. Erie & North East R. R. Co.* 27 *Pa. St.* 339.

823. A provision that the railroad shall be so constructed as not to impede the use of roads, applies not merely to laying the rails but to the ordinary and proper use of the road. If such use causes an impediment, the charter is violated. *Ib.*

824. Using the highways. A company must not, without clear necessity, place its depot so that the receiving and discharging of passengers injuriously interferes with the use of a public way. *N. J. Supreme Ct.* 1856, *State v. Morris & Essex Railroad*, 1 *Dutch.* 437; *Vt. Supreme Ct.* 1854, *State v. Vermont Central R. R. Co.* 27 *Vt.* 103. And see *Lackland v. North Missouri R. R. Co.* 31 *Mo.* 180.

825. But it has a right to pass and repass over a highway in making up its trains and shifting its cars, provided this is done only to a reasonable extent and in a reasonable manner, without encroaching upon the rights of others who have an equal right to use it. *Mass. Supreme Ct.* 1861, *Gahagan v. Boston &c. R. R. Co.* 1 *Allen*, 187.

826. A farm road which a land-owner has constructed upon his own land for the convenient use of his farm, is not to be regarded as a private way, within the meaning of a railroad statute providing a remedy by action for injury or inconvenience caused to an individual's property by alterations in highways, private ways, &c., or by obstructions placed upon the same. *N. H. Superior Ct.* 1861, *Clark v. Boston &c. R. R. Co.* 4 *Post.* 114.

827. A farm crossing is not a road, in the legal sense of the term, within the meaning of a provision in the charter of a railroad company, requiring the erection of a bridge at road crossings. *N. J. Supreme Ct.* 1854, *Green v. Morris & Essex R. R. Co.* 4 *Zabr.* 486.

828. Where a land-owner was entitled to the use of two roads, but a railroad company stopped up one for the purpose of proceeding with their works, and contended that the use of the other road was a sufficient substitution, within the meaning of the railway clauses consolidation act,—*Held*, that an injunction would lie to restrain them from obstructing the former road. *V. Oh. Ct.* 1860, *Attorney-*

General v. Great Northern Railw. Co. 14 *Jur.* 684.

829. Crossings. A railroad corporation, having a right to build their road over or under a highway, and for that purpose to raise or lower the highway, are bound to exercise this right so as not unnecessarily to obstruct the highway, and to use reasonable care to protect those passing thereon from injuries, and are liable for any injuries happening to any one passing on the highway, on account of their neglect to use such care.* *Me. Supreme Ct.* 1860, *Veazie v. Penobscot R. R. Co.* 49 *Me.* 119.

830. A railroad company is not liable, under a statute enjoining the duty, upon railroads, of making passes for accommodation of public travel, for not constructing an under pass for the accommodation of the public travel on a way, unless such way has been laid out agreeably to statute law, or been used by the public for at least twenty years. *N. H. Supreme Ct.* 1857, *Northumberland v. Atlantic & St. Lawrence R. R.* 35 *N. H.* 574.

831. A laying of tramways by a land-owner across a public road running through his property, for his own convenience in the use of his coal cars, is illegal and a nuisance; and a railroad company, occupying the highway with their track, are not liable in damages in removing them, especially where crossings were substituted for the plaintiff's use. *Pa. Supreme Ct.* 1864, *Harvey v. Lack-*

* Under the statute of Maine, (1868, c. 41, § 3,) providing that railroads shall not be carried along any existing highway, but "must cross it in the line of the railway," a corporation have no power to extend a curve in a branch track partly over or along a highway, but without crossing it. *Me. Supreme Ct.* 1869, *Bangor &c. R. R. Co. v. Smith*, 47 *Me.* 34.

By locating their track across a highway, a railroad company acquires the right to lay their rails and road bed across the highway, in the direction or line of their road; and, it may be to lay a second track in the same direction and parallel with the first, if the whole line is of that character, and the business of the road requires it; but not to lay a track in a different direction, on an angle or curve, though within the limits of their described location. *Ib.*

Under the statute of Massachusetts (*Rev. Sta.* c. 89, § 69), town or city authorities have no power to lay out a highway across a railroad, on a level therewith; and a railroad company is not estopped from objecting to the exercise of such power, by an agreement made by it with former owners of the land, which contained a stipulation for a right of way, to be used by such owners and their assigns, at the place where the highway was afterwards laid out. *Mass. Supreme Ct.* 1861, *Boston & Maine Railroad v. Mayor &c. of Lawrence*, 2 *Allen*, 107.

awanna & Bloomsburg R. R. Co. 47 *Pa. St.* 428.

332. Highway officers. Under the Massachusetts statutes (1842, c. 22) authorizing county commissioners to require railroad companies to raise highways at crossings, if necessary for the security of the public, the commissioners' order must determine in detail the manner in which the change shall be made.* *Mass. Supreme Ct.* 1854, *City of Roxbury v. Boston & Providence R. R. Co.* 2 *Gray*, 460.

333. Care in construction. A railroad company is required, if possible, to construct its road over or across highways without any inconvenience to the public; but if it cannot be done without some inconvenience it must be done with the least possible inconvenience. If a bridge, or a substituted road be necessary to prevent the obstruction, the railroad company must build it immediately, or in a reasonable time, and cannot delay it till the completion of the road. The company must so use their own right as not to injure or take away the rights of others [*Redf. on Railw.* 515—518; 27 *Pa. St.* 339]. *Tenn. Supreme Ct.* 1859, *Louisville & Nashville R. R. Co. v. State*, 3 *Head*, 523.

334. In an action against a railroad company for damages incurred by reason of their having interfered with a highway, negligence or want of skill in the defendants is not material. *N. Y. Supreme Ct.* 1858, *Robinson v. N. Y. & Erie R. R. Co.* 27 *Barb.* 512.

335. A railroad company having undertaken to lay down their track along a street which is a public road, are bound to lay it down properly, and to keep it in a proper condition; and where, by the sinking of the pavement, a spike in the rail was left exposed, with which the plaintiff's carriage coming in contact, the plaintiff was thrown out and injured,—*Held*, that the company was guilty of negligence, and the plaintiff might recover. *N. Y. Com. Pl.* 1861, *Fash v. Third Av. R. R. Co.* 1 *Daly*, 148.

* Under the Massachusetts statute an action does not lie on an order of the commissioners which does not prescribe the time. *Mass. Supreme Ct.* 1854; *Keith v. Cheshire Railway*, 1 *Gray*, 614. Compare *Commonwealth v. Vermont & Mass. R. R. Co.* 4 *Gray*, 22. As to the remedy for non compliance,—see also *Roxbury v. Boston & Providence R. R. Corporation*, 6 *Cush.* 424; *Vermont & Massachusetts R. R. Co. v. County Commissioners of Franklin*, 10 *Cush.* 12.

336. It is wholly immaterial whether the the projection of the spike resulted from the failure of the city corporation to repair the street in the locality of the accident. *Id.*

337. Under a power to raise or lower roads, to carry the same under or over a railway, and a requirement of a statute that bridges must be of a certain height from the surface of the road which is crossed, the company may lower the track of the road which they cross, to secure that height, notwithstanding a local regulation forbidding any person to interfere with pavements, &c. without the consent of municipal officers. *Q. R.* 1842, *Queen v. Eastern Counties R. R. Co.* 3 *Eng. Railw. Cas.* 18; 2 *Ad. & E. N. S.* 569.

338. A statute giving to railroad corporations the power to raise or lower any turnpike or way, for the purpose of having their railroad pass over or under the same,—*Held*, to justify a railroad corporation in raising a turnpike road for the purpose of constructing the railroad across it upon the same level. *Mass. Supreme Ct.* 1839, *Newburyport Turnp. Corp. v. Eastern R. R. Co.* 23 *Pick.* 326.

339. The right, conferred upon a railroad company, of raising or lowering highways, in the construction of their road, does not authorize the company to change the course of the highway, even with the consent of the town council, and for so doing the company will be liable to persons who have sustained special damage thereby. *R. I. Supreme Ct.* 1853, *Hughes v. Providence & Worcester R. R. Co.* 2 *R. I.* 493.

340. Change of grade. The consent of one having property upon a street, to the location of a railroad through that street, implies the consent to such regrading of it as is necessary to make it suitable for a roadway, and deprives him of the right to claim damages incident to that location, according to the maxim, *volenti non fit injuria*. *Ky. Ct. of Appeals*, 1854, *Wolfe v. Covington & Lexington Railroad*, 15 *B. Monr.* 404.

341. Company not liable for consequential damages occasioned by a change of grade of a street. *N. Y. Supreme Ct.* 1851, *Chapman v. Albany & Schenectady R. R. Co.* 10 *Barb.* 360.

342. A city ordinance authorized the construction of a railway, on either of two streets, through the corporate limits, under suitable restrictions as to grade. *Held*, that the ordinance did not authorize the company to ob-

struct the street to the injury of adjoining proprietors; nor to substantially alter the grade of the street. *Ind. Supreme Ct.* 1856, *Tate v. Ohio & Miss. R. R. Co.* 7 *Ind.* 479.

343. Power to "alter and grade" roads crossed by their railroad, does not give the right to change the route of such roads. *N. J. Supreme Ct.* 1862, *Warren R. R. Co. v. State*, 5 *Dutch.* 358.

344. Diversion. Under a power to divert or alter roads to carry them over or under the railway, the company may alter the angle of the crossing if they do it without unnecessary inconvenience to the public.* *Q. B. Queen v. Sharpe*, 8 *Eng. Railw. Cas.* 27.

345. Several tracks. A railroad corporation which has duly located its road across a public highway, and acquired a right to construct it there at a certain grade, without any restriction as to the number of tracks, or the place where they should be laid, is authorized to lay and maintain as many tracks as are essential to the convenient transaction of its business; and for that purpose may make any necessary alteration in the surface of the highway. *Mass. Supreme Ct.* 1860, *Commonwealth v. Hartford & New Haven R. R. Co.* 14 *Gray*, 379.

346. A statute authorizing highways to be laid out across railroad tracks, is construed as authorizing the crossing of a side track in addition to the main track, wherever it is necessary that the highway should cross the former in order to cross the latter. *N. Y. Ct. of Appeals*, 1862, *Albany Northern R. R. Co. v. Brownell*, 24 *N. Y.* 345.

347. Remedy of traveler. A railroad company which so constructs and maintains

its road bed, at its intersection with a highway, as to render the highway dangerous or inconvenient to travelers thereon, is liable for an injury sustained by a traveler upon the highway in consequence of the defect, although he may also have a remedy against the town or city which was bound to keep the highway in repair. *Mass. Supreme Ct.* 1864, *Snow v. Housatonic R. R. Co.* 8 *Allen*, 441; *Gillett v. Western R. R. Corp.* 8 *Allen*, 560.

348. The location of a railroad across a public highway, in pursuance of the power conferred by charter, does not, while the railroad is in process of construction, amount to a discontinuance of the highway, in such a sense as to relieve the town from responsibility at that point, but operates only as a temporary suspension of its use. *Vt. Supreme Ct.* 1850, *Willard v. Town of Newbury*, 22 *Vt.* 458.

349. Bridges for highways. A provision that where a bridge should be erected for carrying a road over a railway, the road over such bridge was to be not less than fifteen feet,—*Held* to apply to the bridge itself and not to apply to the approaches. *Q. B.* 1841, *Regina v. Birmingham & Gloucester Railw. Co.* 2 *Ad. & E. N. S.* 47; 2 *Eng. Railw. Cas.* 694.

350. A mandamus will issue at the suit of towns, in which that part of a highway is situated over which a railroad has been extended, to compel the corporation to erect and maintain a bridge over such highway for public use, such obligation having been imposed by statute. *Mass. Supreme Ct.* 1843, *Inhabitants of Cambridge &c. v. Charlestown Branch R. R. Co.* 7 *Metc.* 70. Compare *Regina v. Southwestern R. R. Co.* 15 *Jur.* 871.

351. Obligation to restore the highway.* Where the charter gives the company no authority to alter a highway without restoring it substantially to its former condition and usefulness, the duty of the company applies not merely to the beaten path of the highway, but to the highway throughout, so far as they alter it, and people still have occasion to pass over it. If,

* A railroad company were authorized, where any highway was so located that the road could not be judiciously laid out without interfering therewith, with the consent of the commissioners, to so alter the highway, that the railroad might be made on the best site of ground for that purpose; and it was provided that the company should maintain all bridges which they should construct for the purpose of conducting any highway over the road. The company, having made their road through a deep cut in a ridge, across the line of a highway which traversed the ridge, for the purpose of avoiding the expense of constructing a bridge for the highway, changed the location of the same, with the consent of the commissioners, to a place where it could cross the railroad at the grade. *Held*, that the charter did not authorize such a change of location, as the object of it was wholly to save the expense of a bridge, and not to make a more judicious location of the railroad; and that the portion of the old highway between the points of junction with the new location was not thereby discontinued. *Conn. Supreme Ct.* 1856, *Norwich & Worcester R. R. Co. v. Town of Killingly*, 25 *Conn.* 402.

* As to the obligation, sometimes imposed, of substituting a new way, and its effect, compare *Regina v. Birmingham &c. Railw. Co.* 2 *Ad. & E. N. S.* 47; 2 *Eng. Railw. Cas.* 694; *Attorney-General v. London & Southwestern Railw. Co.* 3 *DeGex. & S.* 489; 18 *Jur.* 467; *Barber v. Essex*, 27 *Vt.* 62.

at such a crossing made on or near a level with the highway, so that persons using the highway, with reasonable care, are liable to pass upon the track, the company leave an open culvert or ditch beneath the track, which might have been covered, they are liable to a passer by, who, without negligence, is injured by falling through. *Conn. Supreme Ct.* 1861, Judson, v. New York & New Haven R. R. Co. 29 *Conn.* 484.

852. Where the restoration of a highway, interfered with by the road, is required by the statute to be made under advice of the commissioners, the determination of the commissioners is final, even though they determine to leave the highway traffic to an old and abandoned road, and give up the new one to the railway; and the court will not by mandamus, on complaint of the town, review the commissioners' decision. *Conn. Supreme Ct.* 1858, Waterbury v. Hartford &c. R. R. Co. 27 *Conn.* 146.

853. Remedy of the town which has been held liable for an injury resulting from the company's neglect. *Hamden v. New Haven*, 27 *Conn.* 158.

854. Water courses. Where the free flow of water from a saw-mill is obstructed, by the erection of a railroad bridge below the mill, the company are liable to the owner of the mill in an action of tort. But they are not liable for any increased expense thereby occasioned to the mill-owner, in getting logs up the stream to his mill, whether the stream be navigable for boats and rafts, or not; for this is not a private nuisance but must be redressed, if at all, by public prosecution. *Mass. Supreme Ct.* 1854, Blood v. Nashua & Lowell R. R. Co. 2 *Gray*, 137.

855. The proprietor of a mill-pond may recover damages, sustained by the construction of a railroad across it, although the dam was authorized, by the legislature, to be raised upon a navigable river, and in constructing it, the conditions of the act were not complied with. *Mass. Supreme Ct.* 1850, White v. South Shore R. R. Co. 6 *Cush.* 412.

856. A railroad embankment in an eddy and creek's mouth, in which plaintiff has a right of storing lumber, whereby the water is prevented from flowing in its accustomed channel, and the plaintiff is deprived of the full enjoyment of his privilege, is directly injurious to the plaintiff. And the fact that the creek is navigable and within the control

of the legislature, is no defence to an action for the injury complained of. *N. J. Supreme Ct.* 1857, Tinsman v. Belvidere Delaware R. R. Co. 2 *Dutch.* 148.

857. The erection of bridges over rivers, with proper draws, so constructed and placed as to do the least possible injury to navigation, is not necessarily a nuisance. The slight, but unavoidable obstruction of public navigable rivers, by a railroad company, under the authority of the State legislature, is a necessary evil, which must be borne, for the sake of the public good which demands it. *N. J. Chancery*, 1853, Attorney-General v. Hudson River R. R. Co. 1 *Stockt.* 526, 534.

858. An unrestricted grant of authority to construct a railroad from one point to another, implies authority to cross a navigable stream, if the railroad cannot reasonably be constructed without doing so, and if the crossing can be made without seriously impairing the public easement. *Mass. Supreme Ct.* 1862, Fall River &c. Co. v. Old Colony &c. R. R. Co. 5 *Allen*, 221.

859. A railroad corporation has a right to erect a bridge upon piers, for the purpose of carrying their railway across a navigable river, between the places prescribed for the commencement and termination of the road; subject to the condition prescribed in the charter, that the usefulness of the stream shall not be impaired thereby. *N. Y. Supreme Ct.* 1836, People v. Rensselaer & Saratoga R. R. Co. 15 *Wend.* 118.

860. To justify a railroad company in bridging a navigable stream at a lower level than the grade of the road on both banks, a clear case of necessity, or of not impairing navigation and the mill privilege, must be shown. *Chan.* 1841, Manser v. Northern & Eastern Railw. Co. 2 *Railw. Cas.* 279; 5 *Jur.* 983.

861. Where a railway company had permission to carry their road over a canal, by means of a bridge of a given description,—*Held* that they might, as incident to the right of erecting the bridge, make a temporary bridge over the canal, supported partly on piles, driven into the bed of the canal, to enable them to transport earth across the canal to build the necessary embankment, in the construction of the permanent bridge. *Rolls Ct.* 1835, London & Birmingham Railway Co. v. Grand Junction Canal Co. 1 *Kag. Railw. Cas.* 224.

362. Navigation. An act of the New Jersey Legislature, passed for the better regulation of a certain river, provided that bridges or viaducts which should thereafter be erected thereon should be placed in such a position as to do the least possible injury to the navigation of the stream. At a certain place below tide water the defendant's track crossed the river by means of a bridge constructed with a draw and erected upon piles, which the defendant proposed to rebuild with stone. A bill filed on the relation of individuals interested in the navigation of the stream alleged that the company were intending to change the position of the draw; to place the piers, to be erected, diagonally across the river, and at right angles with the bridge, and not with the current of the stream; and that its navigation would be thereby greatly impeded. *Held*, it appearing that the defendants were placing the piers in an unusual and unnatural position, that an injunction would lie to restrain the erection of the proposed draw and piers, until the question whether that was the proper position was determined. *N. J. Ct. of Errors*, 1853, *Attorney General v. Hudson River R. R.* 1 *Stockt.* 526, 554. Compare *Newark Plank R. Co. v. Elmer*, 1 *Id.* 754, 786.

363. Wharves. A provision in a railroad charter that if any wharf or dock shall be cut off by the railroad, the company must extend or restore it, does not apply to a wharf within a bay, which is crossed by the road without crossing the wharf. *N. Y. Ct. of Appeals*, 1854, *Tillotson v. Hudson River R. R. Co.* 9 *N. Y.* (5 *Seld.*) 575.

364. Bays. A provision of the charter of a railroad company requiring them to provide draw-bridges where their track should cross "bays," construed to mean such bays as had general navigation. *Getty v. Hudson River R. R. Co.* 21 *Barb.* 617.

365. Consequential damages. A railroad company which have rightfully and properly turned a stream of water and secured the banks in a reasonable manner, cannot afterward be liable for future action of the water. *Vt. Supreme Ct.* 1855, *Norris v. Vermont Central R. R. Co.* 28 *Vt.* 99.

366. Where the charter of a railway company authorized them to make certain specified erections, between the channels of two rivers, and such erections so changed the currents of the rivers as to render more sea-

wall necessary to secure certain wharves and flats in the vicinity,—*Held*, that the damage thereby occasioned was *damnum absque injuria*. *Mass. Supreme Ct.* 1849, *Fitchburg R. R. Co. v. Boston & Maine Railroad*, 1 *Am. Railw. Cas.* 508; 3 *Cush.* 58.

7. Fencing.

367. At common law. Railroad companies are not under obligation to fence their roads unless particularly required to do so by statute. A general law directing partition fences does not apply to them. *Iowa Supreme Ct.* 1855, *Henry v. Dubuque & Pacific R. R. Co.* 2 *Clarke*, 288. To similar effect, *N. Y. Supreme Ct.* 1848, *Tonawanda R. R. Co. v. Munger*, 5 *Den.* 255; *N. H. Superior Ct.* 1850, *Towns v. Cheshire R. R. Co.* 1 *Fost.* 363; 1854, *Cornwall v. Sullivan R. R. Co.* 8 *Id.* 161; *Ill. Supreme Ct.* 1852, *A. & S. R. R. Co. v. Baugh*, 14 *Ill.* 211; *So. Car. Ct. of Appeals*, 1855, *North Eastern R. R. Co. v. Sineath*, 8 *Rich. Law*, 185; *Pa. Supreme Ct.* 1852, *N. Y. & Erie R. R. Co. v. Skinner*, 19 *Pa.* 298; and see *Knight v. New Orleans & c. R. R. Co.* 15 *La. Ann.* 105; *Matter v. Long Island R. R. Co.* 3 *Edw.* 487.

368. A railroad company, although it may not be required to fence its track against trespassing cattle, is bound, as between it and its passengers, to assume risks of injury to them from such a cause; and it is no answer to a claim for injury from such a cause, that the defendant was not bound to fence, or that cattle were on the track trespassing without their agency or knowledge. The fact that cattle are on the track at the time of accidents, always raises a question of negligence or care; and whether negligence is imputable to the company, or whether they have exercised due care to guard against obstruction, owing to such causes, is always and only determinable by a jury. *Pa. Supreme Ct.* 1866, *Lackawanna & Bloomsburg R. R. Co. v. Chenewith*, 52 *Pa. St.* 382.

369. Company agreeing to fence. Where a railroad company obtain a right of way through an individual's land, upon the condition that they will fence the road, but neglect so to do, in consequence of which swine belonging to an adjoining proprietor stray upon the track and are killed by the company's cars, they are liable to the owner for their loss. *Iowa Supreme Ct.* 1867, *Fer-*

non v. Dubuque & Southwestern R. R. Co. 22 Iowa, 528.

370. An action of tort cannot be maintained against a railroad company for neglecting to fence their road, and for the recovery of the value of cattle killed in consequence of such neglect, where the duty to fence arises merely by contract with the land-owner. A contract to fence in payment of a right of way is not such a contract as relieves an owner of cattle from keeping them off the road, permitting him to impede trains in their rate of speed; he is obliged to prevent his cattle from roaming. Otherwise he is guilty of concurrent negligence, as a trespasser, and cannot recover for their loss. [7 Harris, 298; 6 Barr, 472]. *Pa. Supreme Ct.* 1865, *Drake v. Philadelphia & Erie R. R. Co.* 51 *Pa. St.* 240.

371. Land-owner agreeing to fence. An adjoining owner who has received from the company compensation for maintaining fences himself, cannot recover from them for the killing of an animal that escapes over such fences from his land.* *Ind. Supreme Ct.* 1861, *Terre Haute &c. R. R. Co. v. Smith*, 16 *Ind.* 102; *N. Y. Supreme Ct.* 1852, *Talmadge v. Rensselaer & Saratoga R. R. Co.* 13 *Barb.* 498; *N. Y. Com. Pl.* 1859, *Duffy v. N. Y. & Harlem R. R. Co.* 2 *Hill.* 496

372. If, on a hearing before a jury for the assessment of damages for land taken for a railroad, it is agreed between the parties, that the proprietors of the road shall make and maintain fences against the owner of the land taken, along the line of the road, such agreement, if valid, can only be enforced against the proprietors of the road in an action by the party with whom it is made, and not by any subsequent purchaser of the estate to which it relates.† *Mass. Supreme Ct.* 1848,

* Where commissioners assessed the damages done to a land-owner by the construction of a railroad, and a separate sum for building fences, and judgment was rendered in his favor for both sums, but the payment resisted, by a proceeding in chancery, on the part of the railway, and while this was still undecided, the company commenced running their engines, and the cattle of the occupier of the land strayed upon the track and were killed by the engines of the company.—*Held*, that the obligation to maintain the fence rested primarily upon the company; and that until they had either built the fences, or paid the land-owner for doing it, and sufficient time to enable him to do it, the mere fact that cattle had strayed upon the road from the land adjoining, was no ground for imputing negligence to the owner. *Vt. Supreme Ct.* 1851, *Quimby v. Vermont Central R. R. Co.* 23 *Vt.* 387.

† In New York the statute of 1854 gives a remedy against

Morris v. Boston & Maine Railroad, 2 *Cush.* 536.

373. Where, under the conditions on which the company acquired their title to the land, the adjoining owner was bound to maintain fences,—*Held*, that after the fences had been burned by sparks from the locomotive, the company were not under such an obligation to rebuild, as to be liable to him for injuries to cattle which escaped on to the track. *N. Y. Supreme Ct.* 1855, *Terry v. N. Y. Central R. R. Co.* 22 *Barb.* 574.

374. If the lessor of a person whose cattle are killed by a train, while straying upon a railroad running through the leased land, can be shown to be under obligations to the company to fence, which he has neglected to do, the company cannot be charged, without proof of gross negligence and carelessness. *Ohio Supreme Ct.* 1854, *Cincinnati, Ham. & Dayt. Railroad Co. v. Waterson*, 4 *Ohio (N. S.)* 424.

375. A mere grant by a land owner, of a right of way, does not impose the obligation of fencing upon either party; and the company are not responsible for the destruction of cattle in the field unless it is shown that it was caused by the wanton and reckless negligence of their agents. *Ky. Ct. of Appeals*, 1853, *Louisville & Frankfort Railroad Co. v. Milton*, 14 *B. Mon.* 75.

376. Covenant no protection against statute. Where a statute is passed requiring railroad companies to fence their road, such a company cannot divest itself of responsibility by agreeing with separate land-holders along the road that they shall keep up the fences; it is a public duty imposed on the railroad of which it cannot divest itself. *Ind. Supreme Ct.* 1859, *New Albany & Salem R. R. Co. v. Maiden*, 12 *Ind.* 10.

377. Where a company is not bound by law to fence its road, it is only liable for injury to animals resulting from wantonness or gross negligence. [16 Ill. 198.] *Ill. Supreme Ct.* 1862, *Illinois Central R. R. Co. v. Phelps*, 29 *Ill.* 447; *Ky Ct. of Appeals*, 1859, *Louisville &c. R. R. Co. v. Ballarel*, 2 *Met.* 177. Compare *Stearns v. Old Colony &c. R. R. Co.* 1 *Allen*, 493; *Vicksburg & Jackson R. R. Co. v. Patton*, 81 *Miss.* 156.

378. Where a railroad company which was not obliged to fence unless requested by

a person, or grantees of a person, agreeing to maintain fence, but not doing so. *Loews of 1854*, 613, ch. 263, sec. 2.

the land-owner, agreed with an adjoining owner not to fence against his land, and a cow strayed from such lands upon the track of the road, and was killed by one of their trains,—*Held*, that the owner of the cow, having, by his own fault, contributed to the loss, could not recover of the company. *R. I. Supreme Ct.* 1853, *Tower v. Providence & Worcester R. R. Co.* 2 *R. I.* 404.

879. Snow drifts. A railroad corporation, which erect a fence on their own land, to keep the snow from being blown upon their road, are not liable for the damages occasioned by the accumulation of snow upon another's land, on the other side of the fence. *Mass. Supreme Ct.* 1857, *Carson v. Western R. R. Co.* 8 *Gray*, 423.

880. Crops destroyed. Where a railroad company covenanted to maintain fences upon land intersected by their road, and failed to perform the covenant, whereby the crops growing thereon were destroyed,—*Held*, that the company were liable for the value of the crops growing upon the land and destroyed, as of the time when fit for harvesting. *Ill. Supreme Ct.* 1855, *Chicago & Rock Island R. R. Co. v. Ward*, 16 *Ill.* 522.

881. The legislature have power, by the general statute, to require all railways, whether already in operation or thereafter to be chartered, or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road-crossings, under penalty of paying all damages caused by their neglect to comply with such requirements. This power may be vindicated, 1. Because it comes fairly within the police of the State; 2. Because it regards the division fence between adjoining proprietors; 3. Because it properly concerns the safe mode of exercising a dangerous occupation or business;* and 4. Because it is but a reasonable provision for the protection of domestic animals; all of which interests fall legitimately within the range of legislative control, both in regard to natural and artificial persons.

* The statute requiring railroad companies to fence is not to be taken solely as a police regulation for the benefit of passengers to the exclusion of its application to cases of stock killed by freight trains. *Ind. Supreme Ct.* 1861, *Indianapolis &c. R. R. Co. v. Snelling*, 16 *Ind.* 485.

The statute extends to all kinds of animals that would be kept from the track by an ordinary fence, without reference to the question whether they are large enough to throw a train off the track. *Ind. Supreme Ct.* 1866, *Indianapolis &c. R. R. Co. v. Marshall*, 27 *Ind.* 300.

Vt. Supreme Ct. 1855, *Thorpe v. Rutland & Burlington R. R. Co.* 27 *Vt.* 140. To similar effect *Ind. Supreme Ct.* 1856, *Madison & Indianapolis R. R. Co. v. Whiteneck*, 8 *Ind. (Tann.)* 217; 1859, *New Albany & Salem R. R. Co. v. Tilton*, 13 *Ind.* 3; *New Albany & Salem R. R. Co. v. Maiden*, *Id.* 10; *Indianapolis & Cincinnati R. R. Co. v. McAhren*, *Id.* 552; *Iowa Supreme Ct.* 1864, *Jones v. Galena &c. R. R. Co.* 16 *Iowa*, 6; *Conn. Supreme Ct.* 1858, *Bulkley v. New York &c. R. R. Co.* 27 *Conn.* 479; *N. Y. Supreme Ct.* 1850, *Suydam v. Moore*, 8 *Barb.* 858; *Waldron v. Rensselaer & Saratoga R. R. Co.* *Id.* 390; 1852, *Talmadge v. Rensselaer & Saratoga R. R. Co.* 13 *Id.* 493; and see *Trice v. Hannibal & St. Joseph R. R. Co.* 35 *Mo.* 188. But compare *Milliman v. Oswego & Syracuse R. R. Co.* 10 *Barb.* 87.

882. A town or village, within the meaning of the statute requiring railroad corporations to construct fences, may exist, if there were streets or alleys dedicated to the public, although there is no plat of the same, dedicating streets, &c., in the manner pointed out by the statute in that regard. *Ill. Supreme Ct.* 1861, *Illinois &c. R. R. Co. v. Williams*, 27 *Ill.* 48. See also *Ohio & Mississippi R. R. Co. v. Irwin*, 27 *Ill.* 178.

883. The statute requiring cattle guards at "road" crossings is to be construed as applicable to a street crossing in a village or city.* *N. Y. Ct. of Appeals*, 1863, *Brace v. N. Y. Central R. R. Co.* 27 *N. Y.* 269.

884. But it does not require a company whose track is laid along a city street to put guards along the track at the point of intersection of a cross street, which would prevent travelers in the latter street from crossing the track. *Id. N. Y. Com. Pl.* 1854, *Halloran v. N. Y. & Harlem R. R. Co.* 2 *E. D. Smith*, 257.

885. That an act requiring cattle guards at road crossings does not apply to farm crossings see *Brooks v. N. Y. & Erie R. R. Co.* 13 *Barb.* 594.

886. Improved lands. Where a statute requires railways to fence their road, where the same passes through "inclosed or improved lands," if injury happen to another's cattle through want of fences, upon common or uninclosed land, it is not legally imputable to the negligence of the company. *Me. Supreme Ct.* 1849, *Perkins v. Eastern Railway*

* Overrules *Parker v. Rensselaer &c. R. R. Co.* 16 *Barb.* 315; and *dictum* in *Vandekar v. The Same*, 18 *Id.* 390.

and the Boston & M. Railway, 29 *Me.* 307. Compare *Knight v. Abert*, 6 *Barr*, 472; *Philadelphia &c. R. R. Co. v. Wilt*, 4 *Whart.* 143.

887. Highway screens. Railroad companies, in the use and management of their roads, are bound only to use ordinary care; and the omission to erect fences, screens, or guards between their road and a highway, or turnpike, contiguous thereto, cannot be considered a want of such care. *N. Y. Supreme Ct.* 1855, *Coy v. Utica & Schenectady R. R. Co.* 23 *Barb.* 643. To similar effect, *K. B.* 1832, *King v. Pease*, 4 *Barn. & Ad.* 30. Compare *Mosher v. Utica & Schenectady R. R. Co.* 8 *Id.* 427.

888. Fencing highway. A railway company are not, either at common law or under a statute requiring them to fence to separate their land from that of adjoining owners not taken, bound to maintain fences between their track and a highway running by the side of it. And although cattle that are passing along the highway in the ordinary use of it, might be deemed cattle of the occupants of adjoining land so that the company would be liable for injuries to them, cattle straying on the highway are not to be regarded as lawfully there, and the company are therefore not liable for an injury sustained by such cattle in getting from such high road upon their railway through a defect of the fences. *N. H. Supreme Ct.* 1850, *Towns v. Cheshire R. R. Co.* 1 *Foot.* 363; *C. B.* 1854, *Manchester Railway Co. v. Wallis*, 25 *Eng. Law & Eq.* 373; 14 *C. B.* 243; 7 *Railw. Cas.* 709; 23 *Law J. (N. S.)* 85; 18 *Jur.* 268; 2 *Com. Law R.* 573.

889. Under the English statute,—which requires railway companies to keep a gate closed where the road crosses a highway,—if they have the gate open they are liable for cattle killed by getting on the track in consequence, without reference to whether such cattle were lawfully on the highway as between their owner and the public. *Q. B.* 1851, *Fawcett v. York & North Midland Railway Co.* 16 *Q. B.* 610.

890. Crossings. Where a railroad corporation is required to fence both sides of its road, and a farm crossing is constructed over the track for the benefit of an adjacent land-owner, it is the duty of the corporation to guard it by a continuous fence, and to erect suitable bars or gates, in order to give con-

venient access to it. But if the land-owner forbids them to make such bars or gates, the corporation will not be liable for injuries resulting from the want of them. *Vt. Supreme Ct.* 1853, *Hurd v. Rutland & Burlington R. R. Co.* 25 *Vt.* 116.

891. If the land-owner refuses to have cattle guards erected, or undertakes with the company to erect them himself, the omission of the company to perform the duty imposed by the statute is not wrongful; for the provision of the statute is for the benefit and protection of the land-owner. Hence, in such case, a tenant of the landholder cannot recover for an animal killed in the absence of such guards. *N. Y. Supreme Ct.* 1854, *Tombs v. Rochester & Syracuse R. R. Co.* 18 *Barb.* 583.

892. Yards. A railroad company is not required to fence their road where the engine-house and machine-shop, car-house, and wood-house, and yard are situated; and are not liable for cattle killed there, for want of a fence. [8 *Ind.* 402.] *Ind. Supreme Ct.* 1863, *Indianapolis &c. R. R. Co. v. Oestel*, 30 *Ind.* 231; *C. P.* 1858, *Roberts v. Great Western Railway Co.* 4 *C. B. N. S.* 506. See also *Cornwall v. Sullivan R. R. Co.* 8 *Foot.* 161.

893. What is a sufficient fence. If the use to which the adjoining land is put is such (being an ordinary use) as to require a strong fence, it would be the duty of the company to provide it; and to place hurdles along it if necessary. *C. P.* 1860, *Bessant v. Great Western R. R. Co.* 8 *C. B. (N. S.)* 363.

894. Where a railroad company keep such a fence as "good husbandmen generally keep," they are liable for death or injury of cattle only upon proof of their negligence, and even in such cases they may be exempted from liability by the negligence of the owner of the injured animals, in the manner of their keeping. *Ind. Supreme Ct.* 1863, *Toledo & Wabash Railw. Co. v. Thomas*, 18 *Ind.* 215.

895. A crooked or Virginia fence, of which every corner projects over the line, alternately upon the land of the adjoining proprietor and that of the company, is a fence upon the sides of the railroad, within the meaning of a statute providing for railway fences; and the company commit no trespass upon the land of the adjoining proprietor, in erecting such fence. This kind of fence has been built as a division fence

time out of mind.* *N. Y. Supreme Ct.* 1854, *Ferris v. Van Buskirk*, 18 *Barb.* 397.

396. How soon to be built. Under a provision in the charter of a railroad company requiring fences to be constructed by them when it should be completed and in running order, fences must be built at least as soon as they commence running the road. *Vt. Supreme Ct.* 1855, *Clark v. Vermont & Canada R. R. Co.* 28 *Vt.* 103.

397. Where the law requires railroad companies to maintain fences along the line, they must, as soon as they have opened the fields of an adjoining land-holder for the purpose of constructing their road, use all reasonable and prudent means to restrain the cattle of the land-owner from straying on to the railroad track, and to prevent the irruption of other cattle into his lands from their line of road. *Vt. Supreme Ct.* 1858, *Holden v. Rutland & Burlington R. R. Co.* 30 *Vt.* 297. Compare *Gardner v. Smith*, 7 *Mich.* 410.

398. Fence must be maintained. A railroad company, in order to secure the protection of section 44 of the general railroad act (*Laws of 1850, 283*), from liability for damage to animals on their track, must not only erect, but maintain the fences and cattle-guards required by the statute.† *N. Y. Supreme Ct.* 1862, *McDowell v. N. Y. Central R. R. Co.* 37 *Barb.* 195; *Wis. Supreme Ct.* 1866, *Brown v. Milwaukee &c. R. R. Co.* 21 *Wis.* 39. And see *Chicago &c. R. R. Co. v. Reid*, 24 *Ill.* 144.

399. Where a railroad company has caused its road to be securely fenced, and has exercised reasonable care and vigilance to keep it so, and the fence is thrown and left down by third persons, without the authority or knowledge of the company, whereby cattle stray upon the track and get killed or injured,

* See to the contrary *Herrick v. Stover*, 5 *Wend.* 580.

† Where the defect in the fence through which the cattle escaped was caused by drift wood brought down by a freshet, and which the company dislodged above their culvert and which carried away plaintiff's fence below, — *Held*, that the company were not liable. *Indianapolis &c. R. R. Co. v. Wright*, 13 *Ind.* 218.

A railroad company, wishing to build a small bridge, removed a fence and left a gap unguarded, although plaintiff requested them to close it, through which the plaintiff's hogs escaped, and were killed in the night by the cars. The company was held responsible. *Ind. Supreme Ct.* 1862, *Indianapolis &c. R. R. Co. v. Logan*, 19 *Ind.* 294. And see *Gardner v. Smith*, 7 *Mich.* 410.

On the duty of adjoining owners, to give notice to the company, of defects in the fences, &c. See *Poler v. N. Y. Central R. R. Co.* 16 *N. Y.* 476.

before the company has notice, the company is without fault, and not liable. *Ind. Supreme Ct.* 1864, *Toledo & Wabash R. R. Co. v. Fowler*, 22 *Ind.* 316; *S. P.* 1863, *Toledo &c. R. R. Co. v. Daniels*, 21 *Ind.* 256. But compare *Munch v. N. Y. Central R. R. Co.* 29 *Barb.* 647.

400. A railroad company is not required to keep a patrol at night along the road, to see that the fence is not broken down. If the fence is sufficient, and all reasonable diligence is used to keep it up, the company will not be guilty of negligence in that particular. *Ill. Supreme Ct.* 1861, *Illinois &c. R. R. Co. v. Dickerson*, 27 *Ill.* 55.

401. Liability for neglect to fence.* A

* The cases are in conflict as to whether the negligence of the company and that of the owner of the cattle, are material, under the statute. The discrepancy of opinion arises, in part, from the fact that in some of the States the law allows cattle to be at large, and in others it does not.

Whether the owner's negligence in the care of the cattle is material, where the company are in default respecting the fences, compare *Headen v. Rust*, 39 *Ill.* 186; *Central Military Tract R. R. Co. v. Rockafellow*, 17 *Id.* 541; *New Albany & Salem R. R. Co. v. Flx.* 12 *Ind.* 485; *McCall v. Chamberlain*, 18 *Wis.* 687; *Rogers v. Newburyport &c. R. R. Co.* 1 *Allen*. 16; *Toledo &c. R. R. Co. v. Fowler*, 22 *Ind.* 316; *Murray v. South Carolina R. R. Co.* 10 *Ritch. Law*, 227; *Midland Railw. Co. v. Daykin*, 38 *Eng. L. & Eq.* 193.

For the rules applied in various States, under the local statutes and usages as to cattle, consult the following cases:

Maine.—*Waldron v. Portland, S. & P. R. R. Co.* 35 *Me.* 422. *New Hampshire*.—*Chapin v. Sullivan R. R. Co.* 39 *N. H.* 58, 564. *Vermont*.—*Jackson v. Rutland & Burlington R. R. Co.* 25 *Vt.* 162. *Connecticut*.—*Isbell v. New York &c. R. R. Co.* 27 *Conn.* 398; *Bulkeley v. Same*, 27 *Id.* 479. *New York*.—*Munger v. Tonawanda R. R. Co.* 4 *N. Y. (4 Comst.)* 849; *Waldron v. Rensselaer & Saratoga R. R. Co.* 8 *Barb.* 390; *Clark v. Syracuse & Utica R. R. Co.* 11 *Id.* 112; *Brooks v. N. Y. & Erie R. R. Co.* 13 *Id.* 594; *Hal-loran v. N. Y. and Harlem R. R. Co.* 2 *E. D. Smith*, 257; *Corwin v. N. Y. & Erie R. R. Co.* 18 *N. Y. (3 Kern.)* 42; *Terry v. N. Y. Central R. R. Co.* 22 *Barb.* 574; *Staats v. Hudson River R. R. Co.* 28 *How. Pr.* 463; *Bowman v. Troy & Boston R. R. Co.* 37 *Barb.* 516. *New Jersey*.—*Vandegrift v. Rediker*, 2 *N. J.* 185; *Price v. New Jersey R. R. &c. Co.* 31 *N. J. Law (2 Vroom)*, 229. *Pennsylvania*.—*N. Y. & Erie R. R. v. Skinner* 19 *Pa. St.* 298; *North Penn'a R. R. Co. v. Redman*, 49 *Pa. St.* 101. *Maryland*.—*Baltimore & Ohio R. R. Co. v. Lamborn*, 13 *Md.* 257; *Keach v. Baltimore &c. R. R. Co.* 19 *Id.* 33. *Virginia*.—*Richmond &c. R. R. Co. v. Jones*, 6 *Am. Law Reg.* 846. *North Caro-lina*.—*Garris v. Portsmouth & Roanoke R. R. Co.* 2 *Ired. Law*, 824; *Scott v. Wilmington & Raleigh B. R. Co.* 4 *Jones, Law. (N. C.)* 433; *Montgomery v. Wilmington &c. R. R. Co.* 6 *Id.* 464. *South Carolina*.—*Danner v. South Caro-lina R. R. Co.* 4 *Ritch.* 329; *Wilson v. Will. & Man. R. R. Co.* 10 *Id.* 52. *Georgia*.—*Macon & Western R. R. Co. v. Davis*, 13 *Ga.* 63. *Alabama*.—*Nashville & Chattanooga R. R. Co. v. Peacock*, 25 *Ala.* 229. *Louisiana*.—*Knigh-t v. New Orleans &c. R. R. Co.* 15 *La. An.* 106. *Ohio*.—*Ker-whacker v. Cleveland &c. R. R. Co.* 8 *Ohio St.* 172; *Cleve-land &c. R. R. Co. v. Elliott*, 4 *Id.* 474; *Central Ohio R. R. Co. v. Lawrence*, 18 *Id.* 66. *Indiana*.—*Williams v. New Albany & Salem R. R. Co.* 5 *Ind.* 111; *Lafayette & Indian-apolis R. R. Co. v. Shriner*, 6 *Id.* 141; *Indianapolis & Cin-*

railroad company are liable for injury to cattle straying upon the railroad track, in consequence of their own neglect to maintain fences and cattle-guards as required by law, although the plaintiff was not an adjoining proprietor, and it is not shown how or whence the cattle came upon the road. The statute was intended to impose an absolute liability upon railroad companies so neglecting, without reference to mere negligence on the part of the owner of cattle. [2 Eng. L. & Eq. 289.] *N. Y. Ct. of Appeals*, 1855, *Corwin v. N. Y. & Erie R. R. Co.* 13 *N. Y.* (3 *Kern.*) 42; *Ind. Supreme Ct.* 1857, *Indianapolis & Cinn. R. R. Co. v. Townsend*, 10 *Ind.* 38; 1859, *New Albany & C. R. R. Co. v. Aston*, 13 *Ind.* 545; *Mass. Supreme Ct.* 1858, *Browne v. Providence, Hartford & C. R. R. Co.* 12 *Gray*, 55.

402. If the company are in default in respect to fencing, they are liable, without reference to whether they were negligent in managing the train. *Ind. Supreme Ct.* 1854, *Williams v. New Albany & C. R. R. Co.* 5 *Ind.* 111; *Me. Supreme Ct.* 1855, *Norris v. Androscoggin R. R. Co.* 39 *Me.* 273; *N. H. Supreme Ct.* 1857, *Smith v. Eastern R. R. Co.* 35 *N. H.* 356; *Mo. Supreme Ct.* 1858, *Gorman v. Pacific R. R. Co.* 26 *Mo.* 441; *Wis. Supreme Ct.* 1861, *McCall v. Chamberlain*, 13 *Wis.* 637; *Ind. Supreme Ct.* 1862, *Toledo & C. R. R. Co. v. Thomas*, 18 *Ind.* 215; 1864, *McKinney v. Ohio & C. R. R. Co.* 22 *Ind.* 99. Compare *Alger v. Mississippi & C. R. R. Co.* 10 *Iowa*, 268.

403. *Contra.* The duty of a railway corporation to fence its road extends only to the owners of adjoining fields; and, provided

they use common care, they are not responsible for damage, for want of such fence, to cattle illegally on the adjoining close.* *Vt. Supreme Ct.* 1853, *Jackson v. Rutland & Burlington R. R. Co.* 25 *Vt.* 150; *Morse v. Rutland & B. R. R. Co.* 27 *Vt.* 49.

404. The owner of animals suffered to go astray, and trespassing upon a railroad,—as where they are at large by a defect in their owner's fences which the local law requires him to maintain,—cannot recover for their destruction by a train, without proof of negligence on the part of the servants of the company, even where the company is under a special statutory obligation to fence their road, and have omitted to do so. But the company will, at all times, be liable either for recklessness or want of common care. *Vt. Supreme Ct.* 1853, *Jackson v. Rutland & Burlington R. R. Co.* 25 *Vt.* 150; *C. P.* 1852, *Ricketts v. East & West India Docks & Birmingham Junction R. R. Co.* 12 *Eng. L. & Eq.* 520; 21 *Law J. (N. S.)* 201; 16 *Jur.* 1072; 12 *C. B.* 161. See also *Woolson v. Northern R. R. Co.* 19 *N. H.* 267.

405. *Contributory negligence.* Where the law requires owners of cattle to keep them enclosed, and railroad companies to fence their lines, if the owner, knowing a railway to be unfenced, permits his cattle to run in the highway, knowing that there is no obstruction to their passing from thence upon the railroad track, he is guilty of the same degree of negligence as that with which the corporation are chargeable, in permitting their railroad to remain thus exposed, and he cannot recover if it appear that the company were not negligent in the management of the train at the time of the injury. *Vt. Supreme Ct.* 1852, *Trow v. Vermont Central R. R. Co.* 24 *Vt.* 487.

406. The company's neglect of its obligation to build a fence does not exonerate the plaintiff from the obligation to take ordinary care for the protection of his animals, where the fence, if built, would not have been sufficient to close access to the track. If the plaintiff's negligence was the direct and proximate cause of the injury, the defendants should have the benefit of that prin-

cinnati R. R. Co. v. Kinney, 8 *Id.* 402; *Indiana Central R. R. Co. v. Gopen*, 10 *Id.* 292; *Northern Indiana R. R. Co. v. Martin*, 10 *Id.* 460; *Michigan Southern & C. R. R. Co. v. Fisher*, 27 *Id.* 96. *Illinois*.—*Chicago & Miss. R. R. Co. v. Patchin*, 16 *Ill.* 198; *Great Western R. R. Co. v. Thompson*, 17 *Id.* 131; *Central M. T. R. R. Co. v. Rockafellow*, 17 *Id.* 550; *Illinois Central Railway v. Reedy*, 17 *Id.* 580; *Terre Haute & C. R. R. Co. v. Augustus*, 21 *Id.* 186; *Galena & C. R. Co. v. Crawford*, 25 *Id.* 529; *Great Western R. R. Co. v. Helm*, 27 *Id.* 196; *Illinois Central R. R. Co. v. Goodwin*, 30 *Id.* 117; *Great Western R. R. Co. v. Morthland*, 30 *Id.* 451. *Kentucky*.—*Louisville & Frankfort R. R. Co. v. Milton*, 14 *B. Mon. (Ky.)* 75. *Iowa*.—*Balcom v. Dubuque & Sioux City R. R. Co.* 21 *Iowa*, 102; *Whitbeck v. Dubuque & Pacific R. R. Co.* 21 *Id.* 108. *Missouri*.—*Burton v. North Mo. R. R. Co.* 30 *Mo.* 372; *Miles v. Hannibal & C. R. R. Co.* 31 *Id.* 407; *Brown v. Same* 33 *Id.* 309; *Meyer v. North Mo. R. R. Co.* 35 *Id.* 352. *Wisconsin*.—*Stucke v. Milwaukee & Miss. R. R. Co.* 9 *Wis.* 202. *California*.—*Waters v. Moss*, 12 *Cal.* 535; *Richmond v. Sacramento Valley & C. R. R. Co.* 18 *Id.* 351.

* As to the construction put upon the English Statute, which protects only adjoining owners, compare *Marfell v. South Wales & C. Railw. Co.* 8 *C. B. N. S.* 525; *Ricketts v. East & West India Docks & C. Railw. Co.* 12 *C. B.* 160; 16 *Jur.* 1072; 21 *Law J. N. S.* 201.

ciple, notwithstanding their neglect. *Ill. Supreme Ct.* 1858, *Joliet & Northern Indiana Railroad Co. v. Jones*, 20 *Ill.* 221.

407. Where the owner of land is permitted, for his own convenience, to maintain draw-bars or gates in the fence along the line of a railroad, the company are not liable for damages done to his stock passing on to the track through such bars or gates, by reason of his own neglect or default in maintaining them; and the same rule applies to the tenant of the land owner. *Ind. Supreme Ct.* 1861, *Indianapolis &c. R. R. Co. v. Shimer*, 17 *Ind.* 295.

408. A company authorized to run its cars over the road of another by arrangement, is not liable for an accident in so running, produced by the negligence of the other to erect fences and cattle-guards, and without negligence on its own part in running the cars. *N. Y. Supreme Ct.* 1853, *Parker v. Rensselaer & Saratoga R. R. Co.* 16 *Barb.* 315. Compare *Schanck v. N. Y. & New Haven R. R. Co.* 10 *Abb. Pr.* 398; *Labussiere v. N. Y. & New Haven R. R. Co.* 10 *Id. note.*

409. What agents are liable. Under a statute which declares a railway corporation and its agents liable for all damages which shall be done by their agents or engines, to cattle, &c., before the erection of division fences and cattle-guards,—an engineer, and a fireman who was the servant of the engineer, may be chargeable, severally, or jointly with the corporation. *N. Y. Supreme Ct.* 1850, *Suydam v. Moore*, 8 *Barb.* 858. And see *Corwin v. N. Y. & Erie R. R. Co.* 18 *N. Y.* (3 *Kern.*) 42.

410. That the neglect of a contractor for the construction of the road, is neglect of an agent of the corporation, within the meaning of the statute,—see *Gardner v. Smith*, 7 *Mich.* 410.

411. Where a railroad company maintains in good condition proper fences along its road, cattle straying upon the railroad are trespassers, and the law charges the owner with negligence; so that in such a case the owner can only recover by showing gross carelessness or willful misconduct in the company's agents. *Wis. Supreme Ct.* 1866, *Fisher v. Farmers' Loan and Trust Co.* 21 *Wis.* 78. And see 1867, *Sika v. Chicago & N. W. Railw. Co.* *Id.* 370; *New Albany &c. R. R. Co. v. Pace*, 18 *Ind.* 411.

412. After the requisite fences and cattle-

guards have been duly made and maintained, as required by law, a railroad company is no longer absolutely liable for all damages to stray animals, but can be charged only upon the ground of negligence. And a person sustaining such damages by reason of the negligence of a corporation, cannot recover if his own negligence in any way concurred in causing it. *N. Y. Ct. of Appeals*, 1863, *Hance v. Cayuga & Susquehanna R. R. Co.* 26 *N. Y.* 428.

413. Inexcusable wrong. Where cattle running at large, stray upon a railroad at a point not fenced, nor required by law to be fenced, and are killed by an engine, through inexcusable negligence of the company's servants, the company will be held liable. *Ind. Supreme Ct.* 1857, *Indianapolis & Cincinnati R. R. Co. v. Caldwell*, 9 *Ind.* 397. And see *New Albany & Salem R. R. Co. v. McNamara*, 11 *Id.* 543.

414. Form of action. Trespass is not the proper form of action to recover for cattle killed by the defendants' engine. The remedy is an action on the case.* *Exch.* 1849, *Sharrod v. London & N. W. Railw.* 4 *Exch.* 580; 6 *Eng. Railw. Cas.* 239; 4 *Eng. L. & Eq.* 401; 20 *Law J. N. S.* 185.

415. Guards obstructed by snow. A railroad company is bound at all times to keep its cattle-guards open and unobstructed; and if it permits them to remain filled with snow, by which cattle on the highway, without any negligence on the part of the owner, pass on to the track where they are injured by its cars, it is guilty of negligence and liable to the owner of the cattle for damages. *Wis. Supreme Ct.* 1864, *Dunnigan v. Chicago & North Western Railw. Co.* 18 *Wis.* 28.

* As to the rules of pleading in actions against railroad companies for injuries to cattle where fences were defective, see *Chicago & Alton R. R. Co. v. Taylor*, 40 *Ill.* 390; *Cooley v. Brainerd*, 38 *Vt.* 394; *Indianapolis &c. R. R. Co. v. Wharton*, 18 *Ind.* 509; *Chicago &c. R. R. Co. v. Carter*, 30 *Ill.* 390.

For rules of evidence, consult *Smith v. Eastern R. R. Co.* 35 *N. H.* 356; *Indianapolis &c. R. R. Co. v. Means*, 14 *Ind.* 30; *Powell v. Hannibal & St. Joseph R. R. Co.* 35 *Mo.* 457; *Perkins v. Eastern R. R. Co.* 29 *Me.* 307; *Ohio &c. R. R. Co. v. Taylor*, 27 *Ill.* 307; *Indianapolis &c. R. R. Co. v. Snelling*, 16 *Ind.* 435; *Great Western R. R. Co. v. Bacon*, 30 *Ill.* 347; *Morse v. Boston & Maine R. R. Co.* 2 *Cush.* 586; *Ohio & Mississippi R. R. Co. v. Mersenneheimer*, 27 *Ill.* 30; *The same v. Jones*, 27 *Id.* 41.

As to the proper instructions for the jury see *Holden v. Rutland & Burlington R. R. Co.* 30 *Vt.* 297; *Quimby v. Vt. Central R. R. Co.* 28 *Id.* 387; *St. Louis, Alton &c. R. R. Co. v. Linder*, 39 *Ill.* 433.

8. Signals and watchmen.

416. Bell and whistle. A statute in general terms requiring a signal "when a railroad shall cross any traveled public road or street," applies where a railroad passes over the street upon a bridge at a height of fifteen feet above the street; and separate penalties are incurred by every neglect to make a signal. *N. Y. Ct. of Appeals*, 1855, *People v. N. Y. Central R. R. Co.* 13 *N. Y.* (8 *Kern.*) 78.

417. It is competent for the legislature to exempt a railroad company from ringing a bell or sounding a whistle, at a road crossing. *Ill. Supreme Ct.* 1859, *Galena &c. R. R. Co. v. Dill* 22 *Ill.* 264.

418. A compliance with the statute as to putting up notices at crossings, and ringing a bell, will not exempt the proprietors of a railroad from the obligation to use reasonable care and diligence, in other respects.* *Mass. Supreme Ct.* 1848, *Bradley v. Boston & Maine R. R. Co.* 2 *Cush.* 589; 1852, *Linfield v. Old Colony R. R. Co.* 10 *Id.* 562.

419. Head light. It is the duty and right of a railroad corporation to carry a head light, if necessary to the safety of the train, however much it may increase the danger to cattle which are suffered to stray upon its track. *Ohio Supreme Ct.* 1859, *Bellefontaine &c. R. R. Co. v. Schruyhart*, 10 *Ohio St.* 116.

420. Watchman. A railroad company made a private crossing over their track, in a city, and allowed the public to use it as a

highway, stationing a flagman there to prevent persons from crossing when there was danger. *Held*, that they were liable in damages to one, who, using due care, was induced to undertake to cross by a signal from the flagman that it was safe, and was injured while so crossing by a collision which occurred through the flagman's negligence. *Mass. Supreme Ct.* 1865, *Sweeney v. Old Colony & Newport R. R. Co.* 10 *Allen*, 368. Compare *Shaw v. Boston & Worcester R. R. Co.* 8 *Gray*, 45.

421. The obligation resting upon railway companies to protect their lines at level crossings by gates, watchmen, &c., and their liability for injuries inflicted upon foot and carriage passengers occasioned by the negligence of their servants at such crossings considered. *Stubley v. London & North-western Railw. Co.* 4 *Hurlst. & C.* 83; 1 *Law Rep. Exch.* 18; 35 *Law J. N. S.* 8; 11 *Jur. N. S.* 954; 13 *Law Times N. S.* 376; *Stapley v. London &c. Railway Co.* 4 *Hurlst. & C.* 93; 1 *Law Rep. Exch.* 21; 35 *Law J. N. S.* 7; 11 *Jur. N. S.* 954; 13 *Law Times, N. S.* 406; *Lunt v. London & North Western Railway Co.* 1 *L. R. Q. B.* 277; 12 *Jur. N. S.* 409; 35 *Law J. Q. B.* 105; 14 *W. R.* 497; 14 *L. T. N. S.* 225.

IV. IN CITIES.

422. Railroads in cities are not *per se* nuisances.* *N. Y. Chancery*, 1841, *Hamilton v. N. Y. & Harlem R. R. Co.* 9 *Paige*, 171; *N. Y. Supreme Ct.* 1849, *Drake v. Hudson R. R. Co.* 7 *Barb.* 508; 1850, *Plant v. Long Island R. R. Co.* 10 *Id.* 26; 9 *N. Y. Leg. Obs.* 53; *Harris v. Thompson*, 9 *Barb.* 350; 1852, *Hentz v. Long Island R. R. Co.* 13 *Barb.* 646; 1853, *Milhan v. Sharp*, 15 *Id.* 193; 1854, *Anderson v. Rochester &c. R. R. Co.* 9 *How. Pr.* 558. *N. Y. Ct. of Appeals*, 1857, *Williams v. N. Y. Central R. R. Co.* 16 *N. Y.* 97; 1856, *Davis v. Mayor &c. of N. Y.* 14 *N. Y.* (4 *Kern.*) 506. *Ind. Supreme Ct.* 1859, *New Albany & Salem R. R. Co. v. O'Daily*, 12 *Ind.* 551; and see *Lexington R. R. Co. v. Applegate*, 8 *Dana*, 289.

423. Provisions of a railroad charter authorizing the company to occupy a highway in laying the track, relate only to the public

*Whether the obligation imposed by a statute requiring bell to be rung, &c. at crossings enures to the benefit of any other than a person crossing. Compare *O'Donnell v. Providence & Worcester R. R. Co.* 6 *R. I.* 211; *Wakefield v. Conn. & Passumpsic Rivers R. R. Co.* 37 *Vt.* 830.

Whether neglect to give signal is conclusive as to negligence. Compare *Aycock v. W. & W. R. R. Co.* 6 *Jones' Law (N. C.)* 231; *Galena &c. R. R. Co. v. Dill*, 22 *Ill.* 264; *Chicago & Rock Island R. R. Co. v. Reid*, 24 *Ill.* 144; *Bellefontaine v. N. Y. Central R. R. Co.* 34 *N. Y.* 623.

As to whether negligence on the part of the injured person is material, if the signal be not given. Compare *Brand v. Schenectady & Troy R. R. Co.* 8 *Barb.* 368; *Stevens v. Oswego & Syracuse R. R. Co.* 18 *N. Y.* (4 *Smith*), 423; *Dascomb v. Buffalo & State Line R. R. Co.* 27 *Barb.* 221; *Ernst v. Hudson River R. R. Co.* 33 *Barb.* 159; *S. C.* 19 *How. Pr.* 205; *McGrath v. The Same*, 33 *Barb.* 144; *S. C.* 19 *How. Pr.* 211; *Bernhardt v. Rensselaer & Saratoga R. R. Co.* 33 *Barb.* 165; 19 *How. Pr.* 199; *Wilds v. Hudson River R. R. Co.* 24 *N. Y.* 430; *S. C.* 23 *How. Pr.* 493; *Chicago & Rock Island R. R. Co. v. McKean*, 40 *Ill.* 213.

As to proof that giving the signal would have prevented the injury. See *Galena &c. R. R. Co. v. Loomis*, 18 *Ill.* 548; *Pittsburg &c. R. R. Co. v. Karns*, 18 *Ind.* 87; *Illinois Central R. R. Co. v. Phelps*, 29 *Ill.* 447.

*Whether a street railway is "a railroad" compare *Louisville & Portland R. R. Co. v. Louisville City Railway Co.* 2 *Due*, 175; *Chicago v. Evans*, 24 *Ill.* 52.

property in the road, so as to protect them from indictment for a public nuisance, but do not affect their liability to adjacent owners for damages. *N. Y. Supreme Ct.* 1841, *Fletcher v. Auburn & Syracuse R. R. Co.* 25 *Wend.* 462. Followed, 1843, *Mahon v. Utica & Schenectady R. R. Co.* *Hill & D. Supp.* 156; 1858, *Robinson v. N. Y. & Erie R. R. Co.* 27 *Barb.* 512.

424. When a horse railroad is about to be built in the limits of a municipal corporation, the questions whether the construction of the road will operate beneficially or injuriously to the public right of way, whether it would prove a public benefit or a public nuisance, are to be determined by the legislature and the council of the corporation. Hence if the road prove an obstruction to the street, and a public inconvenience and injury, it is not punishable as a nuisance, provided it has been constructed according to the prescriptions of the charter. *N. Y. Chancery*, 1864, *Hinchman v. Paterson Horse R. R. Co.* 17 *N. J. Eq.* (2 *C. E. Green*), 75. Compare *Milbau v. Sharp*, 27 *N. Y.* 611; *S. C.* below, 28 *Barb.* 228; 7 *Abbotts' Pr.* 220; *Davis v. Mayor &c. of N. Y.* 14 *N. Y.* (4 *Kern.*) 506.

425. The use of streets in the city of New York for the purposes of a city railroad, is not a taking of private property, within the provision of the Constitution, which requires compensation to be made.* [Reviewing many cases.] *N. Y. Supreme Ct.* 1862, *People v. Kerr*, 37 *Barb.* 357; *Ind. Supreme Ct.* 1859, *New Albany & Salem R. R. Co. v. O'Daily*, 12 *Ind.* 551; *N. J. Chancery*, 1864, *Hinchman v. Paterson Horse R. R. Co.* 17 *N. J. Eq.* (2 *C. E. Green*), 75; and see *Cincinnati &c. R. R. Co. v. Cummins ville*, 14 *Ohio, St.* 528; *People v. Law*, 34 *Barb.* 494; 22 *How. Pr.* 109.

426. The legislature may authorize the building of a railroad within the corporate limits of a town or city, or upon a street or other public highway. [27 *Pa. St.* 339.] *Tenn. Supreme Ct.* 1859, *Tennessee & Alabama R. R. Co. v. Adams*, 3 *Head*, 596.

* The graded and paved streets of a city are artificial roads, within the provisions of a statute prohibiting a railroad corporation from using any railroad, turnpike or artificial road, without obtaining the consent of the parties owning the same; and they cannot be used by such company without the consent of the councils of the corporation. *Pa. Supreme Ct.* 1866, *Commonwealth v. Central Passenger Railway*, 52 *Pa.* 506.

427. The local governments of cities (in New York) have no right to grant railroad privileges or establish railroads in cities, independent of legislative action and approval.* *N. Y. Supreme Ct. Sp. T.* 1864, *People v. New York & Harlem R. R. Co.* 45 *Barb.* 73; 26 *How. Pr.* 44. But compare *Cincinnati &c. R. R. Co. v. Cummins ville*, 14 *Ohio St.* 528.

428. If a company is authorized to make a railroad by a straight line between two designated points, the right to run upon, along, or across all the streets or roads which lie in the course of such line is thereby implied. Hence the power granted by charter to enter and construct a railroad within a city or town, carries with it, by implication, the power, if necessary, to locate their road upon a street or alley.† *Tenn. Supreme Ct.* 1859, *Tennessee & Alabama R. R. Co. v. Adams*, 3 *Head*, 596.

429. Acquiring lands. A railroad company, which is empowered to lay its track through certain public streets and over certain public squares, may nevertheless take the land of private individuals, for the purposes of its incorporation, by either voluntary purchases, or by purchases effected through the intervention of commissioners, to be appointed by the court. *S. C. Ct. of Appeals*, 1846, *Ex. p. South Carolina R. R. Co.* 2 *Rich.* 434.

430. In the appointment of such commissioners, the court acts ministerially, and can only look to the fitness of the commissioners. The company is not bound to show, nor can the court inquire into, the necessity of taking the lands; of that, the company must judge. *Ib.*

431. Compensation. A railroad company cannot appropriate and occupy a public street, with its road track, without the consent of the proprietors of the abutting

* Where a charter was granted, subject "to all the ordinances of the councils of the said city."—*Held* that the company, by accepting it, agreed to obtain the consent of the councils, agreeably to the ordinances of the city. *Philadelphia v. Lombard &c. R. R. Co.* 3 *Grant (Pa.)* 406.

† A statute empowering a corporation to construct a single or double railroad, from any point on one street to any point on any other,—*Held*, to contemplate a double track in one street or avenue, and not two parallel roads in separate streets or avenues; and that by the actual construction of the road, the power was exhausted, and the corporation could not, without new authority, add a lateral route. *N. Y. Supreme Ct. Sp. T.* 1864, *People v. N. Y. & Harlem R. R. Co.* 45 *Barb.* 73; 26 *How. Pr.* 44.

lots, or without compensation to them, and neither the legislature nor the municipal authorities have power to dispense with this compensation. [16 N. Y.] *Wis. Supreme Ct.* 1861, *Ford v. Chicago &c. R. R. Co.* 14 *Wis.* 609.

432. Using a street for a railroad track, either upon its natural surface or by tunnelling, is not a misappropriation of it, if such use does not substantially interfere with its use as a street. *N. Y. Supreme Ct.* 1851, *Adams v. Saratoga & Washington R. R. Co.* 11 *Barb.* 414. To the same effect, 1850, *Plant v. Long Island R. R. Co.* 10 *Id.* 26; 9 *N. Y. Leg. Obs.* 58; 1851, *Chapman v. Albany & Schenectady R. R. Co.* 10 *Barb.* 360; and see *Porter v. North Missouri R. R. Co.* 33 *Mo.* 128.

433. How far a grant is exclusive. A grant of the right to construct a railroad in a city street is not necessarily exclusive; and the grantees have no right of action against persons who commence the construction of another railroad in the same street, unless it prevents them from constructing or using their own road. [18 N. Y. 160.] *N. Y. Supreme Ct.* 1861, *Brooklyn & Newtown R. R. Co. v. Coney Island R. R. Co.* 35 *Barb.* 364.

434. The charter of a street railway corporation is the grant of a franchise to lay iron rails on part of the public highways, to run horses and cars thereon for the transportation of passengers, and to receive fares for such transportation, in consideration of the benefit to the public resulting from the establishment of such means of travel, and in compensation for the expenses incurred by the grantees in laying their rails and running their cars. Although such a grant does not deprive ordinary travelers of the right to pass over the whole highway, including that part on which the rails are laid, so long as they do not unreasonably interfere with the passage of such cars; it is clearly inconsistent with the use of the tracks by other similar corporations for the running of vehicles of the same kind for the transportation of passengers for hire, without like authority from the legislature. *Mass. Supreme Ct.* 1866, *Metropolitan R. R. Co. v. Quincy R. R. Co.* 13 *Allen* 262. To similar effect *N. Y. Supreme Ct.* 1860, *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.* 32 *Barb.* 358.

435. Remedy of land-owners. The injury which land-owners adjoining a public street in a municipal corporation suffer from obstructions and impediments in the street, resulting from the construction of a railroad therein, is common to all the public, and cannot be remedied by an injunction at the suit of an individual sufferer; but in cases of unquestioned public nuisance, a court of equity will interfere by injunction where the complainant has sustained a special and serious injury, distinct from that suffered by the public at large. *N. J. Chancery*, 1864, *Hinchman v. Paterson Horse R. R. Co.* 17 *N. J. Eq.* (2 *C. E. Green*), 75; *Hogencamp v. Paterson Horse R. R. Co.* *Id.* 83.

436. The courts cannot interfere to prevent the construction of railways, in or upon the streets of cities, where the legal title of the same is vested in the city corporation, and where the company has been authorized by competent legal authorities.—[11 *Ill.* 554; 20 *Id.* 516; 8 *Dana*, 298; 9 *Paige*, 171; 7 *Barb.* 508; 10 *Id.* 360; 18 *Id.* 646; 23 *Id.* 414; 6 *Wheat.* 25]. *Iowa Supreme Ct.* 1861, *Milburn v. Cedar Rapids*, 13 *Iowa*, 246.

437. That the location of a railroad through a public street, in a line not warranted by law, will not be enjoined as a nuisance at the instance of an owner of an unimproved building lot, suffering no present detriment,—see *Zabriskie v. Jersey City & Bergen R. R. Co.* 2 *Beas.* 814.

438. That a railroad having the right to lay their track through a public street, are liable to persons injured by the obstruction of the street, only for an illegal use of the street,*—see *Lackland v. North Missouri R. R. Co.* 34 *Mo.* 259.

439. Injuries resulting. When a railroad company are duly authorized to lay their track in one of the streets of a city, they are not liable, at all events and without proof of negligence or want of skill and reasonable care, for accidents which may be caused by

* Where the ordinance of a municipal corporation provided for the construction of a railroad through the corporate limits, on either of two streets, under various restrictions as to grade &c. to be subsequently regulated,—*Held*, that the city thereby vested, so far as it could, the right in the corporation to run the road along the street, but in such a manner as not to obstruct the street for the adjoining proprietors; and with the condition that the road should be constructed on the existing grade of the street, unless some alteration was made, within the power of the city, by municipal regulation. *Ind. Supreme Ct.* 1856, *Tate v. Ohio & Mississippi R. R. Co.* 7 *Ind.* 479.

the existence of the track there. *N. Y. Com. Pl.* 1854, *Mazetti v. N. Y. & Harlem R. R. Co.* 8 *E. D. Smith*, 98.

440. A person driving in his carriage along a city railroad track, and injured by the projection of a spike which the company ought not to have permitted, may recover from the company, although there was room in other parts of the street for him to have passed. *N. Y. Com. Pl.* 1861, *Fash v. Third Avenue R. R. Co.* 1 *Daly*, 148.

441. Cleaning streets. A passenger railroad company which is required by its charter, and the ordinances of a borough, to keep the street in which its road is laid in perpetual good order from curb to curb through its whole length, is bound to keep the street cleansed from filth necessarily accumulating thereon from its ordinary use as a public thoroughfare. *Pa. Supreme Ct.* 1865, *Passenger R. R. Co. v. Burgess & Co. of Birmingham*, 51 *Pa. St.* 41.

442. Negligence. The peculiar character of the vehicles employed by street railroads running through the crowded thoroughfares of a city makes it incumbent upon such companies to exercise care and diligence to avoid collisions and accidents. No other rule is compatible with the safety and security of the public; but this does not dispense with the care and prudence required of all persons using the street in common with the railroad company. *Mo. Supreme Ct.* 1867, *Liddy v. St. Louis R. R. Co.* 40 *Mo.* 506.

443. It is the duty of a railroad company, in crossing on its level a public street in a populous town, with cars drawn by steam-power, to use extreme care; and not only to employ servants to look ahead on both sides, but also to have the train under such control that it can be promptly stopped, if any one is on the track. *N. Y. Supreme Ct.* 1861, *Wilds v. Hudson River R. R. Co.* 33 *Barb.* 503. Compare *Wilson v. Cunningham*, 8 *Cal.* 241.

444. A city railroad company is entitled to the unrestricted use of its rails, for the progress of its cars, within that limit of speed which the law allows them; and the driver of any other vehicle who may be upon their track, is bound to use greater care than if upon the common pavement. And if through his negligence or wilfulness, in this respect, a collision ensues, he should not have damages against the company, even though the

latter are also in fault. *N. Y. Superior Ct.* 1858, *Wilbrand v. Eighth Avenue R. R. Co.* 8 *Bow.* 314.

445. The right of making a turnout near the termination of the road leading to necessary buildings for the engines upon ground belonging to the company, necessarily results from the general power of the road, but the communication must be subject to the police power of the municipality, and used so as to interfere as little as possible with the public way. *La. Supreme Ct.* 1846, *New Orleans & Carrollton R. R. Co. v. Second Municipality of New Orleans*, 1 *La. An.* 128.

446. Power of municipal corporation. The power of declaring and removing nuisances given to a municipal corporation does not authorize them to limit the rate of speed of railroad trains, or stop the trains except where the track crosses a public way. *N. J. Supreme Ct.* 1861, *State v. Jersey City*, 5 *Dutch.* 170; *S. P. N. Y. Supreme Ct. Sp. T.* 1867, *Brooklyn City R. R. Co. v. Furey*, 4 *Abb. Pr. N. S.* 364.

447. A municipal corporation authorized to make ordinances for the purpose of regulating city railroad cars, prohibiting nuisances, and preventing and removing obstructions on the streets, is not thereby authorized to interfere, at a specific point, with the tracks or business of a railroad which is established and conducted under a legislative grant. *N. Y. Supreme Ct. Sp. T.* 1867, *Brooklyn City R. R. Co. v. Furey*, 4 *Abb. Pr. N. S.* 364.

448. An ordinance of the city prohibiting the putting "in any street, sidewalk, or other public place within the city limits, any dust, dirt, filth, or other rubbish or obstructions of any kind," is broad enough to embrace the obstructions of a street by a railroad company. *Ill. Supreme Ct.* 1866, *Illinois Central R. R. Co. v. City of Galena*, 40 *Ill.* 844.

V. LEASES.

449. Power to make. The Pennsylvania act of April 23, 1861, (*Pamph. L.* 410), authorizing the leasing of railroads, applies to the appurtenances as well as the road itself. *Pa. Supreme Ct.* 1866, *Philadelphia & Erie R. R. Co. v. Catawissa R. R. Co.* 53 *Pa. St.* 20.

450. A contract for a lease by the directors of one corporation to another, of the railroad of the former,—*Held*, a breach of trust, as be-

tween them and the shareholders, as creating a partnership which varied the rights of the shareholders in one company in the gross receipts of their business; and that the other company, having knowingly participated in such breach of trust could not enforce the contract. *Shrewsbury &c. Railw. Co. v. London and Northwestern Railway Co.* 21 *Eng. Law & Eq.* 319. Compare *Durfee v. Old Colony & Fall River R. R. Co.* 5 *Allen*, 280.

451. Effect of lease. Where a lease was made under express authority conferred by statute,—*Held*, that the directors of both roads were bound, as were the majority of the stockholders in both, to conduct and administer the roads according to its terms; and that their liability to the stockholders of each road was just the same as though they had been united by act of the legislature, upon the same terms and conditions as those contained in the lease. *N. H. Supreme Ct.* 1862, *March v. Eastern R. R. Co.* 43 *N. H.* 515.

452. When two railroads are united under a lease specifying the duties and liabilities of each, neither is restricted in any particular not included in their contract with each other; each may obtain new legislative grants, and avail itself of additional powers, in any way they may find advantageous to themselves, provided these new operations are kept so distinct, as not to interfere with the due operation of their agreement with each other. *N. H. Supreme Ct.* 1862, *March v. Eastern R. R. Co.* 43 *N. H.* 515.

453. Such lease must be construed with reference to the objects proposed by the existing charters of each at the time the lease was made, and its construction or operation cannot be affected by any change of the plans or objects of the corporation, beyond the existing scope of their chartered powers at the time of the making of such lease. *Ib.*

454. A railroad company cannot, by leasing its corporate property and franchises, relieve itself from liability to the public for injuries sustained and damages resulting from breach of contract or duty by the lessee. *Ill. Supreme Ct.* 1858, *Ohio & Mississippi R. R. Co. v. Dunbar*, 20 *Ill.* 623; *Mass. Supreme Ct.* 1857, *Langley v. Boston & Me. R. R. Co.* 10 *Gray*, 103; 1859, *McCluer v. Manchester & Lawrence R. R. Co.* 13 *Gray*, 124; 1864, *Ingersoll v. Stockbridge & Pittsfield R. R. Co.* 8 *Allen*, 483. See also *Wyman v. Penobscot*

& Kennebec R. R. Co. 46 *Me.* 162; *Stearns v. Atlantic & St. Lawrence R. R. Co.* *Id.* 95; *Whitney v. The Same*, 44 *Id.* 362.

455. Where one company operates the road of another company under a lease authorized by statute, they may, in respect to their traffic thereon, be held to the rule of liability imposed by law on such other company, and cannot insist on the benefit of exemptions contained in their own original charter. *Mich. Supreme Ct.* 1867, *McMillan v. Mich. S. & N. I. R. R. Co.* 16 *Mich.* 79.

456. Special covenant. A stipulation to pay the "actual cost" of running extra trains,—*Held* to mean only money actually paid out therefor, and not to include a proportion of the expenses of the road and the wear and tear of the track. *Lexington &c. R. R. Co. v. Fitchburg R. R. Co.* 9 *Gray*, 226.

457. In a lease of a railway, a covenant on the part of the company lessee to work the railway efficiently and indemnify against all liabilities, &c., for want of repair, is not to be construed as a mere covenant not to abandon the railway, especially if the lease reserves a share of the gross receipts to the lessor. But, on the other hand, it is not to be construed as obliging the lessees to work it in such manner as to produce the largest possible gross receipts. A fair and reasonable amount of working to make it productive, and with due reference to the other interests of the company lessee, is only required.* *Eng. 1853, West London Railw. v. London and N. W. Railw.* 18 *Eng. L. & Eq.* 481; 11 *Com. B.* 327; 22 *Law J. N. S.* 117; 17 *Jur.* 117.

458. It is not a breach of such a covenant to work the line for goods traffic only and not passengers. *Ib.*

459. Rent reserved in a lease executed by a railroad company of a part of its track, being a compensation for the use of such track, the right to it passes, upon consolidation, as a necessary appurtenance to the ownership of the land and the superstructure upon it. *N. Y. Supreme Ct.* 1861, *New York Central R. R. Co. v. Saratoga & Schenectady R. R. Co.* 39 *Barb.* 289, 29 *How. Pr.* 463.

460. Liability of lessee to third persons. Under a railroad statute imposing upon a

* As to the construction of stipulations in an agreement made between two railroad companies, whereby one road was to be operated for the mutual benefit of the two companies, see *Blossburg and Corning R. R. Co. v. Tioga R. R. Co.* 1 *Keyes*, 436.

railroad company the duty of maintaining fences and cattle-guards at farm-crossings, and providing that until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages from such defect; a lessee of the road becomes, also, liable for injury to cattle caused by his operating it without proper cattle-guards at farm-crossings. *Vt. Supreme Ct. 1856, Clement v. Canfield, 28 Vt. 302.*

461. A company running its trains over the road of another company, under a contract or license therefor, is liable for injuries resulting from the unfenced condition of the road. [Approving 28 Vt. 302, and disapproving 44 Me. 362; 46 Id. 162.] *Ill. Supreme Ct. 1866, Illinois Central R. R. Co. v. Kanouse, 39 Ill. 272.* To similar effect *Wis. Supreme Ct. 1861, McCall v. Chamberlain, 13 Wis. 637.*

462. A statute requiring every railroad corporation to carry a bell on every engine passing upon "their road," &c. applies to a railroad corporation who have taken a lease of a railroad owned by another corporation, and are running their own engines upon it under such lease. *Mass. Supreme Ct. 1852, Linfield v. Old Colony Railroad Corporation, 10 Cush. 563.*

463. An individual lessee running the road is not liable, under a statute declaring railroad companies failing to fence liable. Negligence must be shown in order to charge him. *Io. Supreme Ct. 1867, Liddle v. Keokuk, Mt. Pleasant & M. R. R. Co. 23 Io. 378.*

464. The lessee of a railroad is an agent of the corporation, under the general railroad act of Vermont (Comp. Sta. c. 26, §41) making such corporations and their agents liable for damages occasioned by want of fences and cattle-guards. *Vt. Supreme Ct. 1856, Clement v. Canfield, 28 Vt. 302.*

465. A railroad corporation cannot dispute their liability for freight delivered to them to be carried over a railroad leased to them, on the ground that the lease is void. *Mass. Supreme Ct. 1859, McCluer v. Manchester & Lawrence Railroad, 18 Gray, 124.*

466. The company owning the track is also liable by reason of its neglect to fence, although the injury was done by the trains of the other company. *Ill. Supreme Ct. 1866, Toledo, Peoria & Warsaw R. R. Co. v. Reimbold, 40 Ill. 148.*

VI. BONDS AND MORTGAGES.

467. Bonds. A railroad company has a right to issue bonds to carry on its legitimate business, unless prohibited by law.* *Pa. Supreme Ct. 1859, Philadelphia &c. R. R. Co. v. Lewis, 33 Pa. St. 38.* Compare as to the Massachusetts Statute, *Commonwealth v. Smith, 10 Allen 448; Richardson v. Sibley, 11 Id. 65.*

468. A railroad company who has regularly delivered its coupon bonds to parties contracting with them, on account of services under the contract, are estopped from setting up claims upon the contractors as an equity against such bonds in the hands of holders who had received them *bona fide* from the contractors. *Pa. Supreme Ct. 1867, McElrath v. Pittsburg & Steubenville R. R. Co. 55 Pa. St. 189.*

469. What may be pledged. A right of way for a railroad is of such a nature as to be capable of being pledged in security of a loan to the State, and on failure of redemption, of being sold and transferred so as to vest the easement in the purchaser. And the purchaser may be another railroad company, if authorized by law to make such a purchase, and the original object and consideration of the grant of the easement be not defeated or changed. *Ohio Supreme Ct. 1857, Junction R. R. Co. v. Ruggles, 7 Ohio St. 1.*

470. The future net earnings of a railroad company can be mortgaged to secure interest-payments on the construction bonds. *Iowa Supreme Ct. 1861, Jessup v. Bridge, 11 Iowa, 572.*

471. What is a mortgage. A railroad corporation's deed of trust to secure its bonds or coupons, operates as a mortgage.† *Ind. Supreme Ct. 1863, Coe v. Johnson, 18 Ind. 218.*

472. Under a general power to mortgage the corporate property and franchises to secure the payment of money borrowed by the company for completing the road, it is entirely immaterial whether the right of way for the railroad was all acquired or not, at the time such mortgage was put on record, or whether the road had or had not been at that time entirely located, or the location thereof, if

* The re-issue of bonds which pass by delivery.—*Held*, not illegal. *Eaton &c. R. R. Co. v. Hunt, 30 Ind. 457.*

† Construction and effect of a deed of trust for the security of scrip issued by the company. *Thompson v. Hollingsworth, 31 Ind. 475.*

previously made, was afterwards changed. *N. Y. Supreme Ct. Sp. T.* 1857, *Seymour v. Canandaigua & Niagara Falls R. R. Co.* 25 *Barb.* 284; 14 *How. Pr.* 581.

473. The power of a railroad corporation to borrow money and mortgage their property, is not limited by the usual clause in their charters, providing that shares shall not be assessed over \$100, and that, if more money is necessary, it shall be raised by creating new shares. [6 *Humph.* 515; 4 *Hill*, 265] *N. H. Supreme Ct.* 1862, *Richards v. Merrimack & Conn. River Railroad*, 44 *N. H.* 127.

474. A railroad company in Ohio, under the act of February, 1848, may effectually mortgage its property connected with the use of its franchise, whether real or personal, to be subsequently acquired; but the existence of such a mortgage does not operate to exempt such property, in its nature personal, and while it remains in possession of the corporation, from being levied upon by judgment-creditors of the company. [10 *Ohio St.* 372; *Id.* 412]. *Ohio Supreme Ct.* 1863, *Coe v. Peacock*, 14 *Ohio St.* 187.

475. What is covered. A railroad corporation mortgaged its line of road, its tolls, and its revenues.—*Held*, that the mortgage covered also all the rolling stock and fixtures, whether movable or immovable, essential to the production of tolls and revenues. *Md. Ct. of Appeals*, 1861, *State v. Northern Central Railw. Co.* 18 *Md.* 193. Compare *Parkhurst v. Northern & C. R. R. Co.* 19 *Id.* 472.

476. A mortgage of a railroad, with its superstructure, track, and all other appurtenances, and all the right and title "to the land on which said railroad is and may be constructed, together with all rights of way, &c., and including the engine-houses, depots, &c., at, &c., and the lots, &c., of land on which the same are or may be erected, and all the pieces of land which shall be used for depot and station purposes, and structures thereon, and appurtenances thereto, and all franchises," &c., does not, as against subsequent mortgage creditors, include woodland lying seven miles from the road-track, subsequently purchased by the company, and used by them to supply wood and timber for the use of their road. *Wis. Supreme Ct.* 1860, *Dinsmore v. Racine & C. R. Co.* 13 *Wis.* 649.

477. A deed of trust, transferring a railroad to a trustee, to secure payment of bonds,

and giving powers to the trustee to operate the road, and granting "the road, railways, bridges, locomotives, engines, cars, depots, right of way and land, with all buildings, shops, tools, and machinery then in use, owned by them, or which they might thereafter require, with the superstructure, rails, and other materials used thereon," must be construed to cover everything essential to the road, and to embrace wood provided for the use of the road from time to time. *Ind. Supreme Ct.* 1854, *Coe v. McBrown*, 22 *Ind.* 252.

478. Reservation of control. A provision in a railroad mortgage, that "all the rights of the bondholders or trustee are subject to the possession, control, and management of the directors of said company, until default," does not give creditors, under contracts made after the mortgage and before default, a preference over the mortgage lien. *Iowa Supreme Ct.* 1863, *Dunham v. Issett*, 15 *Iowa* 284. See also *Parkhurst v. Northern & C. R. R. Co.* 19 *Md.* 472.

479. Where vacancies in the board of trustees under a railroad mortgage are to be filled from the bondholders, the election of persons who have procured bonds for the purpose of qualifying themselves, will not be held invalid, if no intention of fraud is shown. *N. H. Supreme Ct.* 1862, *Richards v. Merrimack & Conn. River Railroad*, 44 *N. H.* 127.

480. Such a trustee will not cease to be chargeable as such, because he has parted with the bonds required as a qualification. *Id.*

481. Questions of priority. The holders of bonds pledging income, not necessarily entitled to enjoin the company from mortgaging the road to secure a new issue of bonds. *Garrett v. May*, 19 *Md.* 177.

482. A mortgage of the road "built and to be built" will take precedence over the claim of a contractor, who has afterwards completed an unbuilt part of the road under an agreement that he should retain possession of the road and apply the earnings to his debt, and has retained possession under his agreement. *U. S. Supreme Ct.* 1863, *Dunham v. Cincinnati & C. R. Co.* 1 *Wall.* 254.

483. A first mortgage was expressed to include subsequently acquired property, and a second mortgage was subsequently made, purporting to convey all the property referred

to in the first mortgage,—*Held*, that the second mortgage embraced rolling stock acquired subsequently to the making of the first mortgage. *Mass. Supreme Ct.* 1858, *Henshaw v. Bank of Bellows Falls*, 10 *Gray*, 568.

484. A subsequent mortgage, that by its terms is expressly subject to prior mortgages, cannot be given priority over them on the ground of defects in their execution or record. *Ohio Supreme Ct.* 1859, *Coe v. Columbus &c. R. R. Co.* 10 *Ohio St.* 372, 405.

485. Rights of other creditors. An authorized mortgage by a railroad company, of its rights and property, does not protect the remaining interest of the mortgagor in that property from liability for other debts; and such interest may be levied on, unless it should appear that by means thereof the mortgagee's security will be endangered. *Id.* But compare *Loundenschlager v. Benton*, 3 *Grant*, 384.

486. The mortgagees will be protected in equity, even where there is a legal defect in the execution of the instrument; especially where a receiver had been appointed before levy. And the fact that the judgment debt was for money lent to pay interest and taxes, and for right of way, gives the creditor no greater rights against the mortgagees. *Ohio Supreme Ct.* 1859, *Coe v. Columbus &c. R. R. Co.* 10 *Ohio St.* 372, 404.

487. A judgment creditor, even though his demand be for running expenses of the road, cannot seize and remove portions of mortgaged property, when by doing so he would diminish the security of the mortgage which is already inadequate. *Ohio Supreme Ct.* 1867, *Lane v. Baughman*, 17 *Ohio St.* 642.

488. The power of sale in a railroad mortgage is cumulative, and therefore it does not exclude the right of foreclosure by suit. *Ind. Supreme Ct.* 1863, *Eaton &c. R. R. Co. v. Hunt*, 20 *Ind.* 457.

489. Foreclosure. In an action to foreclose a railroad mortgage covering the road and rolling stock, each kind of property must be sold as real and personal, respectively, the real estate according to the rules governing judicial sales of real estate. The railroad, with its fixtures, constituting an entire tract, indivisible for the purpose of the sale, together with the franchise, should be sold as an entire tract lying in two or more counties,

and the proceedings incidental to the sale should be had in the county in which the action was brought. The personal property should be sold as such, but with such precautions to prevent a sacrifice as the court may order. The mortgagees must be regarded as proceeding on that part of the instrument which operates as a mortgage, and not under the power to sell, and the costs should be regulated accordingly. *Ohio Supreme Ct.* 1859, *Coe v. Columbus &c. R. R. Co.* 10 *Ohio St.* 372, 407.

490. Although a railroad company has constructed part of its road through another State, a trustee, under a mortgage of all their rights, &c., in the whole road, if within the jurisdiction of the court, can be authorized and compelled to sell whatever interest of the company will pass under the terms of the mortgage. *Pa. Supreme Ct.* 1867, *McElrath v. Pittsburg & Steubenville R. R. Co.* 55 *Pa. St.* 189.

491. Liability of trustees for accidents. A mortgage of a railroad was executed to trustees, for the benefit of bondholders. The trustees, after entering into possession, leased the road to others, but, under a verbal agreement, continued to operate the road for the lessees and receive the earnings, paying the expenses, contracting with and discharging the persons employed on the road, and exercising all the powers usually exercised by railroad corporations over their own roads. *Held*, that the trustees were personally responsible for injuries sustained by reason of the negligence of an employee of the road. *Mass. Supreme Ct.* 1864, *Ballou v. Farnum*, 9 *Allen*, 47.

492. Redemption. Where a railroad company, owning a road lying in two States, chartered by both, mortgage their whole road and franchise, and their right of redemption in one State is sold on execution, the purchaser is entitled to redeem the whole road. *Me. Supreme Ct.* 1861, *Wood v. Goodwin*, 49 *Me.* 260.

VII. OFFICERS AND SERVANTS.

493. President. Where tariffs of fares of freight and passengers upon a railroad are established and posted up by the president of the corporation, and the fares taken upon such tariffs are received and appropriated by the corporation, without objection, the legal presumption is that the president acted

by the authority of the corporation in thus establishing and posting such tariffs. *N. H. Supreme Ct.* 1856, *Hilliard v. Goold*, 84 *N. H.* 230.

494. Superintendent. A railroad corporation has authority to make and carry into execution reasonable regulations for the conduct of all persons using the railroad or resorting to its depots, without prescribing such regulations by by-laws; and the superintendent of a railroad depot, appointed by the corporation, has the same authority by delegation. *Mass. Supreme Ct.* 1844, *Commonwealth v. Power*, 7 *Metc.* 596.

495. By-laws. It is not necessary that the regulations made by a railroad corporation in regard to passengers and other persons using their buildings, should be made in the form of by-laws, to be carried into effect by penalties and prosecutions. Such by-laws are rather the regulations which a corporation have power to make in respect to the government of their own members, and of their corporate officers, or of municipal corporations, that exercise, to a limited extent, the powers of government. But the regulations in question are such as any individual, who should happen to be the owner of the depot and buildings, would have power to make by virtue of his ownership of the estate. *Id.*

496. Thus where the entrance of innkeepers or their servants into a railroad depot, to solicit passengers to go to their inns, produces annoyance, the depot superintendent may prevent persons from going within the station; and if they, after notice of a regulation to that effect, attempt to violate it, and, after notice to leave the depot, refuse so to do, he and his assistants may forcibly remove them; using no more force than is necessary for that purpose. *Id.*

497. The superintendent of a railroad depot has not a right to order a person to leave the depot, and not come there any more, and to remove him therefrom by force if he does come, merely because such person, in the judgment of the superintendent, and without proof of the fact, had violated the regulations established by the railroad corporation, or had conducted himself offensively towards the superintendent. *Mass. Supreme Ct.* 1847, *Hall v. Power*, 12 *Metc.* 482.

498. The general superintendent of a

railroad may be presumed to be authorized to contract for fencing the track. *Ind. Supreme Ct.* 1858, *New Albany & Salem R. R. Co. v. Haskell*, 11 *Ind.* 801.

499. The general manager of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance bestowed at his request, on a servant of the company injured by an accident on their railway. *Each.* 1867, *Walker v. Great Western Railway Co.* 2 *Law Rep. Exch.* 228; 36 *Law J. N. S.* 123; 16 *Law Times, N. S.* 327. But compare *Stephenson v. N. Y. & Harlem R. R. Co.* 8 *Duer*, 241.

500. General Agents. It is competent for the general agents of railroad companies, who have charge of the business of transportation, to establish rates of freight, subject however to the control of the directors, if they choose to act upon the matter. The assent of the directors, as in other cases, may be presumed unless there is evidence to the contrary. *N. H. Supreme Ct.* 1856, *Manchester & Lawrence R. R. v. Fisk*, 33 *N. H.* 297.

501. Freight agents of a railroad corporation are competent to bind the company by their representations and promises, made in the course of business intrusted to their particular care. *Pa. Supreme Ct.* 1866, *Tanner v. Oil Creek R. R. Co.* 53 *Pa. St.* 411.

502. A railroad company may be liable for the damage occasioned by the fraud or negligence of its agent, who from improper motives or against the usage of the company deprives a person of his rightful facilities for transportation. *Galena & Chicago Union R. R. Co. v. Rae* 18 *Ill.* 488.

503. Exactions of Conductor. A railroad company are responsible for the act of their conductor, in exacting illegal fares, although he has no orders to do so. [14 *How. U. S.* 468.] *N. Y. Supreme Ct.* 1861, *Porter v. N. Y. Central R. R. Co.* 34 *Barb.* 353.

504. Engineers. That there is nothing in the general duties of an engineer, which will authorize him to employ others to do work on the road, which, by express contract, the company have employed a contractor to do.* *Vt. Supreme Ct.* 1852,

* Under an act of incorporation of a railroad, providing for the settlement of claims against the road by the superintendent, an action was brought against the superintendent of the road, and in support of the action the plaintiff offered

Thayer v. Vermont Central R. R. Co. 24 *Vt.* 440; 1855, Vanderwerker v. The same, 27 *Vt.* 125.

505. An unsworn certificate, made by an engineer on a railroad, to a paper purporting to be a true copy of estimates, made by his predecessor in office, of the number of feet in certain railroad bridges is not admissible, in an action upon the contract to recover the price for building such bridges. Langford v. Sanger, 85 *Mo.* 183.

506. An engineer in charge of a locomotive is not liable for running the engine over an animal trespassing upon the track, unless he acted willfully. *N. J. Supreme Ct.* 1849, Vandegrift v. Rediker, 2 *Zabr.* 185.

507. Ticket-master. The plaintiff delivered articles, without marks, to a ticket-master of a railroad company, to be carried by a passenger train, which he promised to label, but did not, it being neither his duty nor that of the company to do so,—*Held*, that his promise did not bind the company, and they were not liable for the loss of the articles. *N. H. Superior Ct.* 1851, Elkins v. Boston & Maine Railroad Co. 3 *Foster*, 275.

VIII. TRAFFIC.

1. In general.

508. Railroad companies are common carriers, although not declared to be such, in the charter.* *Ill. Supreme Ct.* 1858, Chicago & Aurora R. R. Co. v. Thompson, 19 *Ill.* 578. To similar effect *Buffalo Superior Ct.* 1866, Heineman v. Grand Trunk R. R. Co. 31 *How. Pr.* 480. And see Porter v. Chicago & C. R. R. Co. 20 *Ill.* 407.

to prove that he had endeavored to adjust his claim with the late chief engineer,—*Held*, that such attempt at adjustment must be made with the superintendent, and was a condition precedent to the right of action against such officer, and that the proof offered in the present case was insufficient. *Ga. Supreme Ct.* 1866, Mason v. Cooper, 19 *Ga.* 543.

* So are persons carrying on the express business. *Mass. Supreme Ct.* 1867, Buckland v. Adams Express Co. 97 *Mass.* 124; *Ga. Supreme Ct.* 1867, Southern Express Co. v. Newby, 36 *Ga.* 609. But as to how far this can be insisted on as between a consignee and a consignor who submitted to a special contract for limited liability,—see Gordon v. Ward, 16 *Mich.* 360.

The general rules of carriers' liability are not within the scope of this work; but we refer the reader to the following cases where these rules have been applied to railway carriage:

Liability for delay in transportation or delivery. Wilson v. York, Newcastle & Berwick Railw. Co. 18 *Eng. L. & Eq.* 557; Nettles v. South Carolina R. R. Co. 7 *Mich.* 190; Lip-

509. They are private carriers merely as towards one who hires cars, motive power, &c., at lower rates, so as to assume the risk himself. *Vt. Supreme Ct.* 1854, Kimball v. Rutland & Burlington R. R. Co. 26 *Vt.* 247; *C. P.* 1852, Austin v. Manchester & C. Railw. Co. 11 *Eng. L. & Eq.* 506; 21 *Law J. N. S.* 179; 10 *C. B.* 454. To similar effect are East Tennessee & C. R. R. Co. v. Whittle, 27 *Geo.* 535; Ohio & Mississippi R. R. Co. v. Dunbar, 20 *Ill.* 623.

510. If a railroad company take a car for transportation over their road, and have exclusive charge of it, though it remain on its own trucks, they are responsible for it as common carriers, and not merely as persons towing vessels. *N. J. Supreme Ct.* 1858, New Jersey R. R. Co. v. Pennsylvania R. R. Co. 3 *Dutch.* 100. Compare Lackawanna & C. R. R. Co. v. Chenewith, 52 *Pa. St.* 393.

511. The owner of a car, which was in the use of another person, upon a railroad, by contract between him and the company, and which was injured in consequence of the bad condition of the road, may recover damages against the company. *Pa. Supreme Ct.* 1849, Cumberland Valley Railw. v. Hughs, 11 *Pa. St.* 141.

512. Effacing brands on empty casks. Railroad companies, &c., receiving empty spirit casks bearing revenue stamp or brand, must efface the same. Act of Cong. of July 20, 1868, 15 *Stat. at L.* 142, § 43.

513. Facilities for loading and unloading are a part of the business of the company as

ford v. The Same, 7 *Id.* 409; Black v. Baxendale, 1 *Exch.* (S. C.) 410; Ingledew v. Northern R. R. Co. 7 *Gray*, 86; Hales v. London & N. W. Railw. Co. 33 *Law J. Q. B. N. S.* 292; Ballentine v. North Missouri R. R. Co. 40 *Mo.* 491; Frank v. Keith, 2 *Duch.* (Ky.) 123.

Liability where, in consequence of delay, the goods came under the peril which destroyed them. Moses v. Boston & Maine R. R. Co. 4 *Fost.* 71; Stevens v. The Same, 1 *Gray*, 277; Michaels v. N. Y. Central R. R. Co. 30 *N. Y.* 564; Read v. Spaulding, 30 *Id.* 680; Denny v. N. Y. Central R. R. Co. 13 *Gray*, 431.

Loss by negligence in unloading. Lewis v. Western R. R. Co. 11 *Meto.* 509; Kimball v. The Same, 6 *Gray*, 542.

Liability for misdelivery. Michigan Central R. R. Co. v. Hale, 6 *Mich.* 248; Lichtenhein v. Boston & Providence R. R. Co. 11 *Oush.* 70; Sauquer v. London & C. Railw. 33 *Eng. L. & Eq.* 338; Chicago & N. W. R. R. Co. v. Ames, 40 *Ill.* 294.

Theft by servant of company. Metcalfe v. London & Brighton & C. Railw. Co. 31 *Law Times*, 165; Machee v. London & South Western Railw. Co. 2 *Exch.* 415; 5 *Railw. Cas.* 302; Great Northern Railw. Co. v. Rimell, 37 *Eng. L. & Eq.* 249.

Company having contracted to carry a passenger, estopped from setting up that it was not authorised to be common carrier. Fuller v. Narragansett R. R. 21 *Conn.* 557.

common carriers, and they cannot make an extra charge therefor beside the lawful tolls for carriage. *Exch.* 1861, *Pegler v. Monmouthshire R. &c. Co.* 6 *Hurl. & N.* 644.

514. Uniformity of charges. Railroad corporations are not bound as common carriers to transport goods and merchandise for all parties at the same rates.* *Mass. Supreme*

* The English Statute (17 & 18 *Vict.* ch. 81, §2) forbids companies to give any undue or unreasonable preference or advantage to any person, company or traffic, or to subject any person, company or traffic to undue or unreasonable prejudice.

This does not prevent a company from making special agreements to carry for one person at a less rate than for others, if the circumstances make the cost less in such case. *C. P.* 1857, *Oxide v. Northwestern Railw. Co.* 40 *Eng. Law & Eq.* 284. Compare *Harris v. Cooksmouth Railw. Co.* 5 *C. B. N. S.* 698; *Ransome v. Eastern Counties Railw.* 31 *Law Times*, 72.

Or where the company are willing to offer the same terms to any other persons who will give them the same amount of business. *C. P.* 1853, *Nicholson v. Great Western Railw. Co.* 5 *C. B. N. S.* 866; 4 *Jur. N. S.* 1187; 28 *Law J. C. P.* 89.

But the company cannot give preference on the ground that the person favored binds himself to employ them in another totally distinct business. *C. P.* 1853, *Baxendale v. Great Western Railw. Co.* 5 *C. B. N. S.* 809; 28 *Law J. C. P.* 81; 7 *Weekly R.* 64.

The statute does not forbid different rates of fares on different branches. *C. B.* 1856, *Caterham Railw. Co. v. London &c. Railw. Co.* 40 *Eng. Law & Eq.* 259.

But the company cannot impose increased prices upon expressmen to discourage their business. *Exch.* 1849, *Pickford v. Grand Junction Railw.* 10 *Mees. & W.* 399. See also *Crouch v. London & North Western Railw.* 2 *Carr & K.* 739; *Baxendale v. Eastern Counties Railw.* 27 *Law J. N. S.* 137; 20 *Law Times*, 320; *Piddington v. South Eastern Counties Railw.* 5 *C. B. N. S.* 111.

Nor can they superadd a charge for collecting and carting packages, against those customers who do not require collection and carting. *C. P.* 1853, *Baxendale v. Great Western Railw. Co.* 5 *C. B. N. S.* 836; 28 *L. J. C. P.* 81; 7 *Weekly R.* 64; *Exch.* 1864, *The Same v. The Same*, 12 *Weekly R.* 602, affirming 14 *C. B. N. S.* 1. And see *Pickford v. Grand Junction Railw. Co.* 10 *Mees. & W.* 399.

Under this statute, the court may require the company to admit the omnibus of a particular person at all reasonable times to the same extent as other vehicles of a similar description, especially where public inconvenience is shown to result from the refusal. *C. B.* 1857, *Marriott v. London &c. R. R. Co.* 40 *Eng. L. & Eq.* 250. Compare, however, *Barker v. Midland Railw. Co.* 36 *Id.* 253.

A provision of a charter authorizing the company to charge for small parcels any sum they might think fit, does not authorize them to charge different persons different prices. *Exch.* 1854, *Crouch v. Great Northern Railw. Co.* 25 *Eng. L. & Eq.* 449; 9 *Exch.* 566; 23 *Law J. N. S.* 148; 7 *Railw. Cas.* 787.

Such a provision does not release them from the operation of a previous general statute requiring them to charge all persons equally. *Exch.* 1864, *Baxendale v. Great Western Railw. Co.* 12 *Weekly R.* 602, affirming 14 *C. B. N. S.* 1.

A railway company, who advertised for carrying a certain description of goods, at a lower rate of charge, when sent through certain agents, were restrained, by injunction, from making any such discrimination. *C. P.* 1857, *Baxendale v. The North Devon Railw.* 30 *Law Times*, 134.

As to liability for delaying delivery in order to injure plain-

Ct. 1859, *Fitchburg R. R. Co. v. Gage*, 12 *Gray*, 393.

515. The provisions of a railroad charter requiring the company to transport in the order of their reception all goods, &c. offered, "so that equal and impartial justice shall be done to all owners of property who shall pay or tender" the proper freight,—*Held*, to apply to express companies, and a contract giving to one express company an exclusive right of carrying "express matter" in the passenger trains is illegal and void. *Pa. Supreme Ct.* 1855, *Sanford v. Catawissa &c. R. R. Co.* 24 *Pa. St.* 378. Compare *Elkins v. Boston & Maine R. R. Co.* 8 *Foot.* 275; *Collins v. The same*, 10 *Cush.* 506.

516. A restriction in the charter limiting charges to a specified rate per ton, per mile—*Held*, to apply to the whole line they were authorized to perfect, although some of the distance was by water; and to include the auxiliary roads built by the company. *N. J. Supreme Ct.* 1848, *Camden & Amboy R. R. Co. v. Briggs*, 1 *Zabr.* 406. Compare *Branly v. Southeastern R. R. Co.* 12 *C. B. N. S.* 63; *Ransome v. Eastern Counties Railw.* 28 *Law Times*, 339.

2. Freight Traffic.

517. Obligation to carry. A railway company, chartered under an act limiting their liability to that of common carriers, are not bound to carry every kind of goods presented, unless they profess publicly to carry the same* *Exch.* 1849, *Johnson v. Midland*

tiff's business, see *Crouch v. Great Northern Railw. Co.* 25 *Law J. N. S.* *Exch.* 137.

In what cases the court will interfere to regulate public accommodation, on summary application of a person aggrieved, under section three of the same statute, *Barrett v. Great Northern and Great Midland Railways*, 28 *Eng. Law & Eq.* 218; 23 *Law Times*, 254; *Caterham Railw. Co. v. London &c. Railw. Co.* 40 *Eng. Law & Eq.* 269.

Construction and effect of English statutes regulating charges for freight, and of scale bills of freight charges issued by English companies, *Parker v. Great Western Railw. Co.* 13 *Law J. N. S.* 105; 7 *Scott N. R.* 835; 8 *Jur.* 194; *Pickford v. Grand Junction Railw.* 10 *Mees. & W.* 399; *Parker v. Great Western Railw.* 11 *C. B.* 445, and 8 *Eng. L. & Eq.* 436; *Edwards v. Great Western Railw.* 8 *Eng. L. & Eq.* 447; 21 *Law J. N. S.* 72; 11 *C. B.* 588; *Crouch v. Great Northern Railw.* 34 *Eng. Law & Eq.* 573; *Finnie v. Glasgow & South Western Railw. Co.* 34 *Eng. L. & Eq.* 11; *Parker v. Great Western Railw.* 34 *Eng. L. & Eq.* 581.

Effect of printed tariff as evidence of rates, *Manchester & Lawrence R. R. Co. v. Fisk*, 33 *N. H.* 297.

* Posting a list of tolls at all the stations according to the statute, does not amount to the company's holding itself out to carry the kind of goods named in the list from every station at which it is posted. *C. P.* 1861, *Oxide v. North*

Railway Co. 4 *Exch.* 367; 6 *Eng. Railw. Cas.* 47.

518. Delivery to the company. Where the plaintiff claims to have delivered goods to the agent of a railroad corporation, at a distance from the line of the railroad, to be carried by him to the road, and thence transported on its line, the authority of such agent to bind the corporation must be shown, in order to render the company liable for failure to deliver such goods, as the transaction is distinct from the general objects of the company.* *Mo. Supreme Ct.* 1864, *Missouri Coal & Co. v. Hannibal & St. Joseph R. R. Co.* 35 *Mo.* 84.

519. Countermand of directions. One who delivers goods to a railway company directed to a particular place, may countermand the direction at any time. If the company have forwarded the goods by another connecting road, a countermand addressed to the clerk of such other company at the terminus is sufficient to hold them liable for a loss occasioned by a delivery according to the original directions.† *Exch.* 1852, *Scotthorn v. South Staffordshire R. R. Co.* 18 *Eng. L. & Eq.* 558; 22 *Law J. N. S.* 121; 17 *Jur.* 214; 8 *Exch.* 341.

520. Company not bound to deliver. The old rule that a carrier must deliver, is not applicable to railroad companies, because they have fixed tracks and fixed points of termination.‡ *Mass. Supreme Ct.* 1854,

Eastern R. Co. 9 *Week. Rep.* 272; 3 *Law Times, C. B. N. S.* 671.

* As to what constitutes a delivery to the company, see *Moses v. Boston & Maine R. R. Co.* 4 *Fost.* 71; *Wells v. Wilmington & C. R. R. Co.* 6 *Jones, Law (N. C.)* 47; *Moses v. Boston & Maine R. R. Co.* 32 *N. H.* 523; *Fitchburg & Worcester R. R. Co. v. Hanna*, 6 *Gray*, 589.

Effect of omitting to declare contents or value. *Crouch v. London & North Western Railw. Co.* 2 *Carr. & K.* 739; 25 *Eng. L. & Eq.* 237; *Behrens v. Great Northern Railw. Co.* 6 *Hurist. & N.* 866; *Planasani v. London & S. W. Co.* 26 *Eng. L. & Eq.* 418.

† Effect of special instructions by the owner of the goods or his servant: *Scotthorn v. South Staffordshire R. R. Co.* 18 *Eng. L. & Eq.* 558; 22 *Law J. Rep. N. S.* 121; 17 *Jur.* 214; 8 *Exch.* 341; *Sager v. Portsmouth & C. R. R. Co.* 31 *Mo.* 323; *Moses v. Boston & Maine R. R. Co.* 4 *Fost.* 71; *Michigan & N. & S. Indiana R. R. Co. v. Day*, 20 *Ill.* 375.

‡ The cases are conflicting on the question of what acts on the part of the company terminate its liability as a carrier. The subject belongs rather to the law of carriers than that of corporations; but a summary of the conflicting cases may be convenient here. They may be classed as follows, according to the limit which they apply to the carrier's liability.

1. When the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as a carrier is ended also, and he is re-

sponsible as warehouseman only. *Thomas v. Boston & Providence R. R. Co.* 10 *Metc.* 472; *Moses v. Boston & Maine R. R. Co.* 32 *N. H.* 523; *Norway Plains Co. v. The Same*, 1 *Gray*, 263; *Illinois Central R. R. Co. v. Alexander*, 20 *Ill.* 23; *Richards v. Michigan S. & N. Indiana R. R. Co.* 20 *Id.* 404; *Porter v. Chicago & Rock Island R. R. Co.* 20 *Id.* 407; *Davis v. Michigan and S. & N. Indiana R. R. Co.* 20 *Id.* 412.

521. Special contracts limiting liability.*

2. Merely placing the goods in the warehouse does not discharge the carrier, but he remains liable as such until the consignee has had reasonable time after their arrival to inspect and take them away, in the common course of business. *Morris & Essex R. R. Co. v. Ayres*, 5 *Dut-A* 393; *Blumenthal v. Brainerd* 38 *Vt.* 413; *Moses v. Bost. & Me. R. R. Co.* 32 *N. H.* 523; *Wood v. Crooker*, 18 *Wis.* 345; *Jeffersonville R. R. Co. v. Cleveland*, 2 *Bush*, 463. And see also *Michigan & C. R. R. Co. v. Schurtis*, 7 *Mich.* 515; *Chicago & Rock Island R. R. Co. v. Warren*, 16 *Ill.* 502; *Hilliard v. Wilmington & C. R. R. Co.* 6 *Jones, Law (N. C.)* 343; *Wardlaw v. South Carolina R. R. Co.* 11 *Rick. Law*, 287.

3. The liability of the carrier continues until the consignee has been notified of the receipt of the goods, and has had reasonable time in the common course of business, to take them away after such notification. *McDonald v. W. R. R. Corp.* 34 *N. Y.* 497; *McMillan v. Michigan S. & N. Indiana R. R. Co.* 16 *Mich.* 79, 103; *Michigan Central R. R. Co. v. Ward*, 2 *Mich.* 533; *The Same v. Hale*, 6 *Mich.* 243; *Richards v. Michigan S. & N. Indiana R. R. Co.* 20 *Ill.* 404; *New Albany & Salem R. R. Co. v. Campbell*, 12 *Ind.* 55; *Michigan & C. R. R. Co. v. Bivens*, 13 *Ind.* 268.

Distinction between effect of notice as terminating carrier's liability, and as entitling him to charge storage. *Richards v. Michigan S. & N. & C. R. R. Co.* 20 *Ill.* 404.

* What amounts to a special contract which limits a carrier's liability. *Chippendale v. Lancashire & Yorkshire Railw. Co.* 21 *Law J. N. S. Q. B.* 22; *Austin v. Manchester, Sheffield & Lincolnshire Railw. Co.* 10 *C. B.* 454; 16 *Jur.* 763; 21 *Law J. C. P.* 179; *Walker v. York & North Midland R. R. Co.* 22 *Eng. L. & Eq.* 315; 23 *Law J. N. S.* 78; 18 *Jur.* 143; 2 *El. & B.* 769; *York, New Castle & Berwick R. R. Co. v. Crisp*, 25 *Eng. L. & Eq.* 396; 14 *C. B.* 527; 23 *Law J. N. S.* 125; 18 *Jur.* 606; *Slim v. Great Northern Railw. Co.* 26 *Eng. L. & Eq.* 297; 14 *C. B.* 647; 23 *Law J. N. S.* 166; 8 *Jur.* 1119; 1 *Com. Law*, 166; *White v. Great Western Railw. Co.* 2 *C. B. N. S.* 7; *Simons v. The Same*, 29 *Law Times*, 189; 2 *C. B. N. S.* 620; 10 *Jur.* *N. S.* 805; 33 *Law J. N. S.* 199; 10 *Law Times, N. S.* 302; 12 *Week. Rep.* 689; *Aldridge v. Great Western Railw. Co.* 15 *C. B. N. S.* 582; 33 *Law J. N. S.* 161; *Boorman v. American Express Co.* 21 *Wls.* 152; *Strohn v. Detroit & Milwaukee R. R. Co.* 21 *Id.* 554; *Michigan Central R. R. Co. v. Hale*, 6 *Mich.* 243; *McMillan v. Michigan S. & N. Indiana R. R. Co.* 16 *Id.* 79.

Whether they can stipulate for exemption from liability for gross negligence, &c. *Sager v. Portsmouth & C. R. R. Co.* 31 *Mo.* 226; *Chippendale v. Lancashire & Yorkshire Railw. Co.* 7 *Eng. L. & Eq.* 395; 21 *Law J. N. S.* 22; 15 *Jur.* 1106; *Carr v. The Same*, 7 *Exch.* 707; 21 *Law J. N. S.* 261; 14 *Eng. L. & Eq.* 340; 7 *Railw. Cas.* 426; 17 *Jur.* 397; *Morville v. Great Northern Railw. Co.* 10 *Eng. L. & Eq.* 366; 16 *Jur.* 528; 21 *Law J. N. S.* 319; *Austin v. Manchester, Sheffield & Lincolnshire Railw. Co.* 10 *C. B.* 454; 16 *Jur.* 763; 21 *Law J. C. P.* 179; *Graham v. Davis*, 4 *Ohio St.* 362; *Pennsylvania R. R. Co. v. McCloskey*, 23 *Pa. St.* 526; *Illinois Central R. R. Co. v. Morrison*, 19 *Ill.* 136; *Powell v. Pennsylvania R. R. Co.* 32 *Pa. St.* 414; *McManus v. Lan-*

Under the English statute, which authorizes railway companies to make special contracts limiting their liability, provided such contracts are "just and reasonable,"—a contract exempting the company from responsibility caused by the insufficiency of their carriages occasioned by their own neglect or misconduct, is not "just and reasonable," and does not exempt them from liability. The condition is void. *Exch. Ch.* 1859, *McManus v. Lancashire & Yorkshire Railw. Co.* 4 *Hurlst. & N.* 827; 5 *Jur. N. S.* 651; 28 *Law J. Exch.* 358; 33 *Law T.* 259; *Q. B.* *Allday v. Great Western Railw. Co.* 11 *Law T. N. S.* 267.

Compare *Pardington v. South Wales Railw. Co.* 1 *Hurlst. & N.* 892; 2 *Jur. N. S.* 12 10; 38 *Eng. L. & Eq.* 432.

522. A condition that the owner, or drover of beasts about to be carried, is to see to the sufficiency of the wagon, and to make complaints of any defect to the station inspector, is unreasonable. *Exch.* 1864, *Gregory v. West Midland Railw. Co.* 10 *Jur. N. S.* 248.

523. The carrying of live stock being a kind of carrying almost unknown before railroads came into use, a carrier may contract that the owner shall assume all risk of damage from whatever cause, in course of transportation of such property.* *Wis. Supreme Ct.* 1866, *Betts v. Farmers' Loan & Trust Co.* 21 *Wis.* 80.

524. It is competent for the legislature to forbid railroad companies from limiting their common law liability even by express contract; for the power to do so is an implied power, and is not necessary to the enjoyment of the corporate franchises. *Miss. Ct. of*

cashire & Yorkshire Railw. Co. 4 *H. & N.* 827; 5 *Jur. N. S.* 651; 28 *Law J. Exch.* 358; 33 *Law Times*, 259, 259 *Exch. Cham.*; *Gregory v. West Midland Railw. Co.* 10 *Jur. N. S.* 248; *Allday v. The Great Western Railw. Co.* 11 *Law Times, N. S.* 267; *Betts v. Farmers' Loan & Trust Co.* 21 *Wis.* 80.

As to oral contract in addition to written one,—see *Wilson v. York, Newcastle & Berwick Railw. Co.* 18 *Eng. L. & Eq.* 557; *Malpas v. London & South Western Railw. Co.* 35 *Law J. (N. S.)* 166.

* For the rules peculiarly applicable to transportation of animals,—see *Shaw v. York & North Midland Railw. Co.* 13 *Q. B.* 847; *Kimball v. Rutland & Burlington R. R. Co.* 86 *Vt.* 247; *Wise v. Great Western Railw. Co.* 1 *Hurlst. & N.* 63; 25 *Law J. Exch.* 258; *Peters v. New Orleans, Jackson & Great Northern R. R. Co.* 16 *La. Ann.* 223; *Pardington v. South Wales Railw. Co.* 38 *Eng. L. & Eq.* 432; 1 *H. & N.* 892; 2 *Jur. N. S.* 1210; *Roberts v. Great Western Railw. Co.* 4 *Jur. N. S.* 1240; *Hodgman v. West Midland Railw. Co.* 10 *Jur. N. S.* 678; 33 *Law J. N. S.* 238; 10 *Law Times, N. S.* 609; 13 *Week. Rep.* 1064; *Betts v. Farmers' Loan & Trust Co.* 21 *Wis.* 80; *Powell v. Pennsylvania R. R. Co.* 23 *Pa. St.* 414.

Errors, 1867, *Mobile & Ohio R. R. Co. v. Franks*, 41 *Miss.* 494.

525. A provision in the general railroad law forbidding companies to restrict their common law liability as carriers, may be construed as intended to forbid attempting to avoid it by mere notices, but not express contracts with the owners of goods. *Mich. Supreme Ct.* 1867, *McMillan v. Mich. S. & N. I. R. R. Co.* 16 *Mich.* 79. See also *Michigan Central R. R. Co. v. Hale*, 6 *Id.* 243.

525 a. The provisions of section 36 of the general railroad law of N. Y. (*Laws of 1850*, ch. 140), do not prevent railroad companies from making special contracts with passengers, limiting the liability of such companies. *N. Y. Ct. of Appeals*, 1862, *Bissel v. N. Y. Central R. R. Co.* 25 *N. Y.* 442; *Buffalo Superior Ct.* 1866, *Heineman v. Grand Trunk R. R. Co.* 31 *How. Pr.* 430.

3. Passenger Traffic.

526. Time tables. A railway company issuing time tables erroneously stating that a train will run at a certain hour, are liable to a person who makes his arrangements accordingly, and presents himself at the station and offers to take a ticket. And it makes no difference that the train in question is one which runs beyond their line. If such time tables are issued by the company, knowing the statement to be false, they are liable for the deceit as a fraudulent representation. *Q. B.* 1854, *Denton v. Great Northern Railw. Co.* 5 *El. & Bl.* 860; 2 *Jur. N. S.* 185; 25 *L. J. Q. B.* 129; 34 *Eng. L. & Eq.* 154.

527. Purchase of tickets. The contract between a railroad company and a purchaser of one of its tickets is the same, whether the ticket was purchased at one of the company's stations, or at a station of a contiguous railroad, or of any other authorized agent of the company, and although it was a ticket issued by an agreement with a contiguous road entitling the purchaser to pass over both. *Mass. Supreme Ct.* 1851, *Schopman v. Boston & Worcester R. R. Co.* 9 *Cush.* 24.

528. The fact that a train of cars is hired from a railway company for the purpose of an excursion, for which the tickets were sold by the Secretary of the excursion society will not excuse the company from liability to the passengers for injuries caused by their servants. *Exch.* 1850, *Skinner v. London*,

Brighton &c. Railway Co. 5 *Each*. 787; 2 *Eng. L. & Eq.* 860; 15 *Jur.* 299.

529. It is the duty of every person who desires to remain in a railroad station-house, for the purpose of taking the cars therefrom, to make known such intention to the officers of the company on being requested to do so; and may be removed by their servants if he do not.* *Vt. Supreme Ct.* 1858, *Harris v. Stevens*, 81 *Vt.* 79.

530. If a passenger enters a railroad car with no information concerning the rate of fare, or of the rule in relation thereto, and without making any inquiries, he must be held to pay, as on an implied contract, according to the established rules of the company. *Ma. Supreme Ct.* 1865, *State v. Goold*, 53 *Me.* 279.

531. A ticket dated, and bearing the words "Good only two days after date," ceases to be valid after the expiration of the two days. *Mass. Supreme Ct.* 1861, *Boston &c. R. R. Co. v. Proctor*, 1 *Allen*, 267.

532. Notice by a railroad company that conductors' checks are not transferable from one train to another, is not a regulation of the company affecting the rights of passengers, but simply a warning that they will be carried only according to the terms of their contract. The company have a right to charge different rates, by different trains, independent of any by-law or regulation. *N. J. Supreme Ct.* 1854, *State v. Overton*, 4 *Zabr.* 435.

533. Rights of purchaser. A purchaser of a ticket from a railroad corporation, for passage to a station on its line, is entitled to be carried over the railroad to that station in a reasonable time and manner, agreeably to the reasonable rules and regulations of the corporation. *N. H. Supreme Ct.* 1865, *Johnson v. Concord Railroad*, 46 *N. H.* 213. To

similar effect *N. Y. Supreme Ct.* 1857, *Pier v. Finch*, 24 *Barb.* 514.

534. A passenger who buys a ticket over a railroad by a through train, and takes his passage in such train, acquires by his contract a right to be carried from one point to another by that train. If he voluntarily leaves the cars at a way station, he forfeits all right under his contract, and his ticket or check is no evidence of payment of fare in another train. *N. J. Supreme Ct.* 1854, *State v. Overton*, 4 *Zabr.* 435. To very similar effect, *Ohio Supreme Ct.* 1860, *Cleveland &c. R. R. Co. v. Bartram*, 11 *Ohio St.* 457. And see *Cheney v. Boston & Maine R. R. Co.* 11 *Metc.* 121; 1 *Am. Railw. Cas.* 601.

535. Excursion ticket holder is entitled to return by any excursion train, within the time limited and without being obliged to stop over; and the fact that an excursion train was too full to take him may be no excuse. *Q. B.* 1852, *Chippendale v. Lancashire & Yorkshire Railw. Co.* 21 *Law J. Q. B.* 179. Compare *Hawcroft v. Great Northern Railw. Co.* 8 *Eng. Law & Eq.* 362; 16 *Jur.* 196.

536. Commutation ticket. Where an individual purchases of a railroad company a commutation ticket and takes a receipt which prescribes that the ticket shall be shown to conductors, &c. when required, and no duplicate of the same will be issued, and the ticket itself is held subject to the regulations prescribed in the receipt, the company, upon loss of the ticket by accident so that the commuter is unable to produce it, may exact from him the regular rate of fare. *N. J. Supreme Ct.* 1866, *Ripley v. New Jersey R. R. &c. Co.* 81 *N. J. Law* (2 *Vroom*), 388.

537. Railroad corporations may make reasonable regulations as to the mode of their performance of their duties as carriers of passengers.* *N. H. Supreme Ct.* 1865, *Johnson v. Concord Railroad*, 46 *N. H.* 213.

538. What are reasonable regulations. Regulations made by corporations which are

* A railway ticket is a "chattel," within the statute as to the obtaining chattels by false pretence. *N. P.* 1849, *Regina v. Boulton*, 2 *Carr & K.* 917; 1 *Den. C. C. R.* 508; 1 *Temp. & M.* 201; 19 *Law J. M. C.* 67; 8 *Cow. Cr. Cas.* 576; 18 *Jur.* 1094. And see *Regina v. Beecham*, 5 *Cow. Cr. Cas.* 181.

As to forging and uttering forged tickets, see *Regina v. Boulton*, 2 *Carr & K.* 604; *Queen v. Sharman*, 23 *Law J. M. G.* 51.

As to whether the holder of a ticket is presumed to know what it contains and is bound by it, compare *Wells v. N. Y. Central R. R. Co.* 24 *N. Y.* 181; *Perkins v. N. Y. Central R. R. Co.* 24 *N. Y.* 196; *Smith v. N. Y. Central R. R. Co.* 2d. 222; *Barker v. Coffin*, 81 *Barb.* 556; *Nevins v. Bay State Steamboat Co.* 4 *Bowd.* 225; *Brown v. Eastern R. R. Co.* 11 *Cush.* 97; *Malone v. Boston & Worcester R. R. Co.* 12 *Gray*, 283.

* As to proof of the existence of a regulation, and whether notice of it to the passenger must be shown, see *Vedder v. Fellows*, 20 *N. Y.* 126; *Johnson v. Concord Railroad*, 46 *N. H.* 213; *Clark v. Eighth Avenue R. R. Co.* 83 *Barb.* 657; *Polard v. N. Y. & New Haven R. R. Co.* 7 *Bowd.* 487.

Evidence of numerous departures by the conductor from his instructions, is not proof of waiver by the company, unless knowledge on the part of the governing officers is shown. *Johnson v. Concord R. R.* 46 *N. H.* 213.

That specific instructions by the conductor, contrary to general regulations, are an excuse to the passenger,—see *Pennsylvania R. R. Co. v. McCloskey*, 23 *Pa. St.* 526.

common carriers, affecting the rights, convenience, or conduct of passengers, are not by-laws. Their validity depends on their reasonableness, which is a question for the jury. *N. J. Supreme Ct.* 1854, *State v. Overton*, 4 *Zabr.* 435; 1862, *Morris & Essex R. R. Co. v. Ayres*, 5 *Dutch.* 398.

589. Instances of regulations held reasonable:

That persons may be excluded from the depot unless they purchase tickets.* *Vt. Supreme Ct.* 1853, *Harris v. Stevens*, 31 *Vt.* 79.

That passengers must purchase tickets before starting, or must pay a higher rate in the train; but to justify this discrimination the company must afford every reasonable facility to procure tickets.† *Ill. Supreme Ct.* 1857, *St. Louis &c. R. R. Co. v. Dalby*, 19 *Ill.* 353; *S. P. N. Y. Supreme Ct.* 1861, *Porter v. N. Y. Central R. R. Co.* 34 *Barb.* 358; *Me. Supreme Ct.* 1865, *State v. Goold*, 58 *Me.* 279.

But compare *Crocker v. New London &c. R. R. Co.* 24 *Conn.* 249.

That passengers by a freight train must purchase tickets, and must not pay to the servants on the train. *Ohio Supreme Ct.* 1860, *Cleveland &c. R. R. Co. v. Bartram*, 11 *Ohio St.* 457.

That tickets may be dated on the day of sale, and good only on that day, provided that joint tickets should be good for such further time as might be necessary to enable the holders, by the regular trains of the road, to reach the stations to which such tickets were sold. *N. H. Supreme Ct.* 1865, *Johnson v. Concord Railroad*, 46 *N. H.* 213. Compare *Brooke v. Grand Trunk Railw. Co.* 15 *Mich.* 332.

That passengers must exhibit their tickets whenever requested by the conductor, or may

be ejected from the cars. *N. Y. Ct. of Appeals*, 1857, *Hibbard v. N. Y. & Erie R. R. Co.* 15 *N. Y.* 455.

That passengers must surrender their tickets during the trip. And one who purchases his ticket with knowledge of this custom, is bound to surrender it or pay his fare again. *N. Y. Supreme Ct.* 1856, *Northern R. R. Co. v. Page*, 22 *Barb.* 180.

That way-passengers surrender their tickets before reaching the station nearest to that of their destination, without receiving any check or other evidence of the payment of fare. *N. Y. Ct. of Appeals*, 1859, *Vedder v. Fellows*, 20 *N. Y.* 126. But compare *State v. Thompson*, 20 *N. H.* 250.

That passengers choosing to stop and lie over must procure their tickets to be indorsed. *N. Y. Supreme Ct.* 1858, *Beebe v. Ayres*, 28 *Barb.* 275.

That colored persons be seated separately. *Pa. Supreme Ct.* 1867, *West Chester & Philadelphia R. R. Co. v. Miles*, 55 *Pa. St.* 209.

That merchandise shall not be carried in passenger trains. *Wis. Circ. Ct.* 1854, *Merrill v. Milwaukee & Miss. R. R. Co.* 5 *Am. Law Reg.* 364.

540. Violation. Where a by-law of a railway company imposes certain duties on passengers, and lays correlative duties on the company, the corporation must have strictly complied with the by-law on their part to entitle them to enforce its provisions against the passenger. *Q. B.* 1865, *Jennings v. Great Northern Railway Co.* 1 *Law Rep. Q. B.* 7; 35 *Law J. N. S.* 15; 18 *Law Times N. S.* 254.

541. Ejecting for non-payment or disobedience. A passenger who refuses to pay his fare, or to comply with other reasonable regulations, even if he has paid his fare, or leave the cars, may be removed without unnecessary force, by the conductor or agent of the company.* *N. J. Supreme Ct.* 1854, *State v. Overton*, 4 *Zabr.* 435; *Conn. Supreme Ct.* 1859, *Havens v. Hartford & New Haven R. R. Co.* 28 *Conn.* 69. To similar effect *Iowa Supreme Ct.* 1858, *State v. Chovin*, 7 *Clark (Iowa)* 204; *N. H. Supreme Ct.* 1856, *Hilliard v. Goold*, 34 *N. H.* 230.

542. A passenger who, when asked for his fare, tenders, without explanation, a ticket

* Application of English by-laws making it penal to travel without payment of fare, &c., *Regina v. Frere*, 29 *Eng. L. & Eq.* 143; *Dearden v. Townsend*, 1 *Law R. Q. B.* 10; 35 *Law J. N. S.* 98; 12 *Jur. N. S.* 120; 13 *Law Times N. S.* 323; *Chilton v. London & Croydon Railw. Co.* 5 *Eng. Railw. Cas.* 4; 11 *Jur.* 149; 19 *Law J. N. S.* 89; 16 *Moss & W.* 212.

† Compare for the construction of the provisions of the N. Y. Statutes affecting the fares on the Central Railroad, *Nellis v. N. Y. Central R. R. Co.* 30 *N. Y.* 505; *Chase v. N. Y. Central R. R. Co.* 26 *N. Y.* 523.

The provision of the New York statute (1857) restricting fares, does not apply to horse railroads in cities. *N. Y. Com. Pl.* 1866, *Hoyt v. Sixth Avenue R. R. Co.* 1 *Daly*, 528; *N. Y. Superior Ct.* 1866, *Money Penny v. The Same*, 4 *Add. Pr. N. S.* 357.

* After the train has been stopped for the purpose, the right of the conductor to put him out is not taken away by his then offering to pay the fare. *N. Y. Supreme Ct.* 1854, *People v. Jilson*, 8 *Park. Cr.* 234.

which is void by reason of having a hole punched through it, may be ejected; but only at a regular station. [18 Ill. 400.] *Ill. Supreme Ct.* 1859, *Terre Haute &c. R. R. Co. v. Vanatta*, 21 Ill. 188; 1866, *Chicago & Alton R. R. Co. v. Roberts*, 40 Ill. 508.

543. If put off elsewhere than at a station, the attempt to use such ticket without explanation should mitigate the damages. *Ill. Supreme Ct.* 1859, *Terra Haute &c. R. R. Co. v. Vanatta*, 21 Ill. 188.

544. A statute provision that it shall be lawful for a conductor "to put out of the cars, at any usual stopping place the conductor may elect," any person who refuses to pay his fare or comply with reasonable regulations, &c., implies a prohibition against putting out such persons at any other than the regular stations. *Vt. Supreme Ct.* 1857, *Stephen v. Smith*, 29 Vt. (8 Wms.) 160.

545. In removing a passenger who refuses to pay his fare or exhibit his ticket, the servants of the company are limited to the use of just so much force as may effect that object. *N. Y. Ct. of Appeals*, 1857, *Hibbard v. New York & Erie R. R. Co.* 15 N. Y. 455. See also *State v. Ross*, 3 *Dutch* 224. Compare *Johnson v. Concord R. R.* 46 N. H. 218.

546. The conductor of a city car has no right to eject a passenger without first stopping the car; and if he attempts to do so, the passenger has the right to repel the attempt. *N. Y. Ct. of Appeals*, 1861, *Sanford v. Eighth Avenue R. R. Co.* 28 N. Y. 848.

547. A railroad corporation, which instructs its conductors not to allow any person to ride in any freight car attached to their train, is responsible for the act of one of its conductors in improperly ejecting a person from a freight car while the train is in motion. *Mass. Supreme Ct.* 1866, *Holmes v. Wakefield*, 13 Allen, 580.

548. So of acts of the driver of a car, in wrongfully ejecting a passenger from the platform, even though they be forcible, malicious, and wilful, and not merely negligent. [17 N. Y. 862.] *N. Y. Superior Ct.* 1861, *Meyer v. Second Avenue R. R. Co.* 8 Bosw. 805.

549. If the expulsion was committed by a conductor within the instructions of the company, but was in manner unjustifiable, the company are civilly liable for any circumstances of aggravation, excessive violence, &c., which attended it. *N. Y. Ct. of Appeals*,

1861, *Sanford v. Eighth Avenue R. R. Co.* 28 N. Y. 848.

550. One who is wrongfully removed from the cars, may lawfully reënter them. *Conn. Supreme Ct.* 1855, *Crocker v. New London &c. R. R. Co.* 24 Conn. 249.

551. Care due passengers. That a railway company is bound to use the best precautions in known practical use to secure the safety of their passengers, but not every possible precaution which the highest scientific skill (according to speculative evidence) might have suggested.* *Ford v. London &*

* The company may be held liable for injuries sustained by a passenger riding on an outside platform, when they have not provided seats for him within. *N. Y. Ct. of Appeals*, 1867, *Sheridan v. Brooklyn &c. R. R. Co.* 36 N. Y. 39; 84 *How. Pr.* 217; *Clark v. Eighth Avenue Co.* 36 N. Y. 135; 84 *How. Pr.* 315; 1866, *Willis v. Long Island R. R. Co.* 34 N. Y. 670. S. P. *N. Y. Supreme Ct.* 1861, *Edgerton v. N. Y. & Harlem R. R. Co.* 35 Barb. 839.

Riding upon the outside platform of a horse railroad car is not such a want of ordinary care as to prevent a recovery for an injury sustained by being thrown therefrom, by the negligent driving of the car. *Mass. Supreme Ct.* 1864, *Meezel v. Lynn & Boston R. R. Co.* 8 Allen, 284. Compare *Spooner v. Brooklyn City R. R. Co.* 31 Barb. 419.

Liability for injuries sustained by passengers while passing from car to car. *Buell v. N. Y. Central R. R. Co.* 31 N. Y. 314; *McIntire v. The Same*, 43 Barb. 533; *The Same v. The Same*, 37 N. Y. 287.

Riding in the baggage-car. *O'Donnell v. Allegheny R. R. Co.* 50 Pa. St. 490.

Injury sustained in alighting. *Fuller v. Naugatuck R. R. Co.* 21 Conn. 557; *Pennsylvania R. R. Co. v. Kilgore*, 33 Pa. St. 293; *The Same v. Zebe*, 38 Pa. St. 318; *The Same v. The same*, 37 Pa. St. 420; *Keller v. N. Y. Central R. R. Co.* 24 *How. Pr.* 173; *Foy v. London, Brighton &c. Railw. Co.* 13 *Week Rep.* 293.

In leaping from the train to avoid being carried by. *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Damont v. New Orleans & Carrollton R. R. Co.* 9 La. Ann. 441; *Davis v. Chicago & N. W. R. R. Co.* 18 Ws. 175.

In leaping from the train to avoid disaster. *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Eldridge v. Long Island R. R. Co.* 1 Sandf. 80; *Frink v. Potter*, 17 Ill. 406; *Galena & Chicago R. R. Co. v. Yarwood*, 15 Ill. 468; 17 Id. 509; *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356.

Injury from sudden movement of cars. *Gordon v. Grand street & Newtown R. R. Co.* 40 Barb. 546; *Brown v. N. Y. Central R. R. Co.* 32 N. Y. 597; *Stimson v. N. Y. Central R. R. Co.* 32 N. Y. 833.

Injury to passenger in the station. *Martin v. Great Northern Railw. Co.* 30 Eng. L. & Eq. 473; *Toomey v. London, Brighton & South Coast R. R. Co.* 3 C. B. N. S. 145; *Cornman v. Eastern Counties Railw. Co.* 4 H. & N. 781; 4 *Jur. N. S.* 657; *Nicholson v. Lancashire & Yorkshire Railw. Co.* 34 Law. J. Exch. N. S. 84; *Longmore v. Great Western Railw. Co.* 19 C. B. N. S. 188; *Walker v. Midland Railw. Co.* 14 Law Times, N. S. 796.

Rules of evidence applicable to actions by passengers for injuries sustained. *Laing v. Colder*, 8 Pa. St. 479; *Zemp v. Wilmington & Manchester R. R. Co.* 9 Rich. 84; *Robertson v. N. Y. & Erie R. R. Co.* 22 Barb. 91; *Lawrenceburg & Upper Mississippi R. R. Co. v. Montgomery*, 7 Ind. 474; *Galena & Chicago Union R. R. Co. v. Yarwood*, 17 Ill. 509; *Bird v. Great Northern Railw. Co.* 28 Law J. N. S. Exch. 3;

Southwestern Railw. Co. 2 *Post. & F.* 780; Stokes v. Eastern Counties Railw. Co. 2 *Post. & F.* 691. See also Fuller v. Naugatuck R. R. Co. 21 *Conn.* 557; Chicago &c. R. R. Co. v. George, 19 *Ill.* 510.

552. The fact that a statute expressly requires certain precautions to be taken, does not relieve the company of obligations to take precautions not enumerated, but adapted to promote safety. *N. Y. Ct. of Appeals*, 1866, Brown v. New York Central R. R. Co. 84 *N. Y.* 404.

553. A railroad corporation is liable for injuries to a passenger, caused by a crack in the iron axle of a car, although the defect could not have been discovered by any practicable mode of examination. They are bound to provide roadworthy vehicles. *N. Y. Ct. of Appeals*, 1862, Alden v. N. Y. Central R. R. Co. 26 *N. Y.* 102. Compare Manser v. Eastern Counties Railw. Co. 8 *Law T. N. S.* 585; Pym v. Great Northern Railw. Co. 2 *Post. & F.* 619. But see Galena & Chicago R. R. Co. v. Fay, 16 *Ill.* 558.

554. Railway companies are responsible for injuries arising from the use of defective carriages, notwithstanding such carriages were borrowed from another company. *N. Y. Ct. of Appeals*, 1865, Jetter v. New York and Harlem R. R. Co. 2 *Keyes*, 154.

555. Railroad belonging to the State. The owners of passenger cars used upon a railroad belonging to the State, are liable as common carriers for an injury sustained by a passenger occasioned by the collision of their trains, though the motive power of the road was furnished by the State, and under the control of its agents, through whose negligence the accident happened. *Pa. Supreme Ct.* 1858, Peters v. Rylands, 20 *Pa. St.* 497. Compare Ranch v. Lloyd, 31 *Id.* 358.

556. A carrier of passengers by horse-railroad is bound to exercise at least great care and caution in his business. [Citing many cases.] *N. Y. Supreme Ct.* 1860, Clark v. Eighth Avenue R. R. Co. 32 *Barb.* 657.

557. Unusual trains. Railroad companies, though they are carriers of passen-

gers by their passenger trains, are not to be regarded as common carriers of passengers by their freight trains, unless they make it an habitual business, and persons making arrangements to be carried by such trains impliedly agree to accept and be satisfied with such accommodation, in respect of seats and places for entering and leaving the cars, as are usually found upon freight trains. *N. H. Superior Ct.* 1854, Murch v. Concord R. R. Corporation, 9 *Post.* 9. But compare Lawrenceburg & Upper Miss. R. R. Co. v. Montgomery, 7 *Ind.* 474.

558. Who is a passenger. Neither an entry into the cars, nor the payment of fare, is essential to create the relation of carrier and passenger. Being within the waiting-room, waiting to take the cars, is as effectual to make one a passenger as being within the body of a car. *N. Y. Supreme Ct.* 1863, Gordon v. Grand Street & Newtown R. R. Co. 40 *Barb.* 546.

559. A person crossing the track on his way to the ticket office to procure a ticket for a trip is not a passenger, within the rule. *Ind. Supreme Ct.* 1859, Indiana &c. R. R. Co. v. Hudelson, 18 *Ind.* 325.

560. A house carpenter employed by a railroad company to build a bridge for them, and carried upon a train to his work, is to be regarded rather as a passenger than as a servant. *Ind. Supreme Ct.* 1854, Gillenwater v. Mad. & I. Railway, 5 *Ind.* 840.

So held also of laborers. *Ind. Supreme Ct.* 1856, Fitzpatrick v. New Albany &c. R. R. Co. 7 *Ind.* 486; and see Ohio & Miss. R. R. Co. v. Muhling, 30 *Ill.* 9. But compare Ryan v. Cumberland Valley R. R. Co. 23 *Pa. St.* 384; Little Schuylkill Navigation Co. v. Norton, 24 *Id.* 465; Moss v. Johnson, 22 *Ill.* 638; Russell v. Hudson R. R. Co. 17 *N. Y.* 134; Gliman v. Eastern R. R. Co. 10 *Allen*, 233; Tunney v. Midland Railw. Co. 1 *Law R. C. P.* 291; 12 *Jur. N. S.* 691.

561. A passenger who after having voluntarily performed a duty for the company, resumes his proper place as passenger is again entitled to the protection which the latter relation gives him. *Pa. Supreme Ct.* 1867, Cumberland Valley R. R. Co. v. Myers, 55 *Pa. St.* 288.

562. An officer of the mail service carried by virtue of a contract or obligation, not to himself but to the government, may recover as a passenger for injuries resulting from

Sullivan v. Philadelphia &c. R. R. Co. 30 *Pa. St.* 284; 6 *Am. Law. Reg.* 343.

Whether the company are bound to take precautions against passengers putting arms out of the window, compare Laing v. Colder, 8 *Pa. St.* 488; New Jersey R. R. Co. v. Kennard, 31 *Id.* 208; Todd v. Old Colony R. R. Co. 3 *Allen*, 18.

negligence of the company's servants. *Q. B.* 1851, *Collett v. London & North Western Railw. Co.* 15 *Jur.* 1058; 20 *Law J. N. S.* 411. *S. P. N. Y. Ct. of Appeals*, 1857, *Nolton v. Western R. R. Co.* 15 *N. Y.* 444.

563. So may a drover who, paying freight for cattle on a railroad, is allowed to travel on the train without paying fare for himself. *N. Y. Supreme Ct.* 1859, *Smith v. N. Y. Central R. R. Co.* 29 *Barb.* 182. To the same effect is *Flinn v. Wilmington & Baltimore R. R. Co.* 1 *Houst.* 469.

564. One lawfully riding upon the train by invitation and without charge or payment, may recover as a passenger. *U. S. Supreme Ct.* 1852, *Philadelphia & Reading R. R. Co. v. Derby*, 14 *Hov.* 468; *Mass. Supreme Ct.* 1861, *Todd v. Old Colony R. R. Co.* 3 *Allen*, 18. Compare *Edgerton v. N. Y. & Harlem R. R. Co.* 35 *Barb.* 193, 389.

565. Where the company issue to the publishers of a newspaper, for mutual convenience, free tickets for reporters, a reporter is not to be deemed a trespasser in the use of such a ticket, although it contained the name of another reporter of the same paper, and a notice that it was not transferable, if the evidence is such that the jury might find the company had knowledge of the practice of the reporters to use each other's tickets. *Each.* 1854, *Great Northern R. R. Co. v. Harrison*, 26 *Eng. L. & Eq.* 443; 10 *Each.* 376; 23 *Law J. N. S.* 308; 18 *Jur.* 792.

566. Baggage. It is the duty of railroad companies to keep agents in readiness to receive baggage, and if they allow the agents of other companies to receive baggage at their stations, or their own agents to receive it at the stations of other companies, they are bound thereby. *Mass. Supreme Ct.* 1849, *Jordan v. Fall River R. R. Co.* 5 *Cush.* 69.

567. Evidence. The delivery of a baggage check by a railroad company, is *prima facie* evidence that the company has the baggage. If it is given on a change of passage from one railroad to another and the agent of the road does not find the baggage which is checked, he should give immediate notice to the owner, or the company owning the road on which the passenger embarks, will be held liable. *Ill. Supreme Ct.* 1859, *Davis v. Michigan &c. R. R. Co.* 22 *Ill.* 278. See also *Dill v. R. R. Co.* 7 *Rich.* 158.

568. A railroad corporation will not be held liable for lost baggage, unless it is shown

to have come to its possession, or that the company had contracted in some way to transport it. Voluntary assistance by the agents of the company in looking for the baggage, or an offer by way of gratuity, to pay on account of it, is not an admission of the demand. *Ill. Supreme Ct.* 1859, *Michigan &c. R. R. Co. v. Meyres*, 21 *Ill.* 627.

569. Duty to carry. A railroad company are under obligation to put whatever is delivered by and received from a passenger, as baggage, although it be in excess of the weight carried free, into a baggage car of the train in which the passenger takes his passage, and to transport it along with such passenger, and deliver it to him at the place of destination, in the usual manner of transporting and delivery of baggage.* *N. Y. Supreme Ct.* 1862, *Glasco v. N. Y. Central R. R. Co.* 36 *Barb.* 557.

570. Where the statute requires the company to carry a certain amount of personal effects for each passenger, the company cannot, by refusing to label such a package for a passenger, avoid liability for it, under one of their regulations that they will not be liable for packages not labeled by them. *C. P.* 1858, *Munster v. South Eastern Railway Co.* 4 *C. B. N. S.* 676; 4 *Jur. N. S.* 138; 27 *Law J. N. S. C. P.* 808. To similar effect, *C. P.* 1852, *Great Western Railw. Co. v. Goodman*, 16 *Jur.* 862; 21 *Law J. N. S.* 197; 13 *C. B.* 813. Compare *Williams v. Great Western Railw.* 28 *Eng. L. & Eq. R.* 439.

571. Merchandise carried as luggage. When a passenger who knows that he is only empowered to take a certain quantity of luggage, takes merchandise as luggage, he cannot recover for its loss, unless he shows that the company knew it to be merchandise, and by its regulations, or a special contract, allowed it to be taken. The fact that the package was marked "glass" is not sufficient notice to them.† *Each. Cham.* 1862, *Cahill*

* That the passenger's not accompanying his baggage, but going in an after train, will not excuse the carriers from their ordinary liability; see *Logan v. Pontchartrain Railway*, 11 *Rob. (Louis.) R.* 24.

† What constitutes baggage? *Parmelee v. Fischer*, 22 *Ill.* 512; *Whitmore v. Steamboat Caroline*, 30 *Mees.* 518.

A reasonable amount of money for travelling, and personal use, is included. *Jordan v. Fall River R. R. Co.* 5 *Cush.* 69.

When money is not included. *Orange Co. Bank v. Brown*, 9 *Wend.* 85; *Chicago & Aurora R. R. Co. v. Thompson*, 19 *Ill.* 578; *Davis v. Michigan &c. R. R. Co.* 22 *Ill.* 278; *Whitmore v. Steamboat Caroline*, 30 *Mees.* 518; *Hutchings v. Western & Atlantic R. R. Co.* 25 *Ga.* 61.

v. London & North Western Railw. Co. 8 *Jur. N. S.* 1068. But compare *Shepherd v. Great Northern Railw. Co.* 8 *Each.* 80; 7 *Eng. Railw. Cas.* 810; 14 *Eng. L. & Eq.* 867; 21 *Law J. N. S. Each.* 286.

572. A traveler knowing the regulation to the contrary, took with him into the carriage, as luggage, a box containing watches, which, in the course of the trip he delivered up to an officer of the company, on demand, to be put in the luggage van,—*Held*, that he having taken it as luggage when in fact it was merchandise, the company were not liable in respect to it, although shown to have been subsequently stolen by one of their servants. *H. of L.* 1862, *Belfast & Ballymena Railw. Co. & Londonderry & Coleraine Railw. Co. v. Keys*, 8 *Jur. N. S.* 867.

573. Whatever is carried into a passenger car, as baggage, is so far in the possession of the company as to authorize them to detain it for freight due thereon. *Ga. Supreme Ct.* 1858, *Hutchings v. Western & C. Railroad*, 25 *Ga.* 61.

574. Where a railway issued excursion tickets at a lower rate than the ordinary fare, on condition that no baggage should be taken,—*Held*, that the company had a lien on the luggage of a passenger who had taken an excursion ticket, for its carriage. *C. P.* 1863, *Rumsey v. North Eastern Railw. Co.* 14 *C. B. N. S.* 641; 32 *Law J. N. S.* 244; 8 *Law Times, N. S.* 666; 11 *Week. Rep.* 911.

575. Instructions to servants. Where there has been a complete delivery to, and reception by a railroad company, through an authorized agent, of articles to be transported by them as passenger's baggage, the company is liable for the loss of such articles, and in the absence of notification to the passenger of regulations by the company as to what articles are to be received as baggage, private instructions to its agents to that effect cannot,

in the event of their disobedience, exonerate the company from liability. *Mo. Supreme Ct.* 1867, *Minter v. Pacific R. R.* 41 *Mo.* 503. Compare *Great Western Railw. v. Goodman*, 12 *C. B.* 813; 11 *Eng. L. & Eq.* 546; 21 *Law J. N. S. C. P.* 197; 16 *Jur.* 862.

576. Cloak room. The ordinary deposit of luggage in a cloak room is an implied bailment to deliver it upon a reasonable request in a reasonable time, without reference to the train by which the owner may travel, and if the hours of business are not specified in the receipt given, it is for the jury to say what is a reasonable time, for a demand on Sundays as well as on other days. *Q. B.* 1863, *Stallard v. Great Western Railw. Co.* 2 *B. & S.* 419; 8 *Jur. N. S.* 1076; 81 *L. J. Q. B.* 137; 10 *W. R.* 488; 6 *Lr. T. N. S.* 217.

4. Connecting Companies.

577. Authority conferred upon steam railroad companies in the United States, to carry on their roads, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefore, and to connect with roads of other States so as to form continuous lines, &c. Act of Congress of June 15, 1866, 14 *U. S. Stat. at L.* 66.

578. Contract to carry beyond their route. Although the power of a railroad company to make a contract for the transportation of persons or property beyond their own lines is not expressly granted by the act of incorporation, it may be conferred by implication, as necessary to the proper and profitable exercise of the powers specially enumerated in the charter.* *Mo. Supreme Ct.* 1859, *Perkins v. Portland & C. R. R. Co.* 47 *Mo.* 578.

* As to what amounts to such a contract, and what is the receiving carrier's obligation in respect to loss, &c. in the absence of such a contract,—compare *Muschamp v. Lancaster & Preston, & C. Railw. Co.* 8 *Moss. & W.* 421; *Watson v. Ambergate, Nottingham & Boston Railw. Co.* 8 *Eng. L. & Eq.* 497; 15 *Jur.* 448; *Scotthorn v. South Staffordshire Railw. Co.* 18 *Eng. L. & Eq.* 558; 22 *Law J. Rep. N. S.* 121; 17 *Jur.* 214; 8 *Each. R.* 341; *Crouch v. London & North Western R. R. Co.* 25 *Eng. L. & Eq.* 287; 14 *C. R.* 255; 23 *Law J. N. S.* 73; 18 *Jur.* 148; 2 *Com. Law. R.* 138; *Kyle v. Laurens R. R. Co.* 10 *Rich. Law.* 282; *Wilby v. West Cornwall Railw. Co.* 2 *Hurle. & N.* 708; 4 *Jur. N. S.* 284; 21 *L. J. Each.* 181; *Nutting v. Connecticut R. R. Co.* 1 *Gray*, 503; *Elmore v. Naugatuck R. R. Co.* 34 *Conn.* 473; *Jennison v. Camden & Amboy R. R. Co.* 4 *Am. Law Reg.* 234; *Naugatuck R. R. Co. v. Waterbury Button Co.* 24 *Conn.* 468; *Rome R. R. Co. v. Sullivan*, 25 *Ga.* 228; *Northern R. R. Co. v. Fitchburg R. R. Co.* 6 *Allen*, 264; *Midland Railw. Co. v. Bromley*, 33 *Eng. L. & Eq.* 293; *Brintall v. Saratoga & Whitehall R. R. Co.* 32 *Ft.* 665; *Johnson v. N. Y. Central R. R. Co.* 33 *N. Y.* 610; *Fowles v. Great Western R. R. Co.* 16 *Eng. L. & Eq.* 581; 22 *Law J. N. S.* 76; 7 *Each.* 629; 7 *Railw. Cas.* 421.

Pistols, carried for personal use and protection, are baggage. *Woods v. Devin*, 13 *Ill.* 746; *Davis v. Michigan & C. R. R. Co.* 22 *Id.* 278.

Merchandise and Samples are not included. *Collins v. Boston & Maine R. R. Co.* 10 *Each.* 506; *Pardee v. Drew*, 25 *Wend.* 459; *Hawkins v. Hoffman*, 6 *Hill*, 596.

A watch is included in the term baggage. *Grant v. Newtown*, 1 *K. D. Smith*, 95; *McCormick v. Hudson River R. R. Co.* 4 *K. D. Smith*, 181; *Jones v. Voorhies*, 10 *Ohio*, 145. But as to when watches are not,—see *Miss. Central R. R. Co. v. Kennedy*, 41 *Miss.* 671. As to articles of jewelry,—see *Brooke v. Pickwick*, 4 *Bing.* 218; *McGill v. Rowand*, 3 *Barr.* 451.

Title deeds and valuable papers are not. *Phelps v. London & North Western Railw.* 34 *Law J. C. P. N. S.* 259.

579. It is not *ultra vires* for a railway company to engage to carry beyond their own line by sea or by coach. *Each*, 1858, *Wilby v. West Cornwall Railway Co.* 2 *H. & N.* 703; 4 *Jur. N. S.* 284; 27 *L. J. Each.* 181. Or by the road of another company *N. Y. Supreme Ct.* 1859, *Cary v. Cleveland & Toledo R. R. Co.* 29 *Barb.* 35.

580. The N. Y. act of 1847 (*Laws of 1847*, ch. 270, § 9), providing that where two or more railroads are connected, any company owning either of said roads, receiving freight to be transported to any place on the line of either of said roads so connected, shall be liable as common carriers for the delivery of such freight at such place,—applies as well where one of the connecting roads is beyond the State as where all are within it. It also enables a company to bind itself by a special contract for the delivery of goods within a limited time, at a place on a connecting route, in another State. *N. Y. Ct. of Appeals*, 1862, *Burtis v. Buffalo & State Line R. R. Co.* 24 *N. Y.* 269.

581. Railroad companies, as common carriers, may contract to receive freight at, or convey it to points beyond their own road, and thus become liable for the acts of other carriers, not under their control. In regard to matters not altogether beyond the general objects of their incorporation, and which, upon a liberal construction, may fairly be considered as embraced within them, it is not competent for the company to adopt the acts of their agents and officers so long as they prove beneficial, and when they prove otherwise, shield themselves from responsibility, by resorting to a more limited and literal construction of their corporate powers. *Vt. Supreme Ct.* 1855, *Noyes v. The Rutland & c. R. R. Co.* 27 *Vt.* (1 *Wms.*) 110.

582. A railroad company chartered with full power and authority to do such corporate acts as are permitted to other companies incorporated for similar purposes is authorized to contract to deliver freight at points which could be reached only by passing it over connecting roads; but it has no power to bind the companies owning the connecting roads, without their consent or acqui-

escence. *Ga. Supreme Ct.* 1858, *Rome R. R. Co. v. Sullivan*, 25 *Ga.* 228.

583. The liability imposed by 2 Rev. Stat. of N. Y. 5 ed., 693, § 67,—making companies owning connected roads liable as carriers,—does not extend to charge one company for the act or neglect of another which previously received the goods and injured them. It applies only to the company originally receiving and undertaking to convey the goods.* *N. Y. Supreme Ct.* 1864, *Smith v. N. Y. Central R. R. Co.* 48 *Barb.* 225.

584. A railroad company which receives the cars of another company upon its track, placing them under the control of its agents and servants, and drawing them by its locomotive power, assumes towards the passengers the liability of common carriers of passengers. *Mass. Supreme Ct.* 1851, *Schopman v. Boston & Worcester R. R. Co.* 9 *Cush.* 24.

585. A railroad company, by giving permission to another railroad company to use a portion of their track, do not bind themselves to make their track safe, nor to put it in repair, nor to make any change in its existing state; nor are they under any obligations to the passengers of the other railroad to furnish safe means of transit, and the claim of a passenger, who may be injured for damages is on the company with whom he immediately contracts. *N. H. Superior Ct.* 1854, *Munch v. Concord R. R. Co.* 9 *Post.* 9.

586. Through tickets. Where a company advertise to sell tickets, including passage to a place beyond their route by means of a connecting line of stage coaches, and the ticket bears the name of the conductor of the railway, the jury cannot infer, from merely these facts, that the purchaser of the ticket made a special contract with the company for his safe transportation over such connecting line. It is well understood by the public that the through ticket in such a case is only

* As to countermanding instructions,—see *Withers v. Macon & c. R. R. Co.* 35 *Ga.* 373.

As to recovering back excessive charges, from the company who receives them for the whole route,—see *Parker v. Bristol & c. R. R.* 6 *Each.* 792; 6 *Eng. Railw. Cas.* 776.

* As to the liability of a company to whom the goods are delivered over in course of transportation,—see *Maybin v. South Carolina R. R. Co.* 8 *Rich. Law.* 240. The Same *v. Bradford*, 10 *Id.* 807. *Bradford v. South Carolina R. R. Co.* 7 *Id.* 201. Same *v. Same*, 10 *Id.* 221. *Coxon v. Great Western Railw. Co.* 5 *Furl. & N.* 274. *Judson v. Western R. R. Co.* 4 *Ailen*, 520. *Michaels v. N. Y. Central R. R. Co.* 30 *N. Y.* 564. *Judson v. Western R. R. Co.* 6 *Allen*, 498. *Le Sage v. Great Western Railw. Co.* 1 *Daly*, 806. *Stratton v. N. Y. & New Haven R. R. Co.* 2 *E. D. Smith*, 184. *McMillan v. Michigan S. & N. Ind. R. R. Co.* 16 *Mich. (3 Jona.)* 79, 123. *Manhattan Oil Co. v. Camden & Amboy R. R. Co.* 5 *Abb. Pr. N. B.* 290. *Bristol & Exeter Railw. Co. v. Collins*, 7 *H. of L. Cas.* 194; 24 *Law J. N. S. (Each.)* 41.

for convenience of payment, and that the passenger is to look to each line as the carrier on its own road. It might be otherwise where a participation in profits or joint control is shown. *Conn. Supreme Ct.* 1852, *Hood v. N. Y. & N. Haven R. R. Co.* 22 *Conn.* 1. Compare, however, *Buffitt v. Troy & Boston R. R. Co.* 86 *Barb.* 420.

587. Although the rule may be different for freight, through passenger tickets for a trip over connecting lines, issued in the form of coupons for each successive company, are to be regarded as distinct tickets for each road. The first company is looked upon as merely the agent of the others for selling. *Vt. Supreme Ct.* 1857, *Sprague v. Smith*, 29 *Vt.* 421.

588. Where a company sells tickets which run over the line of other companies, and there is no evidence of any privity on the part of the other companies, except an arrangement to carry passengers having such tickets, the contract is an entire one with the company issuing the ticket, and the holder of it must recover, if at all, from that company. So *Held*, although by their charter they were not liable for loss of luggage, and the luggage appeared to have been lost at the terminus of the line of one of the other companies. *Exch.* 1859, *Mytton v. Midland Railway Co.* 4 *Hurlb. & N.* 615; 28 *L. J. Exch.* 885.

589. A "through ticket" and baggage-check, imply a special undertaking on the part of the company issuing them, to transport the passenger and his baggage as far as the ticket entitles him to go, whether over that company's road or another. And it is immaterial that there is a change of cars at the terminus of the first road. *Ill. Supreme Ct.* 1860, *Illinois Central R. R. Co. v. Copeland*, 24 *Ill.* 382.

590. Where a railroad company sells a through ticket to a passenger, and gives her a through check to transport herself and trunk to a point outside the State by a specified route over lines of road belonging to other companies in other States, with a right on the passenger's part to choose by which of two routes she will go from an intermediate point to the terminus,—a rechecking of her trunk at that intermediate point in consequence of an exercise of that choice does not constitute a new contract on the part of the company, but that act must be held to

have been done in pursuance of the original agreement. *Wis. Supreme Ct.* 1867, *Candee v. Pennsylvania R. R. Co.* 21 *Wis.* 582.

591. Liability for injuries. A railroad company are responsible for an injury, sustained by a passenger on their cars, in consequence of the careless management of a switch, by which another railroad connects with and enters upon their road, although the switch is provided by the proprietors of the other road, and attended by one of the servants, at the expense of such other company. *Mass. Supreme Ct.* 1849, *McElroy v. Nashua & Lowell R. R. Corp.* 4 *Cush.* 400.

592. A railroad company is responsible for an injury occasioned by want of proper care and prudence on the part of its servants in the management of a train which is under their exclusive care, direction, and control, although the train belongs to another company. *Mass. Supreme Ct.* 1861, *Fletcher v. Boston & C. R. R. Co.* 1 *Allen*, 9.

593. A railroad company, which grants the use of its road to another company, is responsible for accidents caused to passengers which it itself carries, by the negligence of the trains of the other company thus running by its permission. *U. S. Supreme Ct.* 1867, *R. R. Co. v. Barron*, 5 *Wall.* 90.

594. The undertaking of a company in carrying the owner of a drove of cattle in a car provided for the purpose in the cattle train is only that of ordinary passenger carriers, and does not render them liable for injuries to the person occurring on the track of another road over which the trains of both companies run, and solely by the fault of the other company. *Vt. Supreme Ct.* 1857, *Sprague v. Smith*, 29 *Vt.* (3 *Wma.*) 421.

5. Contracts between different companies.

595. An agreement that a railway company shall work a particular line of railway belonging to another company and that the property and plant shall be handed over for that purpose, implies a delegation of powers which cannot be made or accepted without authority of parliament. * *Vice Chancery*,

* In such a case the court will not interfere to assist either of the parties in obtaining a collateral benefit, which the agreement would give, or aid them in any manner which would promote the object of the agreement. *Vice Chan. Ct.* 1852, *Great Northern Railw. Co. v. Eastern Counties Railw. Co.* 19 *Eng. L. & Eq.* 224; 9 *Hure*, 306; 21 *Law J. N. S.* 887.

1852, *Winch v. Birkenhead &c. Railw. Co.* 13 *Eng. L. & Eq.* 506; 16 *Jur.* 1085. Compare *Shrewsbury &c. Railw. Co. v. London &c. Railw. Co.* 21 *Eng. L. & Eq.* 319; *Johnson v. Shrewsbury &c. Railw. Co.* 19 *Id.* 584; *Beman v. Rufford*, 1 *Sim. N. S.* 550; 15 *Jur.* 914; 20 *Law J. N. S.* 537; *East Anglian Railway Co. v. Eastern Counties Railway Co.* 7 *Eng. Law & Eq.* 505; 21 *Law J. N. S.* 23.

596. **Connection.** Railroad corporations may make a connection of their lines by virtue of a contract mutually entered into between them, or under the provisions of a statute authorizing such connection. If the connection be under a contract, its continuance in certain cases will be enforced in equity. But where the contract is terminated by the parties, equity will not interfere to enforce its performance. *Ma. Supreme Ct.* 1864, *Androscoggin & Kennebec R. R. Co. v. Androscoggin R. R. Co.* 52 *Me.* 417.

597. **Use of track.** It is competent for the Legislature to authorize one company to use any portion of a railroad track owned by another company, upon making due compensation.* *N. Y. Supreme Ct.* 1864, *Matter of Kerr*, 42 *Barb.* 119.

598. An agreement between two railway companies that one, instead of constructing a separate track into the city which formed the terminus of both lines, should come in on the track of the other, upon certain stipulations as to the payment for the traffic of the new line, may be construed as not confined to the original limits of such new line; but upon its subsequent extension and the introduction of branches and a change in the name of the corporation, it may be held to

apply to the whole of such increased traffic.* *Each.* 1854, *East Lancashire Railw. Co. v. Lancashire & Yorkshire Railw. Co.* 25 *Eng. L. & Eq.* 465; 9 *Each.* 591; 28 *Law J. N. S.* 157.

599. A connection made by one company with another line, under authority which the legislature reserved the power to grant, is not necessarily permanent on the part of the company making it, although the other company on the faith of it makes expensive and permanent arrangements to accommodate the enlarged business. *Mass. Supreme Ct.* 1850, *Boston & Lowell R. R. Co. v. Boston & Maine R. R. Co.* 5 *Cush.* 375.

600. An agreement between two railway companies, which provides for an interchangeable use of the road of each on certain specified terms, need not be by deeds, and may be permanent rather than a revocable license, although it contains words of grant to the company only, and not words of succession. *V. Chan. Ct.* 1851, *Great Northern Railw. Co. v. Manchester &c. Railw. Co.* 10 *Eng. L. & Eq.* 11; 5 *De. Ges. & S.* 138; 16 *Jur.* 146.

601. **Joint regulation of traffic.** A contract between two railroad companies whose routes connect, fixing the rates on both lines for transportation, is not invalid as conveying away part of their franchises.† *U. S. Circ.*

* But as to use of a station compare *London, Brighton &c. Railw. Co. v. London & Southwestern Railw. Co.* 5 *Jur. N. S.* 801; 28 *Law J. N. S.* 321; 7 *Week. Rep.* 591; 4 *De Ges. & J.* 362; 33 *Law Times*, 246.

When an agreement as to the terms of passing over or along each other lines has been entered into between railway companies, the parties will be bound by the terms of the contract, notwithstanding section 92 of the Railways' Clauses Consolidation act, which gives all companies and persons, the right to use railways, upon the payment of the tolls demandable. *Vice Chancery*, 1852, *Great Northern Railw. Co. v. Eastern Counties Railw. Co.* 9 *Hare*, 806; 13 *Eng. L. & Eq.* 224; 21 *Law J. N. S.* 387.

Construction and effect of peculiar statutes and contracts authorizing one railroad corporation to use the track, &c., of another. *Lowell & Lawrence R. R. Co. v. Boston & Lowell R. R. Corporation*, 7 *Gray*, 97; *Great Northern Railw. Co. v. Eastern Counties Railw. Co.* 12 *Eng. L. & Eq.* 224; 9 *Hare*, 806; *Lancashire &c. Railw. Co. v. East Lancashire Railw. Co.* 36 *Eng. L. & Eq.* 84.

† By an agreement between the appellant and another railroad company, the former was to appoint an agent whose duty it should be to receive and collect freight, to sell all passenger tickets, and to receive the revenues accruing from the joint operations of the two companies.—*Held*, that by this agreement there was no partition of the agency as to the sales of through tickets over both roads, and that the appellant was responsible for the manner in which this agent discharged his duty in the sale of such tickets. *Md. Ct. of Appeals*, 1860, *Northern Central R. R. Co. v. Scholl*, 16 *Md.* 381.

But an agreement to apply to parliament for the necessary powers is innocent. *V. Ch. Ct.* 1852, *Winch v. Birkenhead &c. Railw. Co.* 5 *De Ges. & S.* 562; 18 *Eng. L. & Eq.* 506; 16 *Jur.* 1085.

* As to the effect of such a statute,—see *Naugatuck R. R. Co. v. Waterbury Button Co.* 24 *Conn.* 468.

Where the court are authorized, (as under the Massachusetts statute) to appoint commissioners to determine the terms upon which connecting railroad corporations shall transport each others passengers and freight, it is proper for the commissioners to report their award to the court, that it may supervise and control their proceedings; but if it be found that they have acted within the scope of their authority and fulfilled their duty, the court will not examine the questions which they determined, and review their discretion. *Mass. Supreme Ct.* 1850, *Boston & Worcester R. R. v. Western R. R.* 14 *Gray*, 358.

As to what matters the award may include,—see also *Lexington & West Cambridge R. R. v. Fitchburg R. R. Co.* 14 *Gray*, 266.

Ct. (Ind.) 1853, *Columbus &c. R. R. Co. v. Indianapolis &c. R. R. Co.* 5 *McLean*, 450. Compare *Shrewsbury & Birmingham Railw. v. London &c. Railw.* 9 *Eng. L. & Eq.* 394; 2 *Macn. & G.* 324; 4 *Eng. Railw. C.* 513.

Otherwise of a contract restraining one company from continuing its road beyond a certain point. *Hartford & New Haven R. R. Co. v. New York & New Haven R. R. Co.* 8 *Roberts*, 411.

602. **Covenant to stop trains.** A covenant by one of two intersecting railway companies to stop their trains at the junction, passes with a lease of their railway made by the company covenantee, as beneficial to the lessee, since it affects the temporary enjoyment of the estate. *Each.* 1853, *West London R. R. Co. v. London & North Western R. R. Co.* 18 *Eng. L. & Eq.* 481; 11 *Com. B.* 327; 22 *Law J. N. S.* 117; 17 *Jur.* 117.

IX. LIABILITY FOR NEGLIGENCE.*

603. A corporation is liable even for torts committed by their agents, or servants, within the apparent scope of their authority, or in the pursuit of the general purpose of the charter, or where the departure from the general scope of the charter powers is not such as to be notice to all, that the agent is departing from the proper business of the corporation. *Vt. Supreme Ct.* 1855, *Jones v. Western Vermont Railw.* 27 *Vt.* 399; *S. P. Pa. Supreme Ct.* 1866, *Lackawanna & Bloomsburg R. R. Co. v. Chenewith* 52 *Pa. St.* 382.

604. To hold a railroad company responsible for accidents occasioned by the neg-

ligence of its agents, it is not essential to show that the injury resulted from the direct action of the company, in its corporate capacity. A corporation necessarily acts through the instrumentality of its officers and agents; and, if not prohibited by charter, may delegate its authority to them, so far as may be necessary to effect the purposes of its creation. Thus, a superintendent vested with the whole control of the trains, and all arrangements connected therewith, may, by negligence or improper orders, render the company liable. *Tenn. Supreme Ct.* 1859, *Washburn v. Nashville & Chattanooga R. R. Co.* 3 *Head*, 688.

605. Acts of a driver or brakeman on the car of a street railroad in assisting passengers to get upon the car, are deemed within the scope of his employment by the company; and the company are liable for the consequences of any negligence in the manner in which they are performed. *N. Y. Ct. of Appeals*, 1862, *Drew v. Sixth Avenue R. R. Co.* 26 *N. Y.* 49.

606. **Liability as to contractors' work.** A railroad corporation is liable for trespasses committed by their contractors while operating the road in the process of construction. *Ill. Supreme Ct.* 1859, *Chicago & Rock Island R. R. Co. v. Whipple*, 22 *Ill.* 105.

607. The company are liable for the negligence of the servants of a contractor who has undertaken to make a section of the road for a stipulated sum, and who employed his own servants; for the work is done for the benefit and under authority of the company and by their direction. [1 *Bos. P.* 403.] *Mass. Supreme Ct.* 1839, *Lowell v. Boston & Lowell R. R. Co.*, 23 *Pick.* 24; *Ill. Supreme Ct.* 1859, *Illinois &c. R. R. Co. v. Finnigan*, 21 *Ill.* 646. See also *Stone v. Cheshire R. R. Co.* 19 *N. H.* 427; *Virginia &c. R. R. Co. v. Sanger*, 15 *Gratt.* 230.

To the contrary, *Each.* 1849, *Reedie v. The London & North Western Railway Co.* 4 *Each.* 244; 6 *Eng. Railw. Cases* 184; 20 *L. J. Each.* 65; *Vt. Supreme Ct.* 1855, *Clark v. Vermont & Canada R. R. Co.* 28 *Vt.* 103; 1856, *Town of Pawlet v. Rutland & Washington R. R. Co.* 28 *Vt.* 297.

608. The paramount duty of a railroad company through its agents intrusted with the conduct of a train, is to look to the safety of persons and property thereon; subordinate to which is the duty to avoid unneces-

* So far as the liability of railroad companies for injuries caused by their trains depends merely upon the application of those general rules of law which give damages for injuries caused by negligence, it is not within the scope of the present work to present it fully, but the cases in the text indicate the general principles in their relation to corporate character; and the following reference to other cases of particular classes may also be serviceable:

Excessive speed, around curve and through cut. *Reeves v. Delaware &c. R. R. Co.* 30 *Pa. St.* 454.

Obstruction of view of track by cars standing on side track. *Burton v. Philadelphia &c. R. R. Co.* 4 *Harr.* 252.

Too heavy trains. [1 *Carr. & P.* 251; 1 *McLean* 551; *Angell on carriers*, Sec. 592.] *Central M. T. R. R. Co. v. Rockafellow*, 17 *Ill.* 541.

Omission to give warning of starting. *Lucas v. New Bedford & Taunton R. R. Co.* 6 *Gray*, 64.

Fright of animals. *Bordentown & S. Amboy Turnpike v. Camden & Amboy R. R. Co.* 2 *Harr.* 314; *Burton v. Philadelphia &c. R. R. Co.* 4 *Id.* 252; *Peru &c. R. R. Co. v. Haskett*, 10 *Ind.* 409; *Roberts v. Great Western Railw. Co.* 4 *C. B. N. S.* 506; *Manchester &c. Railw. Co. v. Fullerton*, 14 *Id.* 54.

sary injury to animals straying upon the road. *Ky. Ct. of Appeals*, 1859, *Louisville &c. R. R. Co. v. Ballard*, 2 *Met.* 177.

609. Remote causes. Negligence, the immediate result of which is merely that which the company would have lawful right to do intentionally—*e. g.* the negligent misplacement of a switch, by reason of which the train was run on a side track, which the company had a right to run upon,—does not render the company liable for an injury caused while running upon such side track, unless the manner of running the train was negligent. *Ind. Supreme Ct.* 1859, *Indiana &c. R. R. Co. v. Hudelson*, 18 *Ind.* 325.

610. Aggravation of inevitable accident. The corporation may be liable for a death, notwithstanding the impossibility of entirely preventing the accident, if the engineer could have stopped the engine in time to have spared life. *N. Y. Ct. of Appeals* 1861, *Bernhardt v. Rensselaer & Saratoga R. R. Co.* 28 *How. Pr.* 166.

611. Crossings. The proprietors of railroads, when running their engines over crossings, are bound to exert reasonable care and diligence, to prevent injury therefrom to travelers on the road crossed. *Mass. Supreme Ct.* 1848, *Bradley v. Boston & Maine R. R.* 2 *Cush.* 539; *Ga. Supreme Ct.* 1853, *Augusta & Savannah R. R. Co. v. McElmurry*, 24 *Ga.* 75; *Ga. Supreme Ct.* 1855, *Macon & Western R. R. Co. v. Davis*, 18 *Ga.* 679; *S. P.* 1856, *Central R. R. &c. Co. v. Davis*, 19 *Ga.* 437. See also *Barrett v. Midland Railway Co.* 1 *Fost. & F.* 861.

612. Distance between trains. The rules which regulate the distance at which trains shall run from each other on a railroad, are intended solely for the protection of the property of the company, and the safety of their employees and passengers, and not for persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains, in an action to recover damages for an injury done to a person while crossing the railroad track at a place not known or used as a public crossing. *Pa. Supreme Ct.* 1864, *Philadelphia & Reading R. R. Co. v. Spearen*, 47 *Pa. St.* 800.

613. General rules as to contributory negligence. The general rule is, that where the parties are mutually in fault, or, in other words, where negligence of the same nature,

in each party, has coöperated to produce the injury, the party sustaining the loss is without remedy; but this rule is subject to the following qualifications:

1. The injured party, although somewhat in fault, may recover for an injury which could not have been avoided by ordinary care on his part.

2. Where defendant's negligence is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission, not occurring at the time of the injury.

3. Where a party has in his custody or control dangerous implements, or means of injury, and negligently uses them, or places them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury.

4. Where the plaintiff, in the ordinary exercise of his own rights, allows his property to be in an exposed and hazardous position, and it becomes injured by the neglect of ordinary care and caution on the part of the defendant, he is entitled to reparation, because although by neglect he took the risk of injury by mere accident, he did not thereby discharge the defendant from the duty of observing ordinary care and prudence.* *O. Supreme Ct.* 1854, *Kerwhacker*

* What constitutes negligence on the part of a passer by at a crossing. *Macon & Western R. R. Co. v. Winn*, 19 *Ga.* 440. *Johnson v. Hudson R. R. Co.* 6 *Duer*, 638; affirmed, 20 *N. Y.* 65; *Chicago &c. R. R. Co. v. Still*, 19 *Ill.* 499. *Brooks v. Buffalo & Niagara Falls R. R. Co.* 27 *Barb.* 582, note. *Brendell v. Buffalo & State Line R. R. Co.* 27 *Id.* 582, note. *Mackey v. N. Y. Central R. R. Co.* *Id.* 528. *Reeves v. Delaware &c. R. R. Co.* 30 *Pa. St.* 454. *Milwaukee & Chicago R. R. Co. v. Hunter*, 11 *Wia.* 160. *Redf. on Railw.* 894. *Evansville &c. R. R. Co. v. Lowdermilk*, 15 *Ind.* 120. *Ohio &c. R. R. Co. v. Gullett*, *Id.* 487. *Bieseigel v. N. Y. Central R. R. Co.* 38 *Barb.* 429. *Wilds v. Hudson River R. R. Co.* 29 *N. Y.* 815. *Newson v. N. Y. Central R. R. Co.* *Id.* 838. *Ernst v. Hudson River R. R. Co.* 24 *How. Pr.* 97, reversing *S. C.* 33 *Barb.* 159; 19 *How. Pr.* 205. *Keller v. N. Y. Central R. R. Co.* 24 *How. Pr.* 172. *North Pennsylvania R. R. Co. v. Hellman*, 49 *Pa. St.* 60. *Baxter v. Second Av. R. R. Co.* 30 *How. Pr.* 219. *Bieseigel v. N. Y. Central R. R. Co.* 31 *Id.* 181. *Phelps v. Wait* 30 *N. Y.* 76; *Catawissa R. R. Co. v. Armstrong*, 49 *Pa. St.* 186. *Ernst v. Hudson River R. R. Co.* 35 *N. Y.* 9; 3 *Abb. Pr. N. S.* 39; 29 *How. Pr.* 61. *Benwick v. N. Y. Central R. R. Co.* 36 *N. Y.* 183. *Bieseigel v. The Same*, 34 *Id.* 623. *Ments v. Second Av. R. R. Co.* 2 *Rob.* 356. *Baxter v. The Same*, 3 *Id.* 510. *Galena &c. R. R. Co. v. Dill*, 23 *Ill.* 264.

Slaves asleep on the track. *Felder v. Railroad Co.* 2 *McMull.* 403; *Herring v. Wilmington &c. R. R. Co.* 10 *Fred.* 402. *Richardson v. The Same*, 8 *Arch.* 120. And see *Sims v. Macon &c. R. R. Co.* 28 *Ga.* 93. *Children. Ranch v. Lloyd*, 31 *Pa. St.* 558. *Pennsylvania*

v. C. C. & C. R. R. Co. 8 *Ohio St.* 172. Approved, *Conn. Supreme Ct.* 1858, *Isbell v. New York & C. R. R. Co.* 27 *Conn.* 898.

614. Injuries of servants. Though it is the duty of a railroad company to exercise all reasonable care in procuring for its operation, sound machinery and faithful and competent employees, and though they are liable to their servants for the neglect of this duty, yet, after such duty has been discharged, they are not liable to a servant for the injuries occasioned by the neglect of any of his co-servants employed in the same general business of operating the road.* *Md. Ct. of Appeals*, 1863, *O'Connell v. Baltimore & Ohio R. R. Co.* 20 *Md.* 212; *S. P. Ind. Supreme Ct.* 1858, *Indianapolis & Cincinnati R. R. Co. v. Love*, 10 *Ind.* 554; *Indianapolis & Cincinnati R. R. Co. v. Klein*, 11 *Id.* 38; *Ohio Supreme Ct.* 1856, *Mad River & Lake Erie R. R. Co. v. Barber,*

nia R. R. Co. Kelly, *Id.* 372. *Walte v. North Eastern Railw.* 4 *Jur. N. S.* 1300; 21 *Law J. N. S.* 417. *Wright v. Malden & Melrose R. R. Co.* 4 *Allen*, 288. *Mangan v. Brooklyn City R. R. Co.* 86 *Barb.* 280.

Persons of defective powers. *Cleveland & C. R. R. Co. v. Terry*, 8 *Ohio St.* 570.

Fright. Macon & C. R. R. Co. v. Winn, 26 *Ga.* 250. *Wilds v. Hudson River R. R. Co.* 38 *Barb.* 608.

Lack of brakes. *Owen v. Hudson River R. R. Co.* 7 *Bowd.* 329.

Lack of bells and lights on horse car. *Johnson v. Hudson River R. R. Co.* 20 *N. Y.* 65.

* The cases are conflicting upon several points in the application of this rule to Railroad traffic.

As to who are deemed to be in the service of the company, within the rule,—compare *Ryan v. Cumberland Valley R. R. Co.* 28 *Pa. St.* 384; *Little Schuylkill Nav. & C. Co. v. Norton*, 24 *Pa. St.* 465; *Fitzpatrick v. New Albany & Salem R. R. Co.* 7 *Ind. (Port.)* 486; *Degg v. Midland Railw. Co.* 40 *Eng. L. & Eq.* 376; *Russell v. Hudson River R. R. Co.* 17 *N. Y.* 184; *Ohio & Mississippi R. R. Co. v. Tindall*, 18 *Ind.* 366; *Young v. N. Y. Central R. R. Co.* 80 *Barb.* 229; *Seaver v. Boston & Maine R. R. Co.* 14 *Gray*, 466; *Ohio & Mississippi R. R. Co. v. Muhling*, 30 *Ill.* 9; *Gilman v. Eastern R. R. Co.* 10 *Allen*, 283; *Tunney v. Midland Railw. Co.* 1 *L. R.* 291; 12 *Jur. N. S.* 691.

Whether it makes any difference that the injured servant was subordinate to the one whose negligence caused the injury,—compare *Hayes v. Western R. R. Co.* 8 *Cush.* 370; *Little Miami R. R. Co. v. Stevens*, 20 *Ohio*, 415; *Cleveland & C. R. Co. v. Keary*, 8 *Ohio St.* 201; *Louisville & Nashville R. R. Co. v. Collins*, 2 *Due*, 114; *Sherman v. Rochester & Syracuse R. R. Co.* 17 *N. Y.* 158; *Hard v. Vermont & Canada R. R. Co.* 82 *Vt.* 478; *Thayer v. St. Louis, Alton & Terre Haute R. R. Co.* 23 *Ind.* 26; *Pittsburg, Fort Wayne & Chicago Railw. Co. v. Devinney*, 17 *Ohio St.* 197.

Effect of negligence or laches of the person injured. *Skip v. Eastern Counties Railw. Co.* 24 *Eng. L. & Eq.* 396; 23 *Law J. N. S.* 28; 2 *Com. L. Rep.* 185; *McMillan v. Saratoga & Washington R. R. Co.* 20 *Barb.* 449; *Mad. River & Lake Erie R. R. Co. v. Barber*, 5 *Ohio St.* 541; *Moss v. Johnson*, 22 *Ill.* 638; *Snow v. Housatonic R. R. Co.* 8 *Allen*, 441; *Rowland v. Cannon*, 35 *Ga.* 105.

5 *Ohio St.* 541; *Ill. Supreme Ct.* 1859, *Moss v. Johnson*, 22 *Ill.* 638; *Pa. Supreme Ct.* 1867, *Weger v. Pennsylvania R. R. Co.* 55 *Pa. St.* 460; *La. Supreme Ct.* 1851, *Hubgh v. New Orleans & C. R. R. Co.* 6 *La. Ann.* 495; *Each.* 1850, *Hutchinson v. The York, New-castle & Berwick Railw. Co.* 5 *Each.* 343; 14 *Jur.* 337; 19 *L. J. Each.* 296; 6 *Eng. Railw. Cas.* 580.

But compare *Snow v. Housatonic R. R. Co.* 8 *Allen*, 441; *Harrison v. Central R. R. Co.* 81 *N. J.* 298.

615. A railroad corporation is bound to provide proper road, machinery and equipment, and proper servants. This must be done through appropriate officers. If, acting through appropriate officers, it knowingly or negligently employs incompetent servants, it is liable for an injury occasioned to a fellow servant by their incompetency. If it continues in its employment an incompetent servant after his incompetency is known to its officers, or so manifest that its officers, using due care, would have known it, such continuance in employment is as much a breach of duty and a ground of liability as the original employment of an incompetent servant. *Mass. Supreme Ct.* 1866, *Gilman v. Eastern R. R. Co.* 13 *Allen*, 433.

616. The rule that a servant cannot recover applies only where the action is brought for an injury to a servant or agent against the company by whom such servant was himself employed. *N. Y. Ct. of Appeals*, 1859, *Smith v. N. Y. & Harlem R. R. Co.* 19 *N. Y.* 127; *Vt. Supreme Ct.* 1855, *Sawyer v. Rutland & Burlington R. R. Co.* 27 *Vt.* 370; *Pa. Supreme Ct.* 1865, *Catawissa R. R. Co. v. Armstrong*, 49 *Pa. St.* 186; *Each.* 1866; *Warburton v. Great Western Railw. Co.* 36 *Law J. N. S. Each.* 9; 15 *Week. Rep.* 108; 15 *Law Times N. S.* 361; 2 *L. R. Each.* 30.

617. Violation of statute. Though the failure of a railroad company to comply with the duties prescribed by statute does not necessarily make it liable for damages, it still constitutes a *prima facie* case of want of due diligence.* *Ga. Supreme Ct.* 1853, *Augusta & Savannah R. R. Co. v. McElmurry*, 24 *Ga.* 75.

* Civil action for default which is punishable by penalty. *Brown v. Buffalo & State Line R. R. Co.* 22 *N. Y.* 191; *Jetter v. N. Y. & Harlem R. R. Co.* 2 *Koyce*, 154.

RATIFICATION.

1. Corporations may ratify. Upon the application of the general rule of the law of agency, that acts of an agent, although unauthorized, and therefore not originally binding upon the principal, may be rendered obligatory upon him by a subsequent ratification, to the acts of agents of corporations,*—see *Essex Turnp. Corp. v. Collins*, 8 *Mass.* 229; *Hayden v. Middlesex Turnp. Corp.* 10 *Mass.* 403; *Salem Bank v. Gloucester Bank*, 17 *Mass.* 28; *White v. Westport Cotton Manuf. Co.* 1 *Pick.* 220; *Burrill v. Nahant Bank*, 2 *Metc.* 167; *Bulkley v. Derby Fishing Co.* 2 *Conn.* 252; *Witte v. Same*, *Id.* 260; *Church v. Sterling*, 16 *Conn.* 888; *Baker v. Cotter*, 47 *Me.* 236; *Whitwell v. Warner*, 20 *Vt.* 425; *Bank of Pennsylvania v. Reed*, 1 *Watts & S.* 101; *Fox v. Northern Liberties*, 3 *Id.* 103; *New Hope & Delaware Bridge v. Phoenix Bank*, 3 *N. Y.* (3 *Comst.*) 156; *Emmet v. Reed*, 8 *N. Y.* (4 *Seld.*) 312; *Hoyt v. Bridgewater Copper Mining Co.* 2 *Hurlst. Ch.* 253; *Duray v. Insurance Co.* 4 *N. J.* 171; *City of Detroit v. Jackson*, 1 *Dougl. (Mich.)* 106; *Merchants Bank v. Central Bank*, 1 *Kelley*, 428; *Everett v. United States*, 6 *Ala. (Port.)* 166; *Stuart v. London & Northwestern Railway Co.* 15 *Beav.* 518; 10 *Eng. L. & Eq.* 57; *MacLae v. Sutherland*, 3 *Ell. & B.* 1; 25 *Eng. L. & Eq.* 92; *Ridley v. Plymouth & c. Grinding and Baking Co.* 2 *Exch.* 711; *Bargate v. Shortridge* 5 *H. of L. Cas.* 297; 31 *Eng. L. & Eq.* 44.

2. Where a company acts upon and thereby ratifies a parol agreement entered into by their chairman, they are bound by it, though their deed of settlement requires that such contracts should be signed by three directors. *Exch.* 1856, *Reuter v. Electric Telegraph Co.* 6 *Ellis & B.* 341; 37 *Eng. Law & Eq.* 189.

Upon the general grounds upon which contracts are held obligatory upon corporations, notwithstanding irregularities, informalities, want of power, &c., in making them,—see **CONTRACTS.**

3. Although a vote passed at a meeting of directors to do a certain thing, is void because of there not being a sufficient number of directors present, it may nevertheless be afterwards ratified. Thus, if less than a quo-

rum of directors of an insurance company vote to allow certain losses, a vote of a quorum to lay an assessment to pay the losses, will amount to a ratification. *N. H. Supreme Ct.* 1858, *Atlantic Fire Ins. Co. v. Sanders*, 86 *N. H.* 252.

4. An act in the nature of a tort done in behalf of a corporation,—e. g. an assault or imprisonment committed by a servant of a railroad company, in endeavoring to compel a passenger to pay fare,—may be ratified and assumed by the company, so as to render them equally liable as if they had originally directed it. *Exch. Ch.* 18, *Eastern Counties Railway Co. v. Brown*, 6 *Exch.* 314; 15 *Jur.* 297; 20 *Law J. Exch.* 196.

5. Municipal corporations. The ratification by a municipal corporation, of a contract entered into on their behalf, without authority, binds the corporation as effectually as though they had contracted in the first instance. *Cal. Supreme Ct.* 1866, *People ex rel. Alexander v. Swift*, 31 *Cal.* 26.

6. Subscriptions originally irregularly made by municipal corporations to railroads, may be subsequently rendered valid in the hands of *bona fide* holders for value, by ratification. A statute which in respect to such an issue, creates, as part of the municipal government, an officer whose duty it is to attend to the city's interest and concerns in regard to the railroad subscribed to, and who, the act declares, "shall redeem all scrip which has been issued for it," constitutes a ratification. *U. S. Supreme Ct.* 1866, *Campbell v. City of Kenosha*, 5 *Wall.* 194. Compare *City of Atchison v. Butcher*, 3 *Kans.* 104.

7. So does the levy of a tax therefor, by a municipality, and payment of interest. *U. S. Supreme Ct.* 1866, *Supervisors v. Schenck*, 5 *Wall.* 772.

8. That an offer of a reward, made by the mayor in behalf of a city, and subsequently ratified by the city council, is binding on the city, even though the ratification did not take place until after the service for which the reward is claimed, was performed,—see *Crawshaw v. Roxbury*, 7 *Gray* 374.

9. A town, under authority conferred by the legislature, is competent to ratify its former illegal votes, notwithstanding an injunction restrains action under such votes; and by such ratification the illegal votes of the town and all proceedings under them,

*The officers of an association are not competent to ratify their own unauthorized act. *Mich. Supreme Ct.* 1860, *Hutchins v. Kent*, 8 *Mich.* 526.

become binding.* *Conn. Supreme Ct.* 1866, *Waldo v. Portland*, 83 *Conn.* 363.

10. Limit of power to ratify. A corporation may, through its officers, adopt any contract made by *de facto* officers, provided the ratifying officers have authority to make such a contract. *Iowa Supreme Ct.* 1862, *Dubuque Female College v. City of Dubuque*, 18 *Iowa*, 555.

11. A corporation cannot, by a subsequent ratification, make good an act of an agent which they could not in the first instance have directly empowered him to perform. *N. H. Supreme Ct.* 1860, *Downing v. Mount Washington Road Co.* 40 *N. H.* 280; *N. Y. Supreme Ct.* 1846, *Hodges v. City of Buffalo*, 2 *Den.* 110. And see *McCullough v. Moss*, 5 *Id.* 567.

12. A person who voluntarily contributes money to procure soldiers for the quota of a town, when the town could not have lawfully raised money for such an object, cannot sustain an action therefor on a subsequent vote of the town to refund the same. *Mass. Supreme Ct.* 1867, *Estey v. Inhabitants of Westminster*, 97 *Mass.* 324; 1868, *Cole v. Inhabitants of Bedford*, *Id.* 326, note.

13. Although the contract, when originally made, exceeded the powers of the corporation, and therefore, under those powers, could not be made valid by ratification, yet if the corporation afterwards receives additional and sufficient powers from the legislature, it is then competent for them to ratify the contract. *Wis. Supreme Ct.* 1860, *Milles v. Gleason*, 11 *Wis.* 470. See also *Gooday v. Colchester & Stour Valley Railway Co.* 17 *Beav.* 132, 15 *Eng. L. & Eq.* 596; *Edwards v. Grand Junction Railway Co.* 1 *Mylne & C.* 650; *Preston v. Liverpool & C. Railway Co.* 1 *Sim. N. S.* 586, 7 *Eng. L. & Eq.* 124.

14. Where a city issued bonds supposing that its charter had been duly published and thereby put in force; but it appeared that it had not been published; and after it had been duly published the city spent the proceeds of the bonds, and levied a tax to pay

the interest,—*Held*, that the issuance was thereby ratified and that the bonds were valid. *Wis. Supreme Ct.* 1860, *Milles v. Gleason*, 11 *Wis.* 470.

15. The rector and wardens of a church corporation, which consisted of rector, wardens, and vestry merely, being authorized by a vote of the pew proprietors, who were no part of the corporation, borrowed money for the use of the church, and gave a note in their official capacity. Subsequently the pew proprietors and others were incorporated by a statute which repealed the former charter; and, thereafter, the new corporation, by the payment of interest from time to time, and by settlements of accounts between the rector and the church, recognized the debt as due by themselves,—*Held*, that the new corporation were liable on the money counts, if not on the note. *Mass. Supreme Ct.* 1823, *Episcopal Charitable Society v. Episcopal Church in Dedham*, 1 *Pick.* 372.

16. Where an action was brought in the name of a school district not duly organized, and, while it was pending, the district organized itself legally and ratified the prosecution of the action,—*Held*, that the ratification was valid and effectual. *Mass. Supreme Ct.* 1839, *School District No. 1, in Stoneham v. Richardson*, 23 *Pick.* 62.

17. The action of a board of directors *de facto* which has been ratified by the subsequent action of the corporation, is valid, although since their election, but before the action was taken, another board of directors has been chosen; no evidence being offered that the second board of directors ever accepted their trust. *Me. Supreme Ct.* 1855, *Penobscot & Kennebec Railroad Co. v. Dunn*, 89 *Me.* 587.

18. Knowledge of the facts necessary. When it is attempted to sustain a contract against a corporation upon the ground of a corporate ratification of the acts of their agents (originally unauthorized), in making it, it must be shown that the resolution or acts of the corporation, or of their directors, &c., relied on as constituting a ratification, were performed with a full knowledge of all the material facts necessary to an understanding of their rights. *Cal. Supreme Ct.* 1862, *Blen v. Bear River & C. Co.* 20 *Cal.* 602; *Md. Ct. of Appeals*, 1863, *Cumberland Coal & C. Co. v. Sherman*, 20 *Md.* 117; *N. Y. Superior*

* But where selectmen had applied town money to defray their expenses in defending against a criminal prosecution brought against them for alleged official misconduct in making up the check list,—*Held*, that a subsequent vote of the town to ratify this application of the money, was not valid against a voter and tax payer of the town who has not assented to it. *N. H. Supreme Ct.* 1864, *Gates v. Hancock*, 45 *N. H.* 523.

Ct. 1866, *Greer v. Mayor &c. of New York* 4 *Robt.* 675.

19. Where the officers of a joint stock association purchased goods on credit in contravention of a direct prohibition of the articles of the company, which only permitted cash purchases,—*Held*, that the receipt of the goods by the association did not amount to a ratification of the purchase so as to charge the association with liability for their payment, as the members could not be supposed to know that the purchase was made in violation of the articles. *Mich. Supreme Ct.* 1880, *Hotchin v. Kent*, 8 *Mich.* 526.

20. Where the ratification by a corporation of the unauthorized contract of their agent, consists in their having received the consideration of the contract, it must be proved that the corporation, through its proper officer or officers, knew the terms of the contract, and on what account the consideration was by them received. *Md. Ct. of Appeals*, 1836, *Pennsylvania &c. Steam Nav. Co. v. Dandridge*, 8 *Gill & J.* 248.

21. A person indebted transferred a large amount of stock to the defendant corporation a few days after the directors had voted to assume a debt due from him; which transfer was made as security for his indebtedness to the company. It also appeared he owed them a large sum besides the debt. *Held*, that the receipt of this stock could not be treated as a ratification of the act of assuming the debt, in the absence of proof that it was received as security for this particular debt, and that this was known to the directors. *Vt. Supreme Ct.* 1861, *Stark Bank v. United States Pottery Co.* 34 *Vt.* 144.

22. — but may be presumed. The president of a corporation having entered into a contract, beyond his powers, for the purchase of property, a written report was made on the subject, omitting some details of the contract, but not professing to set it forth in full, and was presented to the board of trustees, who unanimously ratified the "report and proceedings," the president being present and voting. Suit being afterwards brought upon the contract against the corporation, they sought to defend on the ground that they acted upon the report alone, and so with information insufficient to make the ratification binding. *Held*, that without evidence of any actual mistake on the part of the board, this defence was insufficient,

the circumstances not being strong enough to overthrow that inference of knowledge which every ratification implies. *Cal. Supreme Ct.* 1862, *Blen v. Bear River &c. Co.* 20 *Cal.* 602.

23. Ratification must be complete. A corporation which has appropriated the benefits of a contract negotiated by an agent, must affirm or rescind *in toto*. They cannot disaffirm it as to those parts which impose an obligation, and affirm it so far as it operates advantageously. *Mich. Supreme Ct.* 1866, *Peninsular Bank v. Hanmer*, 14 *Mich.* 208; *Iowa Supreme Ct.* 1864, *Davenport Savings &c. Association v. North American Fire Ins. Co.* 16 *Iowa* 74.

24. A contract was entered into by a cashier, in behalf of his bank, by which security was given by a person indebted to a creditor of the bank in the interest and on the motion and arrangement of the cashier. In order to procure the assent of the creditor, the cashier executed a bond of indemnity against a prior mortgage on the property covered by the collateral security. The bank received the benefit of this transaction and defended the creditor against a suit to foreclose the prior mortgage. *Held*, in an action by the obligee to recover the amount paid under the foreclosure decree, that the contract of indemnity given by the cashier, having been affirmed by the subsequent action of the bank, was binding upon it. *Mich. Supreme Ct.* 1866, *Peninsular Bank v. Hanmer*, 14 *Mich.* 208.

25. If funds are furnished to an agent, to be used upon certain specified conditions, in the business of the corporation, and the corporation claim to retain the funds, and appropriate the avails to their own use, after becoming aware of the facts, they thereby ratify the act of the agent *in solido*; they cannot subdivide it. *Vt. Supreme Ct.* 1848, *Whitwell v. Warner*, 20 *Vt.* 425.

26. A corporation attempted to organize as such, out of the state of incorporation; and declared dividends, and laid an assessment, and ordered plaintiff's stock to be sold for non-payment. Subsequently, at a meeting within the State, all the acts done at the former meeting were ratified. *Held*, that the plaintiff could not recover the dividends declared on his shares. If the organization was made valid by the ratification, the other proceedings were also made valid, and the sale of

his stock was confirmed. *Me. Supreme Ct.* 1854, *Freeman v. Machias Water Power &c. Co.* 88 *Me.* 343.

27. What will amount to a ratification. The law raises the same presumption as to assent, &c., against corporations as against natural persons. Thus, although where a corporation is sued for damages upon an *executory* contract, plaintiff must show a contract legally binding upon the corporation; yet, where plaintiff, with the knowledge of the officers of the corporation, *has performed* a contract made with one assuming to act as its agent, (and which is not without the scope of the corporate authority) the corporation will be presumed to have ratified the contract, and will not be permitted to deny the authority of the agent. [*Ang. & A.* 216]. *N. Y. Supreme Ct.* 1853, *Fister v. La Rue*, 15 *Barb.* 323; *N. Y. Ct. of Appeals*, 1858, *Peterson v. Mayor, &c.* of N. Y. 17 *N. Y.* 449.

28. No express vote is necessary to constitute a ratification by a corporation of an agent's act. A ratification may be inferred from corporate acts involving or implying a confirmation. *Conn. Supreme Ct.* 1858, *Howe v. Keeler*, 27 *Conn.* 538; *Pa. Supreme Ct.* 1824, *Ridgway v. Farmers' Bank*, 12 *Serg. & R.* 256. But compare *Southard v. Inhabitants of Bradford*, 53 *Me.* 389.

29. Acquiescence. That ratification of acts done in behalf of a corporation may be inferred from the acquiescence of the directors or other governing body of the corporation; from the fact that after the facts have been brought to their knowledge they have taken no measures to show dissent,—see *Woodbridge v. Proprietors of Addison*, 6 *Vt.* 528; *Hoyt v. Thompson*, 19 *N. Y.* 207.

30. After a lapse of ten years, without objection from the board, a deed made by the president of a bank on behalf of the corporation, should be sustained, notwithstanding some deviations from the order of the board of directors authorizing him to make it. A ratification may be presumed. *Fla. Supreme Ct.* 1854, *Union Bank of Florida v. Call*, 5 *Fla.* 409.

31. Where an unauthorized sale is made by the officers of a corporation, it will be deemed ratified by the company, if it appears that the fact of the sale was communicated to the board of directors, who had authority to manage the affairs of the corporation, and was openly talked of at one of their meet-

ings; and that no steps were taken by them to disaffirm the action of the officers who made the sale. *Wis. Supreme Ct.* 1863, *Walworth County Bank v. Farmers' Loan & Trust Co.* 16 *Wis.* 629.

32. In an action against a railroad company for damages in failing to deliver goods, A testified that he was appointed sub-agent by B, the agent of the corporation; that the corporation had frequently given directions in their business to him; that the railroad officials had delivered freight on the production of his receipts; and that the superintendent and president of the company knew of his acts as agent. *Held*, that the evidence was admissible to prove a ratification of his agency. *Ala. Supreme Ct.* 1856, *Alabama &c. R. R. Co. v. Kidel*, 29 *Ala. N. S.* 221.

33. Taking the benefit of the contract. If the corporation take the benefit of a contract negotiated for them, take possession of the property contracted for, &c., this will operate as a ratification of the entire contract. *Mass. Supreme Ct.* 1823, *Episcopal Charitable Society v. Episcopal Church in Dedham*, 1 *Pick.* 372; see also *Randall v. Van Vechten*, 19 *Johns.* 60; *Medomak Bank v. Curtis*, 24 *Me.* 36; *Gooday v. Colchester & Stone Valley Railw. Co.* 15 *Eng. L. & Eq.* 596; 17 *Beav.* 132.

34. Where a committee of a corporation contracted expressly under their private seals, and the whole benefit of the contract resulted to the corporation, and it had from time to time paid money on the faith of the transaction,—*Held*, that the jury might legally infer an adoption of the contract, and a vote to pay the whole sum due under it.* *U. S. Supreme Ct.* 1818, *Bank of Columbia v. Patterson*, 7 *Cranch*, 299.

35. Certain property was purchased by agents of a corporation, who gave two notes in the name of the company, for the price, and the company took possession of the property. *Held*, that this was a ratification of the purchase, and the company could not set up a want of authority. *N. Y. Supreme Ct.* 1843, *Moss v. Rosie Lead Co.* 5 *Hill*, 137. Approved and followed, 1849, *Moss v. McCullough*, 7 *Barb.* 279.

* In such a case no action can be maintained against the committee personally. *N. Y. Supreme Ct.* 1859, *Haight v. Sahler*, 30 *Barb.* 313. See also *Williams v. Gregg*, 3 *Strobh. Eq.* 297.

36. Where the president of a corporation was invested, by a resolution of the company, with general discretionary powers as to all matters in the prosecution of the company projects, and he purchased, in the name and for the use of the corporation, a house, to be used as an office, and the trustees occupied it for the purposes of their meetings during the space of six weeks,—*Held*, that whether such officer was acting without authority or not, the trustees had ratified his acts, and therefore that a subsequent rejection of the contract was of no avail, and could not excuse the company from payment. *Cal. Supreme Ct.* 1858, *Shaver v. Bear River &c. Mining Co.* 10 *Cal.* 396.

37. The occupation of property and payment of rent, by the officers of a municipal corporation, constitutes such an acquiescence as to amount to a ratification of the acts of the officers in taking a lease on behalf of the corporation, though the hiring was unauthorized at the time the lease was made. *N. Y. Superior Ct.* 1866, *Witt v. The Mayor &c. of N. Y.* 5 *Robt.* 249.

38. If one professing to be authorized, mortgage the personal property of a corporation in order to procure a loan, and the money which is obtained thereby comes to the use of the corporation, and is retained by it, that will be evidence of a ratification of the mortgage. *N. H. Superior Ct.* 1841, *Despatch Line of Packets v. Bellamy Manuf. Co.* 12 *N. H.* 205.

39. Where money was borrowed upon a note executed for a bank by its cashier, and the board of directors received and appropriated the proceeds of the note to the use of the bank, or acquiesced in such appropriation, and suffered the note to be several times renewed by notes executed in a similar manner, and made several payments of interest thereon,—*Held*, that the bank had ratified the act of the cashier in giving the note, and such ratification was equivalent to a previous express authority. *Wis. Supreme Ct.* 1862, *Ballston Spa Bank v. Marine Bank,* 16 *Wis.* 120.

40. The treasurer of a ferry company agreed on behalf of the company to let one of their steamboats at a certain rate, with an agreement that, if it were rechartered, any surplus that should be received over the specified rate should be divided between the company and the original hirer. The steam-

boat was rechartered; the corporation allowed it to go into the possession of the second charterer, and to remain in his use for several weeks, and, after its return, collected of such second charterer the sum which he promised to pay therefor, and entered it upon the corporate books. *Held*, that these facts were sufficient to authorize a jury to find a ratification, by the corporation, of the contract of the treasurer. *Mass. Supreme Ct.* 1865, *Brown v. Winnisimmet Co.* 11 *Allen,* 326.

41. Where a debt due to a corporation is settled by some of its officers, without due authority, and the corporation subsequently, with knowledge of the facts, appropriate to their own use, through the regular and authorized officers, notes received from the debtor in consideration of such settlement, such appropriation amounts to a ratification of the settlement, and makes it binding upon the corporation. *N. Y. Superior Ct.* 1859, *Houghton v. Dodge,* 5 *Bosw.* 326; *S. P.* 1860, *Farmers & Citizens' Bank v. Sherman,* 6 *Id.* 181. And see *Hoyt v. Shelden,* 3 *Id.* 267.

42. Making payments. The acts of a treasurer of a church corporation in signing an application for paving a street,—*Held*, to have been ratified and confirmed by subsequent payment of the tax levied upon the corporation to defray the expenses of the work. *Md. Ct. of Appeals,* 1865, *Mayor, &c. of Baltimore v. Bouldin,* 23 *Md.* 328.

43. That a vote of a school district to raise money to pay the premium called for upon an insurance of the school house effected by a trustee without any authority, amounts to a ratification of the trustee's act in insuring the school house,—see *Holt's Appeal,* 5 *R. I.* 603.

44. Accepting report. A personal indebtedness incurred in good faith by trustees without authority from the corporation to incur debt, but incurred in the course of their employment, and of which the corporation have had the benefit, may be assumed by the corporation. And a vote accepting the trustees' report in which such debt is stated as due from the society, is a ratification of the act, and makes the debt that of the corporation. *Mass. Supreme Ct.* 1838, *Hayward v. Pilgrim Society,* 21 *Pick.* 270.

45. That if the directors accept and adopt, without objection, a treasurer's report, in which acceptances are mentioned as outstanding liabilities of the company, they

thereby ratify the acceptances,—see *Parttridge v. Badger*, 25 *Barb. N. Y.* 146.

46. Bringing suit by the corporation upon the contract or act of an officer or agent, is a ratification of such contract or act. See *Planters' Bank v. Sharp*, 4 *Smed. & M.* 75; *Roe v. Pierce*, 2 *Campb.* 96.

47. Defending suit. Resistance by a corporation to an attempt to recover property which they acquired by instrumentality of one acting as their agent,—*Held*, a sufficient recognition of the agency. *Lathrop v. Commercial Bank*, 8 *Dana*, 114.

48. A bank president was in the habit of permitting transfers of stock. He having refused to allow a particular transfer, the party aggrieved sued the bank, and they defended the action on the ground that they were not bound to make such transfer. *Held*, that they had ratified the act of the president in refusing to permit the transfer, and were liable therefor. *N. Y. Ct. of Errors*, 1839, *Commercial Bank of Buffalo v. Kortright*, 22 *Wend.* 348.

49. What does not amount to a ratification. The treasurer of an institution for savings became a party to an assignment for the benefit of creditors, and thereby undertook to release one of the promisors on a joint and several note belonging to the institution, though he had no authority, either general or special, for that purpose. Payments of dividends were subsequently made to the treasurer's successor in office, and endorsed on the note, and entered in the books of the institution, as so much received of the assignees of such promisor; and the treasurer's accounts and cash, including the sum so received, and the notes of the institution, including the note in question, were subsequently examined by a committee and certified as correct. *Held*, that these acts did not amount to a ratification of the release. *Mass. Supreme Ct.* 1850, *Dedham Institution for Savings v. Slack*, 6 *Cush.* 408.

50. The act of a city corporation in employing counsel to defend a policeman charged with an assault, is not an adoption of his act, such as to render the city liable for damages recovered. *Mass. Supreme Ct.* 1861, *Buttrick v. Lowell*, 1 *Allen*, 172.

51. The servant of a railroad company took the plaintiff, a passenger on the company's line, into custody for an alleged breach of one of the company's by-laws, and carried

him before a magistrate. The attorney of the company attended before the magistrate to conduct the charge. *Held*, that this evidence that the company ratified the act of their servant, did not involve a ratification by the company of the arrest. *Each. Ch.* 1851, *Eastern Counties Railway Co. v. Broom*, 6 *Each.* 314; 15 *Jur.* 297; 20 *L. J. Each.* 196.

52. The writing of a letter by the secretary of a railway company for the purpose of effecting a compromise, is not a ratification of the act of the servant who committed the alleged tort. *Each.* 1851, *Roe v. Birkenhead &c. Railway Co.* 7 *Eng. L. & Eq.* 546; 6 *Eng. Railw. Cas.* 795; 7 *Each.* 86.

RECEIVERS.

[The appointment, powers and duties of receivers of corporations are to a great extent regulated by statute provisions, peculiar to the different States, respectively. There are, however, certain general principles which underlie the subject, and are recognized and followed throughout the country. The present chapter contains the adjudications deemed important to explain or illustrate these general rules; while, for special statutes and adjudications depending upon them, as well as decisions illustrative of the procedure followed in a single State, the various books upon the law of *Remedies* within the particular State should be consulted.]

1. Public policy. It is not against public policy, to appoint receivers over corporations. *Md. Ct. of Appeals*, 1861, *State v. Northern Central Railway Co.* 18 *Md.* 193.

2. Jurisdiction to appoint receivers. Notwithstanding a general statute of the State provides that on the dissolution of a corporation, the directors shall be the trustees, and hold the property and rights of the corporation, yet the legislature may, on dissolving a corporation, appoint other trustees.* *N. Y. Chancery*, 1828, *McLaren v. Pennington*, 1 *Paige* 102; *N. Y. Supreme Ct.* 1832, *People v. Manhattan Co.* 9 *Wend.* 851.

3. That a special provision in a charter, authorizing an appointment of a receiver in a particular contingency, does not oust the ordinary jurisdiction of chancery to appoint a receiver,—see *Tripp v. Chard Railway*, 21 *Eng. L. & Eq.* 53.

* Under the Louisiana act of March 15, 1865, the governor of the state may appoint a liquidator to take charge of, and liquidate the affairs of any corporation when its charter has been decreed to be forfeited; provided there is no law existing at the time which directs the mode of liquidation. *La. Supreme Ct.* 1857, *State of Louisiana v. Haymes*, 12 *La. Ann.* 236.

4. What facts warrant the appointment.

Where there are no persons authorized to take charge of and conduct the affairs of a corporation, a court of general equity powers may appoint a receiver to take charge of the effects and preserve them for the benefit of the creditors and stockholders generally. [1 Paige, 587.] So, also, where a fraud is shown in the defendant, and the fund is in danger of being wasted or misapplied. [5 Sim. 485; 1 Barb. 664; Hopk. 429; 8 Johns. Ch. 48.] So, also, to prevent the removal of the property beyond the jurisdiction of the court. [8 Paige, 377.] *N. Y. Supreme Ct.* 1849, *Conro v. Gray*, 4 *How. Pr.* 166. Followed, 1851, *Conro v. Port Henry Iron Co.* 12 *Barb.* 27.

5. If, through the neglect of the stockholders to hold an election, there be no person authorized to take charge of the corporate property, chancery will appoint a receiver at the instance of a stockholder. [2 Brown's P. C. 504; 1 Ball & Beat. 75.] *N. Y. Chancery*, 1829, *Lawrence v. Greenwich Fire Ins. Co.* 1 *Paige*, 587.

6. To warrant appointing a receiver under a statute authorizing a tribunal to appoint a receiver of a corporation upon the ground that "it is so managing its concerns, that the public, or those having funds in its custody, are in danger of being defrauded thereby," it is not necessary that the proofs should show, in the case of a bank, that there is a formed design on the part of the managers to cheat the billholders or the depositors. It is enough that the condition of the bank, from gross and illegal mismanagement, and the temptation to, and danger of fraud growing out of it, is such as to demand interference. *R. I. Supreme Ct.* 1857, *Bank Commissioners v. Rhode Island Central Bank*, 5 *R. I.* 12.

7. What will not. Where it is in the power of the trustees of an incorporated company to sell the stock of delinquents, the fact that the stockholders refuse to aid the company by advancing means to relieve it from pecuniary embarrassments, when called upon for such purpose, furnishes no ground for interfering with the corporate property, by placing it in the hands of a receiver. *Ill. Supreme Ct.* 1863, *Baker v. Backus*, 32 *Ill.* 79.

8. To authorize an injunction and the appointment of a receiver of a corporation,

there must be a well-grounded apprehension of injury about to be done. Where the misconduct alleged in the bill occurred, if at all, several years before, and no act is threatened, nor mischief impending, an injunction and receiver will not be ordered. *N. J. Chancery*, 1846, *Kean v. Colt*, 1 *Halst. Ch.* 365.

9. A receiver will not be appointed on a bill filed by one stockholder of a company against a director, to take charge of moneys alleged to have been improperly received and retained by the said director, no apprehension of loss being alleged in the bill, and the answer alleging that the money was loaned to the director by the board of directors. *N. J. Chancery*, 1847, *Hager v. Stevens*, 2 *Halst. Ch.* 374.

10. In case of foreign corporations. An injunction and receiver will not be granted in New York against a corporation, at the suit of a stockholder, on the ground that the company has been dissolved, and its charter annulled by a foreign government, where the decree of dissolution is not absolute, but declares that the company shall be considered in existence for certain specified purposes; and where the company has property in New York over which the foreign government had no jurisdiction; and it appears that it will be more conducive to the interests of all the stockholders not to disturb the existing management and arrangements of the company, and that to grant the relief asked for would produce irreparable injury to a majority of the stockholders. If the decree of the foreign government is recognized here as binding on the company and its stockholders, and by its terms the property of the company is to be seized and held subject to the order of commissioners therein appointed, to whom all right and title to the property is intended to be passed, a stockholder could not, in the courts of such foreign country, apply for a receiver, and therefore he cannot apply for a receiver here. *N. Y. Supreme Ct.* 1857, *Hamilton v. Accessory Transit Co.* 26 *Barb.* 46.

11. No power will be exercised by the New York Supreme Court, over a foreign corporation, in proceedings commenced by a stockholder, to wind up its affairs; though, for the purpose of preserving its property, the court has ample power to take charge of it and to appoint a receiver. *N. Y. Supreme*

Ct. Sp. T. 1868, *Murray v. Vanderbilt*, 39 *Barb.* 140.

12. Notice of the application requisite. Appointing a receiver on an *ex parte* application, is irregular, except in a very special case, or where the defendant is out of the jurisdiction. And the special circumstances should distinctly appear in the bill or petition. *N. Y. Chancery*, 1881, *Verplanck v. Mercantile Ins. Co.* 2 *Paige*, 438. And see *Devoe v. Ithaca & Owego R. R. Co.* 5 *Paige*, 521.

13. In proceedings to appoint a receiver of an insolvent bank, the fact that no officer of the bank could be found on whom service of notice of a motion for the appointment of a receiver could be made, leaves the court at liberty, in its discretion, to appoint a receiver, without notice to the bank. *N. Y. Superior Ct.* 1860, *Dayton v. Borst*, 7 *Bow.* 115.

14. Who may be receivers. On a voluntary dissolution of a corporation, its officers are not disqualified from being appointed receivers. Even if the corporation is insolvent, if the stockholders are personally liable, the latter, as well as the creditors, are interested in the closing of the affairs. *N. Y. Chancery*, 1840, *Matter of Eagle Iron Works*, 8 *Paige*, 385.

15. An officer of an insolvent bank,—*Held*, not a proper person to be appointed its receiver. *Attorney General v. Bank of Columbia*, 1 *Paige*, 511.

16. Where a stockholder and director was regularly appointed receiver in a suit in which the corporation was plaintiff, and had gone far in the faithful and successful discharge of his trust before objection was made, the court ordered a new reference for an appointment, with liberty to the complainant to propose him anew, he to continue in office in the meantime. *N. Y. V. Chan. Ct.* 1840, *Bank of Monroe v. Schermerhorn, Clarke*, 366.

17. The order appointing a receiver cannot, as against third persons, date or relate back beyond the order appointing him. It is irregular and improper to insert such a clause in the order appointing the receiver.*

* But where the plaintiff brought an action against a corporation and certain of its trustees, and obtained an injunction and an order for a receiver, referring it to a referee to appoint a suitable person; and the trustees who were defendants appealed from this order, and obtained a stay of

[6 *Barb.* 542; 5 *Sandf.* 610; *Id.* 653; 4 *Den.* 80.] *N. Y. Supreme Ct.* 1861, *Artisans' Bank v. Treadwell*, 84 *Barb.* 558.

18. Assignment unnecessary. *In equity*, the receiver takes the property by operation of law under the order of appointment; and an assignment is mere matter of practice, and not necessary to transfer the property [Edw. on R. 83; 8 *Paige*, 386; 9 *Id.* 640; 1 *Smith's Ch. Pr.*, 628, 635;] though it may be otherwise at law. *N. Y. A. V. Chan. Ct.* 1845, *Mann v. Pentz*, 2 *Sandf. Ch.* 257.

19. Under the statutes of New York, the property and effects of the corporation vest in the receiver, and he has power to sue, on giving the requisite security. [2 *N. Y. Rev. Stat.* 464, §§ 41, 42; *Id.* 468, §§ 66-68; *Id.* 41, § 7.] No assignment is necessary. *N. Y. Supreme Ct.* 1847, *Gillett v. Fairchild*, 4 *Den.* 80.

20. Questioning the appointment. If, in proceedings for the appointment of a receiver of an insolvent corporation, sufficient facts are shown to authorize the court to act, the appointment is not to be questioned collaterally. *So Held*, of an appointment by the court of chancery of New Jersey, under the statutes of that State. *N. Y. Superior Ct.* 1860, *Dayton v. Borst*, 7 *Bow.* 115.

21. That chancery will not question the propriety of the appointment of the receiver, upon any collateral inquiry, but only upon motion to discharge the order,—see *Russell v. East Anglian Railway*, 6 *Eng. Railw. Cas.* 501; 3 *Macn. & G.* 125; *Fripp v. Chard Railway*, 21 *Eng. L. & Eq.* 53.

22. A stockholder cannot question the appointment of a receiver of the company, or an order directing a sale of its assets, after having joined in an application for the order of sale. *N. Y. Supreme Ct. Sp. T.* 1860, *Battershall v. Davis*, 31 *Barb.* 323.

23. Powers of receivers. The receiver of an insolvent corporation represents both the creditors and stockholders, and may assert their rights when affected by the

proceedings, and meanwhile brought a suit against the same corporation, and obtained the appointment of a receiver; and the order for a receiver in the first action was subsequently affirmed, and the referee thereupon proceeded under the order, and appointed a receiver.—*Held*, that the latter appointment related back to the time of granting the order of reference, and gave the receiver so appointed a right to possession of the assets, to the exclusion of the other. *N. Y. Supreme Ct. Sp. T.* 1860, *Deming v. N. Y. Marble Co.* 13 *Abbott's Pr.* 66.

fraudulent or illegal acts of the institution. *N. Y. Ct. of Appeals*, 1850, *Gillet v. Moody*, 3 *N. Y. (3 Comst.)* 479. And see *Haxtun v. Bishop*, 3 *Wend.* 18.

24. That the receivers of a corporation are the agents of all the creditors, and their solicitor of record is their common solicitor, and one creditor cannot appear by his own solicitor without leave of court first obtained on a proper case shown,—see *Mechanics' Bank v. Bank of New Brunswick*, 2 *Green, Ch.* 487.

25. The receiver of a corporation who takes title under a statute, and not under the consent of the corporation, should act, contract, and convey in his own name. The name or seal of the corporation is unnecessary. *N. Y. Ct. of Appeals*, 1851, *Hoyt v. Thompson*, 5 *N. Y. (1 Seld.)* 320.

26. That a statutory receiver may ratify a contract made by the corporation after their insolvency or suspension of business, though the contract is one which is declared void as against creditors, but he is not bound to do so,—see *Suydam v. Receivers of the Bank of New Brunswick*, 2 *Green, Ch.* 114.

27. As compared with those of the corporation. The receiver of an insolvent corporation has no greater rights than the corporation, and cannot impeach or disaffirm their lawful and authorized acts. *N. Y. Ct. of Appeals*, 1850, *Hyde v. Lynde*, 4 *N. Y. (4 Comst.)* 387.

28. Legal acts of a corporation bind its receiver. *Ib.* *N. Y. Supreme Ct.* 1857, *Devendorf v. Beardsley*, 23 *Barb.* 656.

29. A receiver is subject to all the rights and equities existing against the company. He takes the place of the company, and stands as the representative of the company.* *N. Y. Supreme Ct.* 1861, *Bell v. Shibley*, 33 *Barb.* 610.

30. Receivers of a bank, appointed for the purpose of closing its concerns, have no rights superior to those which the bank would have had, if the management of its affairs had continued with its directors; and the liabilities of third parties are not chang-

ed by their appointment. *Mo. Supreme Ct.* 1856, *Lincoln v. Fitch*, 42 *Mo.* 456.

31. Receivers are not entitled to the privileges of purchasers for a valuable consideration. An assignment to a receiver passes the rights and property of the corporation precisely in the same plight and condition, and subject to the same equities, as they were held by the corporation.* *N. J. Supreme Ct.* 1852, *Receivers v. Patterson Gas Light Co.* 3 *Zabr.* 283.

32. The receiver of an insolvent banking association has no greater rights than the corporation, but he may file a bill to set aside a void trust-deed of the corporation, and to recover possession of the property assigned. *N. Y. V. Chan. Ct.* 1843, *Leavitt v. Yates*, 4 *Edw.* 134.

33. Where a corporation have made a transfer of securities to secure performance of their illegal contract, their receiver, appointed upon their insolvency, may repudiate the illegal transfer, and claim the securities as part of the fund. *N. Y. Ct. of Appeals*, 1852, *Talmage v. Pell*, 7 *N. Y. (3 Seld.)* 328. And see *Hazelton v. Allen*, 3 *Allen*, 114.

34. As respects set-off. In New Jersey the debtor of an insolvent corporation has the same equitable right of set-off against a claim of the receivers appointed under the act entitled "an act to prevent frauds by incorporated companies," that he had against the corporation at the time of its insolvency. *N. J. Supreme Ct.* 1852, *Receivers v. Patterson Gas Light Co.* 3 *Zabr.* 283.

35. Thus a debtor of an insolvent bank, whether his indebtedness has actually accrued or not at the time of the insolvency, may set off, against his indebtedness to the receivers, either a deposit in the bank, or bills of the bank *bona fide* received by him before the failure of the corporation. The

* Thus directors of an incorporated society, who are by statute, on its dissolution, made trustees, with power to settle its concerns, &c., are entitled to the benefit of the plea of the statute of limitations, if the company would have been. *N. Y. Chancery*, 1823, *Kane v. Bloodgood*, 7 *Johns. Ch.* 90. S. P. 1823, *Roosevelt v. Mark*, 6 *Johns. Ch.* 264. And see *Stafford v. Bryan*, 1 *Paige*, 339.

* The provision of 2 *N. Y. Rev. Stat.*, 469,—that all judgments confessed by a corporation after the filing of a petition for a voluntary dissolution are void as against the receiver,—applies to all judgments, whether rendered upon cognovit, or bond and warrant, or after commencement of suit in the usual way. The object of the statute unquestionably was, to prevent the corporation or its officers from doing any act by which one creditor should get a preference over another, with their assent. And the intention of the legislature would be entirely frustrated if the courts should hold that a preference could be given by the withdrawal of a plea, or the signing of a cognovit, in a suit commenced in the usual form of commencing adversary suits. *N. Y. Chancery*, 1840, *Matter of Waterbury*, 8 *Paige*, 380.

claim of the debtor does not constitute a legal set-off as against the receivers. But in an action at law by the receivers, the defendant will be permitted, under the provisions of the statute to prevent frauds by incorporated companies, to avail himself of the defence. *Id.*

36. In Rhode Island debtors of an insolvent bank in the hands of a receiver, will be allowed to set off debts due to them by the bank whilst it is doing business, against the debts due from them to the bank. But the bills of the bank purchased by them after an injunction has issued against it, preliminary to its winding up, cannot be the subject of set-off and especially if the debtor be a director of the bank, and has purchased in the bills at a discount; the allowance of a set-off of bills, so purchased, being in derogation of the rule of equality in payment, established by statute as between the billholders of an insolvent bank. *R. I. Supreme Ct.* 1858, *Clarke v. Hawkins*, 5 *R. I.* 219. Compare *Colt v. Brown*, 12 *Gray*, 233.

37. In New York the maker of a promissory note held by a corporation, passing, either before or after its maturity, to a receiver on the insolvency of such corporation, has the same right of set-off against such note in the hands of the receiver which he would have against the corporation. *N. Y. Superior Ct.* 1860, *Berry v. Brett*, 6 *Bosw.* 627.

38. The claim of a bank on a note made by a depositor, and discounted by the bank, but not due till after the appointment of the receiver, and the claim of the depositor for the balance on the bank to his credit, is a case of "mutual credit" [1 *Atk.* 230; 3 *T. R.* 507; 4 *Id.* 211; 13 *Ves.* 65; 7 *Durnf. & E.* 378; 5 *Taunt.* 56; 8 *Id.* 156; 1 *Holt's N. P.* 408; 8 *Mees. & W.* 277; 6 *Paige*, 220], and the latter demand may be set off in the receiver's action for the former. *N. Y. Supreme Ct. Sp. T.* 1857, *Jones v. Robinson*, 26 *Barb.* 310.

39. The receiver may sue in his own name as indorsee, a note indorsed in blank; and in his hands it is not liable to a set-off of a subsequent claim against the bank. *N. Y. Supreme Ct.* 1829, *Haxtun v. Bishop*, 8 *Wend.* 13.

40. An insured was indebted by bond and mortgage to an insurance company, whose policy he held at the time of a great con-

flagration, which rendered the company insolvent,—*Held*, that the receiver of the company was bound, under the laws of New York, to liquidate the loss so as to permit a set-off. This was a case for a set-off in equity, both under the provisions of 2 *Rev. Stat.* 354, § 18,—regulating set-off—and under the provisions of 2 *Rev. Stat.* 47,—regulating trustees of debtors,—which latter provisions were by law applicable to the receiver in this case. *N. Y. Chancery*, 1836, *Holbrook v. American Fire Ins. Co.* 6 *Paige*, 220.

41. But a bond and mortgage executed by the insured jointly with a third person, is not within either rule, and the equity of the creditors is equal to it, so it cannot be set off. *Id.*

42. Power to collect assets. Independent of a special statute authorizing receivers to treat as void all acts done in fraud of creditors, and making the parties to such acts liable to the receivers for the same, receivers of corporations have authority to sue for all moneys due to their corporations, and for all property improperly disposed of in violation of the rights of either creditors or stockholders, for the purpose of paying the debts and dividing the surplus, if any, among the stockholders. *N. Y. Supreme Ct.* 1867, *Osgood v. Laytin*, 48 *Barb.* 463.

43. Where dividends of an insolvent corporation were paid entirely out of the capital, the receivers of such corporation can maintain an action against the stockholders, to recover them back, if the funds so misappropriated are required to pay the debts of the corporation. *N. Y. Ct. of Appeals*, 1867, *Osgood v. Laytin*, 5 *Abb. Pr.* 1.

44. In an action brought by a receiver of a bank, appointed under the statute of Rhode Island (*Rev. Sts. Ch.* 146), against its former president, to recover the value of certain securities, belonging to the bank, fraudulently appropriated by him to his own use, it is not necessary to show that some billholder, depositor, or other creditor, or some stockholder, has been injured by the defendant's act, or that the parties, the bank and the defendant, are *in pari delicto*, or that certain shares given by the defendant in consideration of the securities have not been tendered to him; but the receiver may recover the value of such securities upon proof that they belonged to the bank, and were wrongfully

appropriated by the defendant, and that before action brought, they were collected by him, or were due in money by him to the bank. *R. I. Supreme Ct.* 1862, *Hayes v. Kenyon*, 7 *R. I.* 186.

45. A trustee of a banking corporation, appointed after a judgment of forfeiture against the bank, succeeds to all the rights of the corporation. He is required to collect all debts due the bank and apply them to the payment of its liabilities; and an amount due for stock in the bank is as much a debt as any other liability. *Miss. Ct. of Errors*, 1850, *Lewis v. Robertson*, 13 *Smed. & M.* 558.

46. That the trustee of a bank whose charter has been forfeited, may in his own name revive a judgment upon which a claim of the bank is founded, and the claim will be regarded as that of the trustee of the bank,—see *Robertson v. Agricultural Bank*, 28 *Miss.* 287.

47. — to collect subscriptions to stock. Where the legislature have recognized and ratified the appointment of a receiver or assignee, made by the stockholders of a corporation before the forfeiture of their charter, the duty of calling in the unpaid stock to discharge debts, devolves upon him. But if he, fraudulently combining with the stockholders, neglects or refuses to do his duty, a creditor may maintain a proceeding in his own name against the stockholders to enforce a personal liability, making such receiver a party defendant. *Ga. Supreme Ct.* 1850, *Hightower v. Thornton*, 8 *Ga.* 486.

48. In general it is the duty of the receiver of an insolvent corporation, if he supposes the same will be necessary, to require the solvent stockholders to pay up the whole balances due from them on their stock. *N. Y. Chancery*, 1845, *Pentz v. Hawley*, 1 *Barb. Ch.* 122.

49. But when the stockholders' subscription contains no express promise to pay, and they have paid up all the regular calls made by the company, a receiver (appointed under 2 *N. Y. Rev. Stat.* 468, § 86) cannot proceed against a part of such stockholders to recover the balance of their subscriptions. Although unpaid subscriptions are to be deemed part of the capital for the purpose of paying debts, yet the liability of the subscriber (declared by 1 *N. Y. Rev. Stat.* 600, § 5) is to be equitably administered. The proper practice would be for the creditor

who filed the original bill against the corporation, when he finds that the property of the company was not sufficient to pay all the debts, to amend his bill, and make the delinquent shareholders parties to the original bill. *N. Y. Ct. of Appeals*, 1850, *Mann v. Pentz*, 8 *N. Y. (3 Comst.)* 415.

50. That a statute provision authorizing the receivers of an insolvent corporation to sue for and recover any sum due upon any share of capital stock, will be construed as a cumulative remedy merely,—see *Mann v. Currie*, 2 *Barb.* 294.

51. Under the Mississippi act of July 26, 1843,—prescribing the mode of proceeding against incorporated banks for the violation of their corporate franchises,—when the trustee of the dissolved bank has collected funds sufficient to pay all the debts of the bank, his powers, duties and rights, as such officer, cease; and he cannot lawfully either at law or in equity, sue for or collect any of the debts that are due such bank and yet unpaid. *Miss. Ct. of Errors*, 1852, *Coulter v. Roberson*, 24 *Miss.* 278.

52. — to dispose of assets. A receiver (appointed under 2 *N. Y. Rev. Stat.* 464, § 41), unless his powers are restricted by the order appointing him, is absolutely vested with all the property and effects of the corporation, and has power to sell and dispose of the same, and to settle its affairs. *N. Y. Chancery*, 1881, *Verplanck v. Mercantile Ins. Co.* 2 *Paige*, 498.

53. Receivers or trustees of the effects of an insolvent corporation of another State, appointed under the laws of such State, with power to take possession of all the effects of such corporation, “and to sell, convey, or assign its real and personal estate,” have power to sell and assign a debt due to the corporation from a citizen of New York; and such sale and assignment give to the purchaser the equitable right of action, as against the debtor, in the courts of New York. *N. Y. Ct. of Appeals*, 1851, *Hoyt v. Thompson*, 5 *N. Y. (1 Seld.)* 320.

54. That a statutory provision which requires a trustee appointed to wind up a bank, to sell the remaining property and assets of the bank, “within thirty days from the first Monday in November next,” is not mandatory, but directory merely; and, therefore, a sale made after the expiration of the time specified, is sufficient to pass a good

title to the purchaser,—see *Savage v. Walshe*, 26 *Ala. N. S.* 619.

55. Where receivers of a canal company advertised that they would receive proposals for a lease of the canal until a certain day,—*Held*, that they were not bound by the advertisement to lease to the highest bidder before that day, or not to receive proposals afterwards. Receivers are not, like mere executive officers, bound to sell the property for the highest price offered, without regard to the purchaser or the use he will make of the property; but they possess a discretion in the management of the trust property, for the due exercise of which they are responsible to the court appointing them, and in the exercise of which they are under its control. *N. J. Chancery*, 1844, *Knott v. Receivers of Morris Canal &c. Co.* 3 *Green, Ch.* 423. Compare *Potts v. New Jersey Arms &c. Co.* 17 *N. J. Eq.* (2 *C. H. Green*), 395.

56. — to compromise debts due to the corporation. Neither one of several, nor all the assignees in conjunction, appointed to wind up the affairs of the Bank of Illinois, is or are authorized to make a compromise with any debtor of the bank, by which the security of the bank or the trust fund will be diminished, unless some advantage will thereby accrue to the creditors of the bank. *Ill. Supreme Ct.* 1858, *Thomas v. Sloo*, 15 *Ill.* 66.

57. — to liquidate demands against the corporation. The receiver of a corporation (appointed under 2 *N. Y. Rev. Stat.* 464, § 42), should allow every claim against the corporation which he is satisfied is justly due [2 *Id.* 469; 42, § 7]; but no claim which could not have been recovered against it, either at law or in equity. *N. Y. Chancery*, 1838, *Attorney-General v. Life & Fire Ins. Co.* 4 *Paige*, 224.

58. A receiver may be allowed to compromise disputed claims against the company, or to submit them to arbitration in pursuance of the statute; and the court will give him a general power to compromise. *N. Y. Chancery*, 1847, *Matter of Croton Ins. Co.* 3 *Barb. Ch.* 642.

59. Under the *N. Y.* act of 1849, *Ch.* 226, charging stockholders of banks with corporate debts, the proceedings of the receiver to ascertain the debts and liabilities of the association are *ex parte*. His report is not conclusive on the stockholders or other par-

ties. After the matter has been through the hands of the receiver, it is wholly open to litigation before the referee, whose duty it is to make apportionment of the unsatisfied debts of the bank, ascertaining who are liable therefor. The proceedings before the referee and on appeal from his report, are summary, but the act is not on that account unconstitutional as depriving parties of due process of law. Publication, without personal notice, is sufficient to constitute due process, within the meaning of the constitution, where actual personal service would be impracticable. *N. Y. Ct. of Appeals*, 1858, *Empire City Bank Case*, 8 *Abb. Pr.* 192; 18 *N. Y.* 199.

60. A receiver cannot waive a defence. *N. Y. A. V. Chan. Ct.* 1839, *McEvers v. Lawrence*, *Hoffm.* 172.

61. A receiver of an insurance company appointed by the court, has no power to waive the rules of law in allowing claims offered for proof against the company. *Mss. Supreme Ct.* 1864, *Evans v. Trimountain Mutual Fire Ins. Co.* 9 *Allen*, 329.

62. If the receivers disallow a claim, and referees are appointed, stockholders have a right to insist that the defence be continued so long as the receivers are of opinion that it can be made effectual. *N. Y. Chancery*, 1838, *Attorney-General v. Life & Fire Ins. Co.* 4 *Paige*, 224.

63. — in respect to suits. The receiver is the proper person to bring a suit to enforce payment of a debt due the company, in a case where directors or stockholders are not sought to be charged. *N. Y. Chancery*, 1841, *Nathan v. Whitlock*, 9 *Paige*, 152.

64. A receiver, as such, is vested with all the rights of action which the company of which he is receiver had when he was appointed, and he can sue for torts committed before his appointment. *N. Y. Superior Ct.* 1848, *Brouwer v. Hill*, 1 *Sandf.* 629.

65. Under 2 *N. Y. Rev. Stat.* 464, § 42; 469, § 68; 41, § 7,—authorizing a receiver to sue in his own name or otherwise, and recover all the estate, debts, and things in action belonging or due to the corporation,—he may maintain trover for a conversion of the personal property of the corporation committed before his appointment. The term *chase in action* is used in contradistinction to *chase in possession*. It includes all rights to personal property not in possession,

which may be enforced by action; and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of a contract, express or implied. In both cases the debt or damages of the owner is a thing in action. [2 Kent, 351; 1 Chitt. G. P. 99, n.; Toml. L. D.; 5 Price, 217; 1 Lilly, Ab. 378.] *N. Y. Supreme Ct.* 1847, *Gillet v. Fairchild*, 4 Den. 80.

66. A common-law receiver cannot sue in his own name, but may sue in the name of the corporation, and may recover, against directors, penalties given by the charter to the corporation, and, in the event of its dissolution, to its creditors; but the declaration must aver that the suit is brought by the direction of the receiver. *N. Y. Supreme Ct.* 1832, *Bank of Niagara v. Johnson*, 8 Wend. 645.

67. That where a corporate company has done acts in fraud of creditors, or members of the company, and a receiver is afterwards appointed, the remedy by proceedings in disaffirmance thereof should be in the name of the persons defrauded, not that of the receiver,—see *Hyde v. Lynde*, 4 *N. Y. (4 Const.)* 387.

68. The omission of the receiver of an insolvent bank to take and file the oath of office, before suit brought, does not incapacitate him to sue. *N. Y. Superior Ct.* 1860, *Dayton v. Borst* 7 Bosw. 115.

69. It is no objection to the receiver's suit against stockholders, that the creditor at whose instance the receiver was appointed is also a stockholder. *N. Y. A. V. Chan. Ct.* 1845, *Mann v. Pentz*, 2 Sandf. Ch. 257.

70. The plaintiff in an action against a corporation, seeking merely a judgment for a money-demand, joined as a party defendant the receiver of the corporation, alleging that the corporation was insolvent, but demanded no affirmative relief against the receiver. *Held*, that as against the receiver the complaint should be dismissed. If necessary to sue the receiver with or instead of the corporation, the complaint should demand relief against him. The mere fact that A. is the assignee or receiver of B., whether these be natural or artificial persons, will not justify a creditor of B. in bringing A. as a party into every suit against B., or where the rights and the remedies of the plaintiff, so far as appears, end with B.

and the assignee or receiver is not to be affected by the suit, nor to be adjudged or compelled to do any thing for the relief of the plaintiff. *N. Y. Supreme Ct.* 1857, *Arnold v. Suffolk Bank*, 27 Barb. 424.

71. In New York a receiver of a bank, appointed in special proceedings, pending an action by third parties against the bank, is not entitled to interfere directly in the action by giving notice of a motion or conducting an appeal. The receiver is a stranger to the proceedings unless he makes himself a party under sections 121 and 122 of the code of procedure. *N. Y. Ct. of Appeals*, 1868, *Tracy v. First National Bank of Selma*, 37 *N. Y.* 523.

72. Where receivers are appointed, they need not be made parties to a bill to foreclose a mortgage against the corporation which was taken for confessed before the receivers were appointed, and who do not apply for leave to come in and defend. *N. J. Chancery*, 1843, *Willink v. Morris Canal & Banking Co.* 8 Green, Ch. 377.

73. Trustees authorized to close the affairs of a bank after its charter has expired, may use a warrant of attorney to enter judgment given to the bank. *Ohio Supreme Ct.* 1844, *Martin v. Trustees of Belmont Bank &c.* 18 Ohio, 250.

74. The Mississippi statute of 1843, provides that on rendering a judgment of forfeiture, the court shall appoint trustees to collect debts due the bank, &c. *Held*, that actions at law or in equity, pending in favor of a bank at the time the judgment of forfeiture is rendered against it, may be revived in the name of the trustees, and the suit may proceed in their name. *Miss. Ct. of Errors*, 1846, *Nevitt v. Bank of Port Gibson*, 6 Smed. & M. 513, 567.

75. That an assignee cannot revive suits pending in the name of a corporation at the time of forfeiture,—see *Torry v. Robertson*, 24 *Miss.* 192.

76. Control over receivers. That the proceedings of a trustee appointed to settle up the affairs of a bank and authorized to make such compromises as he may deem most advantageous, are subject to the revision and control of a court of equity; and may be rejected or condemned,—see *Morris v. Thomas*, 17 *Ill.* 112.

77. Receivers, under the New York act of 1836,—which provided for the adjustment

of the affairs of certain insurance companies in the city of New York that were rendered insolvent by the great fire,—though they are not appointed by the Court of Chancery, are under its control. *N. Y. Chancery*, 1836, *Matter of Globe Ins. Co. 6 Paige*, 102; *Holbrook v. American Fire Ins. Co. Id.* 220.

78. Removal of receiver. A receiver of the assets of an insolvent bank, appointed pursuant to the provisions of § 41 of the Ohio act of February 24, 1845 (1 S. & C. Stat. 181), "to incorporate the State bank of Ohio, and other banking companies," cannot, under existing laws, be removed from his office at the pleasure of the State officers by whom he was appointed. *Ohio Supreme Ct.* 1861, *State v. Claypool*, 18 *Ohio St.* 14.

79. Appointment of substitute. Under section 62 of the Maine act of amendment of Rev. Stat. of 1841, the number of receivers to be appointed by the court, to take possession of the property of a bank, on application of the Bank Commissioners, in case they deem the bank unsafe, is left to the discretion of the court, or of the judge by whom the appointment is made. Hence if one of three receivers is removed or resigns, it is discretionary with the court to appoint, a substitute, or allow the two remaining to act without the appointment of another. *Ma. Supreme Ct.* 1861, *Wiswell v. Starr*, 50 *Ma.* 881.

RECORDS.

- I. HOW KEPT.
- II. USE AS EVIDENCE.
- III. INSPECTION.

I. HOW KEPT.

1. Necessity of keeping corporate records. That a township is a corporation, represented by trustees, who are required to keep a true record of all their proceedings, and can speak only by their record,—see *Board of Commissioners of Fayette County v. Chitwood*, 8 *Ind.* 504.

2. It is not necessary that the votes or decisions of directors of banking corporations should be recorded, unless they are required to be by the charter or by-laws. If recorded, they must be proved as other proceedings of record are proved, by producing the books

or accounting for their absence. If not recorded, parol evidence may be admitted to prove what was done. *N. H. Superior Ct.* 1851, *Edgerly v. Emerson*, 3 *Forst.* 555.

3. That records of the proceedings of a board of directors can be made subsequently to their being held, and will relate back to the time of the transaction,—see *Commercial Bank of Manchester v. Bonner*, 13 *Smed. & M.* 649.

4. Though the by-laws of a corporation require all its business to be entered on its books, yet a neglect by one of its agents to enter his claims does not operate as a forfeiture of them, but subjects him merely to liability for the damage actually caused to his principal thereby. *N. Y. Superior Ct.* 1859, *Rider v. Union India Rubber Co.* 5 *Bow.* 85.

5. By whom they should be kept. The secretary of the corporation the proper person to have possession of, and prove the books of the company. See *Smith v. Natchez Steamboat Company*, 1 *How. (Miss.)* 478.

As to the powers and duties of Secretaries of corporations,—see SECRETARY.

6. — *pro tem.* In Vermont, a record of a vote of a village corporation, made by the village clerk, and placed upon the records by a clerk *pro tem.* under the inspection and direction of the clerk, is legal evidence of such vote, notwithstanding the clerk *pro tem.* has not been sworn. It is incident to all such corporations to appoint a clerk *pro tem.* to keep minutes of their proceedings, if the regular clerk is temporarily absent; and if they cause their proceedings to be entered of record, under the direction of the clerk, such record is evidence of their proceedings. *Vt. Supreme Ct.* 1839, *Hutchinson v. Pratt*, 11 *Vt.* 402.

7. Oath. Under an act regulating manufacturing corporations (*Mass. St.* 1808, ch. 65) which provided that the corporations created by it, should have power from time to time to choose a clerk, who should be sworn,—*Held*, that an omission of the clerk to take the oath of office did not render the records of the corporation incompetent evidence of their proceedings, and could not impair the rights of third parties claiming derivative interests under the votes of the corporation. Such a provision is similar in its nature to those requiring officers to be chosen on a certain day, or requiring treasurers and cashiers to give bonds, which are deemed to be di-

rectory only. They are intended only for the security of the corporation, and to insure its due regulation, and fidelity on the part of its officers, but not as essential to the validity of corporate acts or the performance of official duties. They cannot be construed as conditions precedent, unless they are made so by the express terms of the statute. *Mass. Supreme Ct.* 1852, *Stebbins v. Merritt*, 10 *Cush.* 27.

8. **Requisites of a journal.** The journal of a public body—*e. g.* the council of a municipal corporation—cannot be amended by a vote passed by a subsequent board, so as to recite an order as passed which before appeared only as reported; nor is it competent to prove by extrinsic testimony that an ordinance of such a corporation was voted upon and passed, where the journal of the council shows only that the ordinance was reported. *Ky. Ct. of Appeals*, *City of Covington v. Ludlow*, 1 *Meta.* 295.

9. — of minutes of meeting. In one book of records of a school district, it did not appear that, at a certain meeting, there was an election of a prudential committee. Another record was introduced, which the clerk of the district testified contained a true record of the meeting, and in which the election of such a committee was entered. The clerk further testified that both these records were made by him, soon after the meeting, from loose memoranda put on paper at the time of the meeting. *Held*, that the election of the committee was duly proved; the records not being contradictory, and both being originals, and the one which contained the entry of the election being of equal validity with the other. *Mass. Supreme Ct.* 1888, *Williams v. School District in Lunenburg*, 21 *Pick.* 75.

10. Where the record of a town meeting, held on a certain day, omitted to state that it was adjourned to the following day,—*Held*, that there was not legal proof of the election of a person chosen as town clerk on the day to which the meeting adjourned; and that such person could not amend the record of the first meeting; and that parol evidence of an adjournment was inadmissible. *Mass. Supreme Ct.* 1824, *Taylor v. Henry*, 2 *Pick.* 397.

11. Under statutes requiring that the minutes of corporate meetings should be entered in a book and signed by the chairman of the meeting,—*Held*, that minutes signed

by the chairman were sufficiently authenticated, although it appeared that he did not affix his signature at the meeting, but upon a subsequent day. *Q. B.* 1848, *Miles v. Bough*, 8 *Gale & D.* 119; 12 *Law J. N. S. Q. B.* 74; 7 *Jur.* 81. Followed 1852, *Ingdis v. Great Northern Railway Co.*, 16 *Eng. Law & Eq.* 55; 16 *Jur.* 895. And see *West London Railway Co. v. Bernard*, 3 *Ad. & E. N. S.* 873; 8 *Jur.* 144; 13 *Law J. N. S. Q. B.* 68. *N. W. Railway Co. v. McDaniel*, 14 *Jur.* 987.

12. — of church record. A book being produced as the record of a church, it appeared that, during the whole time it was kept, a certain individual was the minister of the parish and pastor of the church; that the book was kept wholly or chiefly by him; that it contained a regular statement, in proper form for a record, of the admission of members, the choice of officers, and the transaction of the regular business of the church; and that no other book was kept as a record. *Held*, that the book was the record of the church. *Mass. Supreme Ct.* 1881, *Sawyer v. Baldwin*, 11 *Pick.* 492.

13. — of register of shareholders. In a case under an English statute directing companies to keep a "register of shareholders," to be authenticated by the company seal, and which book was declared *prima facie* evidence of who were shareholders, the defendants' register book consisted of several large volumes. The last one of them only was authenticated by the company seal; but it contained a recapitulation of the contents of the previous volumes. *Held*, that this was sufficient. *H. of Lords*, 1852, *Ingdis v. Great Northern Railw. Co.* 16 *Eng. L. & Eq.* 55; 16 *Jur.* 895.

II. USE AS EVIDENCE.

14. **Admissibility of corporate records, as evidence.** Upon the general rule that records of a corporation regularly and properly kept are competent evidence of the corporate acts,—see *Highland Turnpike Co. v. McKean*, 10 *Johns.* 154; *Penobscot & Kennebec R. R. Co. v. Dunn*, 89 *Me.* 587; *Hudson v. Carman*, 41 *Me.* 84; *Penobscot R. R. Co. v. White*, 41 *Me.* 512; *White Mountain Railroad v. Eastman*, 84 *N. H.* 124; *N. A. Building Assoc. v. Sutton*, 35 *Pa. St.* 468; *Banks v. Darden*, 18 *Ga.* 318; *Goodwin v. U. S. Ann. & Life Ins. Co.* 24 *Conn.* 591; *People v. Oakland County*

Bank, 1 *Dougl.* 282; *Fitch v. Pinckard*, 4 *Scam.* 69.

15. — of organization. That they are competent to prove the organization and existence of the corporation,—see *Grays v. Lynchburg & Salem Turnp. Co.* 4 *Rand.* 578; *Buncombe Turnp. Co. v. McCarson*, 1 *Dev. & B.* 306; *Ryder v. Alton & Sangamon R. R. Co.* 18 *Ill.* 516; *Hudson v. Carman*, 41 *Mo.* 84.

16. — of by-laws. By the charter of a bank the president and directors were authorized to make all such by-laws and regulations for the government of the corporation, its officers and members, as they or a majority of them should from time to time think fit. In an action by the bank, upon a certain writing being given in evidence, headed "By-Laws," and which purported to have been the by-laws of the bank while its business was transacted under articles of association and before the act incorporating it was passed, it was objected that there was no evidence that the writing produced had been adopted as the by-laws of the corporation, there being no entry or memorandum of such adoption among the minutes of its proceedings. *Held*, 1. That the authority to make by-laws being specially delegated to the president and directors, and no particular mode of exercising it being prescribed by the charter, it was no more necessary that their adoption should be in writing, than the acts or contracts of any other duly authorized agents.

2. That it being proved by the cashier, that the by-laws in question were always reputed to be the by-laws of the corporation, and with the exception of two articles, were so observed by him; and by a director, that they were delivered to him as such upon his election, and that decisions by the board of directors were made agreeably to them in any question upon their conduct, this was a sufficient adoption of the by-laws by the president and directors. *Md. Ct. of Appeals*, 1827, *Union Bank of Maryland v. Ridgely*, 1 *Harris & G.* 324.

17. — of votes. The records of a school district are proper and legitimate evidence of votes for such district, in a suit to which it is a party. *Conn. Supreme Ct.* 1839, *South School District v. Blakeslee*, 18 *Conn.* 227.

18. — of officer's authority. Original minutes of the proceedings of trustees, who

were the officers of a corporation, made at the time, by one of their number, by the authority of the board, are competent evidence to prove that they had empowered the treasurer to make contracts therein specified; especially after the decease of the trustee who made the entries. *Mass. Supreme Ct.* 1838, *Hayward v. Pilgrim Society*, 21 *Pick.* 270.

19. — of membership. The books of a joint stock company,—*Held*, admissible in evidence against a person representing himself to be a proprietor of the company, on the question of his membership. *V. Chan. Ct.* 1849, *Exp. Maguire, In re St. George Steam Packet Co.* 8 *De Gez & S.* 31; 18 *Law J. N. S.* ch. 256; 18 *Jur.* 678.

20. Entries of admission into trades-guilds or separate corporations,—*Held*, to be evidence to go to the jury of the existence of an aggregate corporation, compounded of the various separate corporations, although there was no proof of admissions into the aggregate body, and it had no common seal. The question whether a body is a corporation, or a voluntary society, is one for the jury. *K. B.* 1780, *Company of Carpenters &c. v. Hayward*, 1 *Dougl.* 373.

21. In a case of pedigree, an entry in the books of the Merchant Tailors' Company, that T. C. was admitted a freeman of that company by the description of T. C. of S. street, son of J. C. deceased,—*Held*, admissible not only to prove the fact that T. C. was admitted a freeman, but that the company received him by that description. *C. P.* 1838, *Collins v. Maule*, 8 *Car. & P.* 502.

22. — of stockholders' liability. In a suit for the subscription to a corporation stock, the corporation subscription books and orders for payment are proper evidence to establish liability. *Ill. Supreme Ct.* 1856, *Peake v. Wabash R. R. Co.* 18 *Ill.* 88. And see *Partidge v. Badger*, 25 *Barb. (N. Y.)* 146; *Marsh v. Collnett*, 2 *Exp.* 665.

23. In an action to recover calls on a subscription to stock, the books of the corporation are competent evidence against the corporation, to prove the amount of the installments, as well as the calls. *Pa. Supreme Ct.* 1859, *Bavington v. Pittsburgh & Steubenville R. R. Co.* 34 *Pa. St.* 358.

24. The records of the clerk of a railway company, of the proceedings of the directors, in making assessments on the shares in the

capital stock, may be used as evidence by the company in suits for calls, against one who subscribed for shares, and was one of the grantees of the charter and a director at the time of making such calls, and who exercised the rights of a shareholder from the outset.* *N. H. Supreme Ct.* 1856, *White Mountains R. R. Co. v. Eastman*, 84 *N. H.* 124.

25. — of town expenditures. Books kept by selectmen, containing accounts of the finances and expenses of the town, are admissible in evidence. *N. H. Superior Ct.* 1845, *Thornton v. Campton*, 18 *N. H.* 20.

26. — of bank dealings. Entries in the books of a bank by a person since deceased, made in the usual course of business, and by one whose duty it was to make them, and who had no interest to misrepresent the facts, are admissible in evidence. *N. H. Supreme Ct.* 1864, *Wheeler v. Walker*, 45 *N. H.* 355.

27. That the books of a bank are evidence of the receipts and payments stated,—see *Union Bank v. Knapp*, 8 *Pick.* 96.

28. Bank books, proved to have been regularly kept, and open to the inspection of the president of the bank and probably examined by him, are admissible in evidence in an action against him by the receiver of the bank to recover of him on an account due the bank as it stood on their books; as also are the returns made by the bank to the bank commissioners during his presidency, which could not have been made up without including, with the amount of indebtedness from directors to the bank, the account against the president, and which were examined and allowed by him. *R. I. Supreme Ct.* 1862, *Olney v. Chadsey*, 7 *R. I.* 224.

29. The minute book of a bank directors' meeting, regularly kept by the cashier, an authority recognized by the president, is good evidence of who were present at and what was done by the board, at a particular meeting, as between one who was president and director of the bank at the time the minute was made, and a receiver of the bank who represents the corporation. *Id.*

* That where a book is made by statute *prima facie* evidence of proprietorship of shares in the corporation, it is admissible as such, though it has been irregularly kept,—see *London Grand Junction Railw. Co. v. Freeman*, 3 *Mann. & G.* 696; 3 *Eng. Railw. Cas.* 468; *Birmingham & C. Railw. Co. v. Locke*, 1 *Q. B.* 256; and is even evidence for the company in an action for calls,—see *London & Brighton Railw. Co. v. Fairclough*, 8 *Scott, N. R.* 68; *London & Grand Junction Railw. Co. v. Graham*, 1 *Q. B.* 271.

30. Memoranda made on the books of a bank, at a meeting held by individuals not shown to have been legally elected as directors, are not admissible in evidence in an action by a receiver of a bank against the president to recover the value of securities belonging to the bank, fraudulently appropriated by him. *R. I. Supreme Ct.* 1862, *Hayes v. Kenyon*, 7 *R. I.* 136.

31. — of proprietary transfers. That the records of proprietary companies, showing the partition and transfer of their common lands, are evidence of their disposal of such lands,—see *Atkinson v. Bemis*, 11 *N. H.* 44; *Woods v. Banks*, 14 *Id.* 101. But compare *Hart v. Gage*, 6 *Vt.* 170. See also PROPRIETARY COMPANIES.

32. — of notice of meeting. A record by a town clerk, of the proceedings of a town meeting, in enacting a by-law authorized by statute to be enacted by towns at meetings specially warned for that purpose, stating that, "at a special meeting of the inhabitants of the town, legally warned and held for the purpose of making the by-law in question, it was voted, &c," is *prima facie* evidence that such meeting was specially warned for the purpose of making such by-law.* *Conn. Supreme Ct.* 1857, *Isbell v. N. Y. & New Haven Railroad Co.*, 25 *Conn.* 556.

33. For or against whom they may be read. Corporation books are evidence in a suit between the company and a corporator. *Del. Superior Ct.* 1843, *Jefferson v. Stewart*, 4 *Harring.* 82.

34. The books of a corporation containing a register of their public acts, are evidence between the members of the body, or against the body, but not in their favor, in a suit brought against the body by a stranger. *Ala. Supreme Ct.* 1835, *Mayor &c. of Tuscaloosa v. Wright*, 11 *Ala. (2 Port.)* 280. Compare *Marriage v. Lawrence*, 3 *Barn. & Ald.* 142; *Philadelphia & Westchester R. R. Co. v. Hickman*, 28 *Pa. St.* 318; *New England Manuf. Co. v. Vandyke*, 1 *Stockt.* 498; *Bristol &c. Canal Nav. Co. v. Amos*, 1 *Mann. & S.* 569.

35. The books of a corporation, although competent to prove the acceptance of its charter, its organization, and the election of

* See, to same effect, as to proprietors' meetings, *Stedman v. Putney*, *N. Chsp.* 11; *Codman v. Winslow*, 10 *Mass.* 146; *Britton v. Lawrence*, 1 *D. Chsp.* 108. But compare to the contrary, *Heysham v. Forster*, 5 *Mann. & S.* 277.

officers, and other corporate acts, are not admissible in evidence in matters of a private nature in support of its own claims against a stranger, nor even against a member who claims adversely, and not under the corporation. *N. H. Supreme Ct.* 1864, *Wheeler v. Walker*, 45 *N. H.* 355.

86. The books of a corporation are evidence between its members, but not against strangers. *Ill. Supreme Ct.* 1865, *Chase v. Sycamore & Courtland R. R. Co.* 38 *Ill.* 215.

87. Thus, in general, the books of a bank are not competent evidence to affect strangers. *Fla. Supreme Ct.* 1854, *Union Bank of Florida v. Call*, 5 *Fla.* 409. But compare *Oliver v. Phelps*, 1 *Spen.* 180.

88. Entries of the transfer of shares, made in the transfer book of an English railway company, according to the requirements of an act of parliament, are not, by themselves, evidence of proprietorship of shares, in an action between strangers. *Each.* 1838, *Hare v. Waring*, 3 *Mees. & W.* 362.

89. The receipt-book of a corporation containing entries of payments by a member, is evidence against the company, without producing the officer by whom they were countersigned. Such entries are not to be rejected because they furnish evidence of other payments than those for which they are properly admissible in evidence. *Pa. Supreme Ct.* 1860, *North America Building Association v. Sutton*, 35 *Pa. St.* 463.

40. Entries in the books of an incorporated company are not evidence against a member of the company, in respect of a contract entered into by him with the company, although the act by which the company is incorporated authorizes each member to inspect and take copies of the books or any part of them. So, although the entries relate to transactions at a meeting at which such member was present, it appearing that the entries were made after the meeting had terminated, from memoranda made by the clerk at the meeting. *K. B.* 1838, *Hill v. Manchester Water Works Co.* 2 *Nov. & M.* 573.

41. Minutes of a corporation are not evidence of an agreement, alleged to have been made by stockholders as individuals, and not intended to bind the corporation. *N. J. Chancery*, 1860, *Black v. Shreve*, 2 *Beas.* 455.

42. An officer of a municipal corporation, sued for abating an obstruction, may justify

as an individual, and use the minutes of the corporate proceedings to establish that the thing removed was in a public street. The fact that he is their officer does not make their records inadmissible. *N. Y. Supreme Ct.* 1831, *Denning v. Roome*, 6 *Wend.* 651.

43. Necessity of producing record evidence. The books of a corporation are the proper evidence of its corporate acts; and while they are in existence and can be obtained, parol evidence is inadmissible to prove the acceptance of the charter, or what persons are members of the corporation. *Ms. Supreme Ct.* 1840, *Coffin v. Collins*, 17 *Ms.* 440.

44. The books of a corporation are the regular evidence of its doings, and the acceptance of the charter should be proved by them. But if books have not been kept, or have been lost or destroyed, or are not accessible to the party upon whom the affirmative lies, then the acceptance may be proved by implication from the acts of the members of the alleged corporation. *Ms. Supreme Ct.* 1856, *Hudson v. Carman*, 41 *Ms.* 84.

45. That when proof of a resolution of directors is necessary, the book of records itself must be produced, or proper secondary evidence of the contents given, after notice to produce them,—see *Montgomery R. R. v. Hurst*, 9 *Ala. N. S.* 513.

46. An instrument in writing was executed by the secretary and treasurer of an incorporated company, which, after acknowledging the receipt of certain notes as a loan to the company, recited that the loan was made on conditions stated in resolutions of the board of direction, passed on a specified day, and recorded on the minutes. In an action upon such instrument against the company,—*Held*, that the plaintiff could not recover without proving the conditions and terms of the loan, either by the production of the resolutions of the directors, or other competent evidence; and the fact that the resolutions were in the company's possession, did not affect the principle. *Ala. Supreme Ct.* 1861, *Alabama & Tennessee Rivers R. R. Co. v. Nabors*, 37 *Ala. N. S.* 489.

47. Admissibility of other proof. In suits between third parties, the records of a corporation need not be produced to prove the authority of the president; but it may be shown by other evidence. *Ms. Supreme Ct.* 1858, *Cabot v. Given*, 45 *Ms.* 144.

48. The records of a bank, when produced by the bank, are not the only competent evidence of the appointment and authority of its cashier, and of deposits made therein; but parol evidence is admissible in proof of those facts. *N. H. Superior Ct.* 1844, *Town of Concord v. Concord Bank*, 18 *N. H.* (4, 2d S.) 26. Compare *BANKS*, 420, 421, 497, 524.

49. The charter of an incorporated company, which provides that the signature of the president, attested by the secretary, shall be taken as full evidence of the doings of the company, does not exclude other evidence of their acts;—*e. g.* an indorsement by the president and agent, without the attestation of the secretary. *Ind. Supreme Ct.* 1850, *Hankins v. Shoup*, 2 *Curt.* 342.

50. In an action against an incorporated borough for the price of goods sold to the corporation, the acts of the wardens and burgesses are admissible to prove an acceptance of the goods, without showing a vote of the corporation. *Conn. Supreme Ct.* 1881, *Davidson v. Borough of Bridgeport*, 8 *Conn.* 472.

In what cases a corporation are bound by an Executed contract, though informally made, see *CONTRACTS*.

51. Where the charter of a corporation does not require that the appointment of an agent, or the making of a contract, shall be by written instrument, and it does not appear to have been so made, the appointment or contract may be proved by parol. *Ind. Supreme Ct.* 1857, *Hamilton v. Newcastle & Danville R. R. Co.* 9 *Ind.* 359.

52. If a corporation, party to a suit, refuse to produce their books, on notice, the other party may give parol evidence of the election of its officers, and of the acts of the directors. *Mass. Supreme Ct.* 1880, *Thayer v. Middlesex Mut. Ins. Co.* 10 *Pick.* 326.

53. It is not necessary for a party who claims title to notes through the indorsement of a foreign corporation, to produce the books of the corporation, if they are out of the commonwealth; and depositions of late officers of the company are admissible, although, in reply to cross interrogatories requesting them to do so, they did not annex the records of the company, or copies of them, if the same were not in their custody. *Mass. Supreme Ct.* 1862, *Topping v. Bickford*, 4 *Allen*, 120.

54. The vote of the directors of a banking institution to accept one security in the place of another, may be proven by parol, when no record is made of it. *Ill. Supreme Ct.* 1855, *Ryan v. Dunlap*, 17 *Ill.* 40.

55. Attestation. How the genuineness of corporate records should be evidenced, in order to render them admissible,—see *Whitman v. Granite Church*, 23 *Me.* 286; *Oakes v. Hill*, 14 *Pick.* 442; *Green v. City of Indianapolis*, 25 *Ind.* 490; *Goulding v. Clark*, 34 *N. H.* 148.

56. Extracts from the records of a corporation produced by the corporation clerk, are admissible evidence of the official acts therein set out. *Ind. Supreme Ct.* 1859, *Breedlove v. Martinsville & Franklin R. R. Co.* 12 *Ind.* 114.

57. Ancient records. Copies of ancient proprietary grants are admissible in evidence, without proof that the meetings at which they were made, were legally assembled. *Mass. Supreme Ct.* 1807, *Pitts v. Temple*, 2 *Mass.* 538; *N. H. Supreme Ct.* 1858, *Little v. Downing*, 37 *N. H.* 355.

III. INSPECTION.

58. Who entitled to demand it. Stranger. In general a mere stranger to the affairs of a corporation (though municipal) is not entitled to an inspection of their books. See *Hodges v. Atkins*, 3 *Wils.* 398; 2 *W. Black.* 877; *Mayor &c. of Southampton v. Graves*, 8 *Durnf. & E.* 590; *Bristol v. Visger*, 8 *Dowl. & R.* 434; *Cox v. Copping*, 1 *Ld. Raym.* 337. But compare *Corporation of Barnstable v. Lathey*, 3 *Id.* 303.

59. Where an action was brought by a corporation for an alleged breach of a by-law affecting every one within the corporate jurisdiction, the defendant, although not a corporator, was allowed a rule to inspect and copy the by-law in the corporate books. *K. B.* 1824, *Harrison v. Williams*, 3 *Barn. & C.* 162. And see *Mayor of Lynn v. Denton*, 1 *Durnf. & E.* 689.

60. Member. A corporator of a municipal corporation has a right to have a general inspection, and to take copies of the public documents and records of the corporation, under such rules and restrictions as will preserve them from loss or mutilation, and prevent any serious interruption of the duties of the *custos*. *N. Y. Supreme Ct. Sp.*

T. 1866, *People v. Cornell*, 47 *Barb.* 329; 32 *How. Pr.* 149.

61. This right is absolute and is not to be restricted to cases where the corporator has some private interest, for the enforcement and protection of which an inspection of certain documents is necessary. The corporate officers still retain an interest in the manner in which their property, business and interests are cared for, conducted and looked after; it follows that they have a right to as full knowledge of all the official acts of their officers as the officers themselves have, so as to enable them to ascertain whether their officers have performed their duty in such manner as is acceptable to them, with a view to determine whether they will continue them in office or not. *Id.*

62. An inspection of the transfer books of an incorporated company was granted in an action between two corporators. See *Gery v. Hopkins*, 7 *Mod.* 129; 2 *Ld. Raym.* 851.

63. An inspection will not be granted of the books of a trading corporation, though of a public nature, and though the applicant is a corporator, in order that he may subsequently procure a dividend to be declared. *K. B.* 1819, *Rex v. Bank of England*, 2 *Barn. & Ald.* 620.

64. Subscriber. In an action by a railway company against a proprietor for calls on his shares, the court will not order the plaintiffs to permit the defendant to inspect and make extracts from the books of the company, when such inspection is not distinctly authorized by the Railway Act; especially if it appears to be the defendant's object to discover what defence can be set up. *Q. B.* 1841, *Birmingham, Bristol and Thames Junction Railway Co. v. White*, 1 *Ad. & E. N. S.* 282; 5 *Jur.* 800; 4 *Perr. & D.* 649.

65. Subscriber for shares in a company,—*Held*, entitled to an inspection of records relating to his agreement, in an action brought by him to recover back his deposit. *Ley v. Barlow*, 5 *Dowl. & L.* 375; 1 *Elck.* 800.

66. Stockholder. In an action against the Bank of England for not paying dividends upon certain stock, the bank admitting that the stock had, up to a certain day, stood in the bank books in the plaintiff's name, alleged that the plaintiff had on that day transferred it. Upon the affidavit of

the plaintiff that she had never agreed or authorized any transfer, and that if such alleged transfer existed it was a forgery, the court made absolute a rule allowing her to inspect the particular entry in the transfer book, purporting to transfer the stock. *Q. B.* 1846, *Foster v. Bank of England*, 15 *Law J. N. S. Q. B.* 212; 10 *Jur.* 372.

67. In the absence of any restriction imposed by charter, or the rules and by-laws of a banking corporation passed in conformity thereto, a stockholder in such corporation has a right to inspect the "discount book" of the bank, within proper and reasonable hours. *La. Supreme Ct.* 1858, *Cockburn v. Union Bank of Louisiana*, 18 *La. Ann.* 280.

68. A corporation was required by charter (in addition to general provisions of statute upon the same subject) to cause a book to be kept containing the names and residences of all stockholders, the number of shares held by them respectively, &c., which book the charter directed should at all reasonable times be open for the inspection of the creditors and stockholders of the corporation. The corporation kept no book precisely answering to the requirement of the charter. They kept, however, a transfer book, a register of certificates of stock, and a stock ledger. On application by a stockholder, for an opportunity to inspect the book prescribed by the charter to be kept, the officers of the corporation offered an inspection of the transfer book and register, but refused to permit the stock ledger to be examined. *Held*, that the stockholder was entitled to an inspection of the stock ledger, that being, of all the books kept by the company, the one which most nearly fulfilled the requisites of the charter provision. The circumstance that it contained more facts than the charter required to be stated, formed no excuse for refusing to furnish it, so long as the company neglected to keep such a book as was required. *N. Y. Supreme Ct. Sp. T.* 1867, *People v. Pacific Mail Steamship Co.* 3 *Abb. Pr. N. S.* 364; 34 *How. Pr.* 193.

69. A shareholder in a joint stock company,—*Held*, not entitled to an inspection of the corporate books for the purpose of proving a plea of justification in an action against him for libel imputing insolvency to the company. *Elck.* 1859, *Metropolitan &c. Co. v. Hawkins*, 4 *Hurlst. & N.* 146.

70. **Creditor.** When creditors of a business corporation are entitled to an inspection of the books,—see *Exp. Walker*, 6 *Eng. L. & Eq.* 51; 15 *Jur.* 858; *Regina v. Derbyshire*, 3 *El. & B.* 784; 26 *Eng. L. & Eq.* 101.

71. **Right to take extracts.** Under 1 N. Y. Rev. Stat., 601, § 1,—providing that the transfer books, and books containing the names of the stockholders, of any incorporated company, shall, at all reasonable times during the usual business hours, be open for the examination of every stockholder, for thirty days previous to the election of directors,—the stockholder has a right, not only to inspect the books, but also make any memorandum or a list of the stockholders therefrom; and if the officer having charge of the books refuses to permit him to exercise this right, he subjects himself to the statute penalty. The officer in charge of the books is not the judge of the motives of the stockholder applying for such examination. *N. Y. Ct. of Appeals*, 1851, *Cotheal v. Brouwer*, 5 *N. Y. (1 Seld.)* 562.

72. **Compelling production, by mandamus.** A mandamus lies to compel officers having charge of corporate books, to give a person entitled thereto an opportunity to inspect them.* *N. Y. Supreme Ct.* 1845, *People v. Mott*, 1 *How. Pr.* 247; *Sp. T.* 1867, *People v. Pacific Mail Steamship Co.*, 8 *Abb. Pr. N. S.* 364; 84 *How. Pr.* 193; *La. Supreme Ct.* 1858, *Cockburn v. Union Bank of Louisiana*, 18 *La. Ann.* 289; *K. B.* 1749, *Rex v. Ingram*, 1 *W. Black.* 50.

73. A mandamus will be granted at the suit of any member of a corporation to inspect the corporate books, when a necessity of inspecting them for a particular purpose is shown; though it arises in a dispute with others. *Rex v. Hostmen of Newcastle-upon-Tyne*, 1 *Str.* 1223.

74. **Members of a private corporation cannot have a mandamus to inspect the charter,**

unless they show it to be necessary with reference to some specific dispute or question then depending, in which they are interested, and then the inspection will be granted only to such an extent as may be necessary for the particular occasion. 5 *K. B.* 1831, *Rex v. Merchant Tailors' Company*, 2 *Barn. & Ad.* 115.

75. Thus, where members of a corporation, merely alleging grounds on which they believed that its affairs were improperly conducted, and the officers unduly chosen, and complaining of misgovernment in some particular instances not affecting the parties themselves or any matter then in dispute, applied for a mandamus to the master and wardens to allow them to inspect and take copies of all records, books, and muniments in the possession of the master and wardens, belonging to the company, or relating to its affairs, the court discharged the rule with costs. *Id.* See also **MANDAMUS**.

76. The directors of a corporation who were sued as such for mismanagement of the company's affairs, were refused permission to inspect the books kept by the company during the period of their directorship, the affidavit of the motion not stating such inspection to be material or necessary to their defence. *C. P.* 1880, *Imperial Gas Co. v. Clarke*, 7 *Bing.* 95; 4 *Moore & P.* 727.

77. That to warrant a mandamus to enforce a member's right to inspect the corporate books, there must have been a distinct refusal on the part of those having the control of the books to permit the corporator to inspect them,—see *Rex v. Wiltshire & Berkshire Canal Navigation*, 8 *Ad. & E.* 477; *Rex v. Trustees of North Leach & Whitney Roads*, 5 *Barn. & Ad.* 978; *Regina v. Sealey*, 8 *Jur.* 496.

78. Although a corporator may at the common law have a mandamus to compel the custodian of corporate records and documents to allow him an inspection of them, yet to entitle himself to the aid of the court, he must show a proper demand by him upon such custodian, at a proper time and place, and for a proper reason, which has been refused; the party asking must also have some interest at stake, rendering the inspection necessary. *It seems* that the writ will not be granted to enable a corporator to gratify an idle curiosity. *Mich. Supreme Ct.* 1861, *People v. Walker*, 9 *Mich.* 328.

* A mandamus to a steward of a corporation, who kept the public books, to compel him to attend with the books at the next corporate assembly, granted. See *Case of the Borough of Calne*, 2 *Str.* a. 943.

Where a statute made it the duty of a turnpike corporation to grant a certificate of amounts due by them for repairs &c. attested in a certain manner, and to transmit a duplicate of the same to the State treasurer, in order that payment might be made by the State, and deducted out of the appropriations made to the corporation; a mandamus was granted to compel them to deliver to the relator, and transmit to the treasurer, such a certificate. *Commonwealth v. Anderson &c. Turnp. Road*, 7 *Serg. & E.* 6.

79. A demand of an inspection of all the books, records, and papers of the company is too broad. *Id.*

80. — by subpoena. That a corporation, by its officers, may be compelled to produce books and papers in its possession, containing matter pertinent to the issue in an action between third parties, as a private individual may,—see *Winder v. Diffendorffer*, 2 *Bland. Ch.* 166.

81. In an action against a corporation as defendants, the plaintiff served on their president a subpoena *duces tecum*, requiring him to appear on the trial with certain certificates and books of minutes of the defendants,—*Held*, that he was not bound to produce them, and that a motion for an attachment had been properly denied. Such officer has no right, and although subpoenaed to do so, is under no obligation, to remove the books and papers of his principals from the office in which they are required to be kept. *N. Y. Supreme Ct.* 1825, *Bank of Utica v. Hillard*, 5 *Cov.* 153; *S. C.* again, 1826, *Id.* 419. *N. Y. Superior Ct.* 1857, *La Farge v. La Farge Ins. Co.* 14 *How. Pr.* 26.

82. The agents of a corporation cannot, in their individual capacities, be compelled to discover the books of the corporation; and on a motion to require them to do so, the court will not enter into the question whether the incorporation is fictitious. *N. Y. Supreme Ct. Sp. T.* 1864, *Opdyke v. Marble*, 18 *Abb. Pr.* 266; 44 *Barb.* 64.

83. A joint stock company is not such a corporation as to entitle its officer to refuse to produce its papers in his custody when subpoenaed. *N. Y. Superior Ct. Chambers*, 1868, *Woods v. De Figanieri*, 1 *Robt.* 659.

RELIGIOUS CORPORATIONS.

I. NATURE AND POWERS.

II. ORGANIZATION.

1. *Generally.*
2. *Unions. Divisions and Secessions.*

III. PROPERTY.

1. *The title generally.*
2. *Devises. Trusts.*
3. *Sales.*

IV. OFFICERS.

1. *The minister.*
2. *Trustees. Churchwardens and Vestrymen.*

V. PEWS.

I. NATURE AND POWERS.

1. *Not ecclesiastical corporations.* Incorporated religious societies are not to be regarded as ecclesiastical corporations in the sense of the English law, but are civil corporations governed by the principles of common law. *N. Y. Ct. of Appeals*, 1854, *Robertson v. Bullions*, 11 *N. Y. (1 Kern.)* 243.

2. *Ecclesiastical government.* There cannot, in this country, be claimed for the decisions of a synod, or of any ecclesiastical judicatory, the same effect which is given to the decision of ecclesiastical courts in England. *Vt. Supreme Ct.* 1846, *Smith v. Nelson*, 18 *Vt.* 511, 551.

3. The proceedings of the synod of the "Associate Church," as a court of the last resort, are not to be held conclusive and absolute, in this country, when they come in question, whether directly or collaterally, in courts of law; but the regularity and effect of their proceedings may be examined and be determined, in courts of justice, upon the same principles which subject the proceedings, either of inferior courts, or voluntary associations, to inquiry and adjudication. *Id.*

4. The synod have no power to appoint a commission to receive the submission of a presbytery, which has been on trial before the synod, and to restore, or dissolve, the presbytery, as the commissioners may think proper. This is a delegation of judicial power, not warranted by any known rules of discipline in the "Associate Church." *Id.*

5. Neither have the synod power to suspend, or depose ministers, except in cases which come to them by appeal from the presbytery, where such matters must commence and be first determined. *Id.*

6. A synod has power to erect new presbyteries; but no power is given to them to dissolve a presbytery, against its consent. *Id.*

7. Thus where the synod declared a presbytery dissolved, and, upon its not submitting to the decision, deposed the ministers who constituted it,—*Held*, that the decree was void, and that the ministers were unlawfully deposed. *Id.*

8. The synod of the Presbyterian Church have not original jurisdiction, without appeal taken from proceedings below, to appoint elders in a church; nor can the general assembly confirm such appointment. *Ky. Ct. of Appeals*, 1867, *Watson v. Avery*, 2 *Bush* 332.

9. Although the civil courts will not re-examine determinations of ecclesiastical bodies, made within the scope of their jurisdiction, they will revise determinations which transcend that limit. Thus where rights of property, secured to congregations and individuals by the organic law of the church, are violated by the unconstitutional acts of the ecclesiastical courts, the civil courts will give relief to the parties aggrieved. Under this principle the civil courts may inquire into the constitutional validity of an election of elders. *Ky. Ct. of Appeals*, 1867, *Watson v. Avery*, 2 *Bush*. 332.

10. A bill brought by the male members of a religious congregation, against the trustees of the same, for alleged breaches of trust and violation of church discipline and worship, was dismissed; it appearing that questions of church government and worship were concerned, and that breaches of doctrine and discipline were charged, of which ecclesiastical tribunals alone had jurisdiction. *Md. Ct. of Appeals*, 1865, *Tartar v. Gibbs*, 24 *Md.* 323.

11. The usages of a church, or the law of its organization as a religious society, if they are to be considered in deciding legal controversies, should be proved as facts. In the absence of testimony, it will be presumed that religious societies cannot dissolve their connection with the principal organization without permission. *Ill. Supreme Ct.* 1862, *Vasconcelles v. Ferrara*, 27 *Ill.* 237.

12. Power to make by-laws. Religious societies may prescribe such rules as they think proper for preserving order, when met for public worship, and may use necessary force to remove a person wilfully violating such rules.* *Ind. Supreme Ct.* 1856, *McLain v. Matlock*, 7 *Ind.* 525.

II. ORGANIZATION.

1. Generally.

13. How effected. That a general statute authorizing the formation of religious societies should be substantially followed and

* It is competent for a Pilot Benefit and Relief society empowered to make laws for the government of the association "and otherwise," to make by-laws, fixing a tariff of wages for pilots (if this be done in good faith, to promote uniformity, and not extortion); and also to impose dues upon the members, which the society may recover by action. *Ky. Ct. of Appeals*, 1867, *Lee v. Louisville Pilot Benevolent &c. Association*, 3 *Bush*. 254.

its express requirements complied with; and all the facts required to be stated in the certificate must be stated,—see *Ferraria v. Vasconcelles*, 28 *Ill.* 456.

14. A subscription to raise money for the support of public worship whenever a minister of a particular sect can be procured, is not the formation of an unincorporated religious society, within the Massachusetts statute of 1811, ch. 6, (which was in force in Maine prior to the Maine Act of 1821. *Me. Supreme Ct.* 1830, *Jones v. Cary*, 6 *Me.* (6 *Greenl.*) 448.

15. Where persons in Massachusetts formed themselves into an association for religious purposes without any lay organization or otherwise, but solely under the direction and advice of ministers and elders of their denomination, and entered into an agreement, which they afterwards fulfilled, to support and maintain public worship,—*Held*, that they constituted a religious society and became competent, as such, to take grants or donations, and to prosecute actions of trespass. *Mass. Supreme Ct.* 1842, *Christian Society in Plymouth v. Macomber*, 5 *Metc.* 155.

See INCORPORATION.

16. Formal requisites presumed. In aid of a suit, upon a contract made with a religious society, which has existed and acted as such for several years, the formal requisites to its organization, under the statute, will be presumed, although they do not appear by the certificate filed. *So held*, where the certificate of organization of an Episcopal church did not show that the rector presided at the first meeting, nor that he was necessarily absent. *N. Y. Superior Ct.* 1828, *All Saints' Church v. Lovett*, 1 *Hall*, 191.

17. Who constitute the corporation. A religious corporation, created under the New York general act, consists not of the trustees as such, but of members of the society. Although the statute declares that the trustees shall be a body corporate, a view of the whole act, as well as the current of authority, and the popular opinion, sustains the view that it is the *society*, not the trustees, which is incorporated; and the members, whether church members or not, are the corporators. The relation of the trustees is not that of a private trustee to the *cestui que trust*, but that of directors to a civil corporation. They are but the managing officers of the corpora-

tion, invested, as to the temporal affairs of the society, with the powers specifically conferred by the statute, and with the ordinary discretionary powers of officers of civil corporations. [2 Paige, 296; 7 Id. 281; 2 Den. 492.] *N. Y. Ct. of Appeals*, 1854, *Robertson v. Bullions*, 11 *N. Y.* (1 *Kern.*) 243. Compare *People v. Fulton*, *Id.* 94.

18. Relations of the religious and the secular body. The distinction between the religious "society," or corporation, and the "church" connected with it,—considered. *Baptist Church in Hartford v. Witherell*, 3 *Paige*, 296; *Lawyer v. Clipperly*, 7 *Id.* 281.

19. In Massachusetts a congregational church, or a church formed within the congregation by covenant and according to usage, to celebrate the Christian ordinances, and for ecclesiastical purposes, with deacons chosen by the members, is not a corporation nor a quasi corporation. *Mass. Supreme Ct.* 1852, *Weld v. May*, 9 *Cush.* 181; *Jefts v. York*, 10 *Cush.* 392.

20. The law, however, recognizes the existence and organization of a church as an aggregate body, takes notice of its acts and doings, and annexes thereto various civil rights and powers. The law, therefore, by necessary implication, authorizes and requires a church, by a proper officer, to keep some record of its acts. And the courts must take notice of a usage so general as that of a church to keep a record. *Mass. Supreme Ct.* 1881, *Sawyer v. Baldwin*, 11 *Pick.* 492.

21. Where a town consists of only one parish, the affairs of the town and parish may be conducted under one organization. And an appropriation made by it, while acting in this double character, of any of its property for town or parish purposes, will be equivalent to a grant of the same for a specific use, and with the rights acquired under it, cannot, after the formation of a new parish, be changed by one alone. *Mass. Supreme Ct.* 1857, *First Parish in Boothbay v. Wylie*, 48 *Me.* 387.

22. Every town is considered to be a parish until a separate parish is formed within it. Then, the inhabitants and territory not included in this separate parish constitute the first parish, and the minister of such first parish, by law, holds, to him and his successors, all the estates and rights, which he held as minister of the town before the se-

paration. *Mass. Supreme Ct.* 1811, *First Parish in Brunswick v. Dunning*, 7 *Mass.* 445.

23. The powers of parishes extend only to the settlement of ministers, and building houses of public worship, and to purposes necessarily connected with those objects. *Mass. Supreme Ct.* 1804, *Bangs v. Snow*, 1 *Mass.* 181.

24. Where the committee of a parish, and the committee of a society, agreed to give P. annually, for his services as minister, the whole income of the parsonage funds belonging to said society and parish, also the use of the parsonage lands, &c., and the sum of \$60, in addition, from the society,—*Held*, that the contract, so far as the engaging and settling of the minister was concerned, was joint; but that in respect to the payment of his services it was several, and that he was entitled to recover of the parish the income of the ministerial fund. *Mass. Supreme Ct.* 1834, *Peckham v. Inhabitants of North Parish in Haverhill*, 16 *Pick.* 274.

25. Members of religious society not required to be residents of the town in which it is organized. See *Congregational Society of Woodstock v. Swan*, 2 *Vt.* 222.

26. Their rights. Neither members of a church connected with a religious society, nor pew-owners in the edifice, have, as such, any higher rights than other corporators, upon questions connected with the general temporal concerns of the society. *N. Y. Chancery*, 1832, *Baptist Church in Hartford v. Witherell*, 3 *Paige*, 296.

27. The charter of a religious congregation conferred the right of voting on the contributing members who were communicants. A subsequent statute confirming the charter, with some alterations, declared that no person should be entitled to vote, who was under the age of eighteen years. *Held*, that to entitle a member of the congregation to vote, it was not necessary that he should have taken the sacrament after the age of eighteen years. *Pa. Supreme Ct.* 1824, *Weckerly v. Geyer*, 11 *Serg. & R.* 35.

28. Termination of membership. The act of the moderator of a particular synod in participating as a commissioner to the general synod in the completion of a union with another body of Christians under a common government, while the church to which he belongs still survived, and he declared his intention of continuing his connection with it,—*Held*, not

a termination of his church membership, nor a forfeiture of his office. *N. Y. Supreme Ct. Sp. T. 1861, People ex rel. Gearn v. Farrington, 22 How. Pr. 294.*

29. — by expulsion. The churches of Massachusetts have power to discipline their members for immoral and scandalous conduct, by rebuke, suspension and excommunication; and those who take part in such proceedings in good faith, and within the scope of this authority, are protected. Not only the vote of excommunication, but the promulgation of it from the pulpit, in accordance with the vote of the church, is within this protection. *Mass. Supreme Ct. 1850, Farnsworth v. Storrs, 5 Cush. 412.*

30. The fact of expulsion from a church is conclusive proof that the persons expelled are not members of such church; whether the excommunication was wrong or not, cannot be examined into, and such expelled members cannot maintain a suit in relation to church property, nor vote for trustees. *Ky. Ct. of Appeals, 1842, Shannon v. Frost, 3 B. Monr. 253.*

31. Membership of parish. What is sufficient to constitute a membership of a parish. See *Keith v. Howard, 24 Pick. 292.*

32. Under the Maine statute of 1821, ch. 135, territorial parishes were not dissolved, but remain as they were prior to the act; and therefore the sons of the members of such parishes, on coming of age and continuing to reside within the limits of the parish, become *ipso facto* members of the same: So also, persons who come to reside within the limits of a territorial parish, and do not belong to any other religious society, do thereby become members of the parish within which they come to reside. *Me. Supreme Ct. 1881, Osgood v. Bradley, 7 Me. (Greenl.) 411.*

33. — how changed. The members of a "poll parish," from the time of their incorporation, cease to be members of the geographically bounded parishes within the limits of which they reside. *Mass. Supreme Ct. 1811, First Parish in Sutton v. Cole, 8 Mass. 96.*

34. A statute which sets off several persons, together with their polls and estates, from the town in which they live, and annexes them to a parish in another town, to which parish it declares "they should forever thereafter be considered as belonging," permanently alters the boundaries of the

parish so far as to include therein such lands, and to make every person afterwards living upon them members of such parish.* *Mass. Supreme Ct. 1810, Colburn v. Ellis, 7 Mass. 89.*

35. Under the laws of Maine relative to religious societies (1821, ch. 135), every person resident within the limits of a territorial parish, if otherwise qualified, was *ipso facto* a member of the same, unless he was regularly united as a member to some poll parish; and on ceasing to be a member of such poll parish, he became forthwith a member of the territorial parish within which he resided, unless such secession was colorable and fraudulent. *Me. Supreme Ct. 1822, Lord v. Chamberlain, 2 Me. (2 Greenl.) 67.*

36. Ceasing to attend the religious and secular meetings of a parish, and attending the worship, and supporting the ministers of another denomination for any length of time, will not alone amount, (under the laws of Maine), to a renunciation of membership in the parish thus left. The only mode of withdrawing, without a change of residence, is by notice in writing, as provided in statute of 1821, ch. 135. *Me. Supreme Ct. 1880, Jones v. Cary, 6 Me. (6 Greenl.) 448.*

37. That the membership of a parishioner in Maine ceases *ipso facto*, upon his filing a certificate pursuant to statute of the State,—see *Fernald v. Lewis, 6 Me. (6 Greenl.) 264.*

38. Powers of the majority. Religious societies organized under the statutes of New Jersey, in acting as corporate bodies in their temporal concerns, must be governed by majorities; and minorities must submit or withdraw. Matters of faith and doctrine may be governed by very different principles, and depend less on numbers than on principles. *N. J. Supreme Ct. Miller v. English, 1 Zab. 317.*

39. A majority of the members of an ecclesiastical society may dispose of their church property to pay their debts, when necessary for that purpose. *Conn. Supreme Ct. 1866, Eggleston v. Doolittle, 38 Conn. 396.*

40. When a church and society are an existing organized association, acting in a col-

* But a statute, the terms of which does not contemplate a permanent change, nor mention the heirs, &c., is to be intended only as a personal accommodation to the tenant, upon whose decease the land reverts to the parish from which it was taken. *Mass. Supreme Ct. 1811, Kingsbery v. Black, 8 Mass. 184.*

lective *quasi* corporate character, an agreement of compromise of a suit by a majority of members is binding upon the minority. *Vt. Supreme Ct.* 1861, *Horton v. Baptist Church &c.* in *Chester*, 34 *Vt.* 309.

41. A majority of a church congregation may direct and control in church matters consistently with the particular and general laws of the organism or denomination to which it belongs, but not in violation of them. *Pa. Supreme Ct.* 1862, *Sutter v. Trustees of First Reformed Dutch Church*, 42 *Pa. St.* 508.

42. The fact that the church connected with a religious corporation formed under section 8 of the New York Act of 1813, for the incorporation of religious societies, may belong to a peculiar denomination, cannot prevent the majority of the corporators from controlling the property and revenues of the society. The corporation and the church, although one may exist within the other, are in no respect correlative. The existence of the church proper, as an organized body, is not recognized by the law, nor does its denominational character affect the legal nature of the corporation. Each body is entirely independent. *N. Y. Ct. of Appeals*, 1860, *Petty v. Tooker*, 21 *N. Y.* 267.

43. The corporators of a religious society have an absolute right, by the vote of a majority, to change the denomination of the church, and the mode of worship, as they may see fit. *N. Y. Supreme Ct.* 1859, *Parish of Bellport v. Tooker*, 29 *Barb.* 256.

44. Where a religious society, which, though in fellowship with others, is independent and at liberty to form its own creed, purchase real property in fee, the right of the majority to the property is not affected by a change of doctrine shown to be a departure from the belief of the majority at the time of the purchase. *Ohio Supreme Ct.* 1834, *Keyser v. Stansifer*, 6 *Ohio*, 363.

2. Unions. Divisions and secessions.

45. Unions. That two religious societies may unite in one; one of them abandoning its distinctive name and organization, and conveying its property to and merging in the other,—see *Madison Ave. Baptist Church v. Baptist Church in Oliver St.* 3 *Robt.* 570.

46. In Massachusetts it is not illegal, either at common law or under the act of 1786, ch. 11, § 8, for two religious corporations, though one of them be in an adjoining

State, to unite in the settlement of a minister over contiguous parishes or over two poll parishes, if they agree to worship together. *Mass. Supreme Ct.* 1834, *Peckham v. Inhabitants of North Parish in Haverhill*, 16 *Pick.* 274.

47. Where a congregation of one denomination forms a union with another, belonging to a different denomination, which had an established form of church government, that congregation is bound by the rules of the denomination which it has joined, and cannot afterwards secede therefrom by a vote of the majority of its members. *Pa. Supreme Ct.* 1862, *Sutter v. Trustees of First Reformed Dutch Church*, 42 *Pa. St.* 503.

48. Two congregations agreed to unite and consolidate their property for the common use, and to build, upon a site owned by one of them, a church for the use of the new congregation. After the union, the new society was incorporated. *Held*, that the congregations were merged in the corporation, that the property of both became the property of the corporation, and that the management of it was vested in the trustees, to the exclusion of elders and deacons; and that there was no trust, or covenant, to rebuild the church. *N. Y. A. V. Chan. Ct.* 1844, *Cammer v. United German Lutheran Churches*, 2 *Sandf. Ch.* 186.

As to Amalgamation and Consolidation of corporations generally, see CONSOLIDATION.

49. Identity of the corporation. The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws and principles which were accepted among them, before the dispute began, are the standard for determining which party is right. *Pa. Supreme Ct.* 1861, *McGinnis v. Watson*, 41 *Pa. St.* 9.

50. Where a devise to a church is claimed by two societies, it is the duty of the court to decide in favor of those, whether a majority or minority of the congregation, who are adhering to the ecclesiastical government of the church which was in operation at the time the trust was declared. *Pa. Supreme Ct.* 1848, *Trustees v. Sturgeon*, 9 *Pa. St.* 321. Compare *App v. Lutheran Congregation*, 6 *Pv. St.* 201; *Dublin case*, 38 *N. H.* 459.

51. The body of communicants gathered into church order, according to established usage, in any town, parish, precinct, or re-

ligious society, established according to law, and actually connected and associated therewith for religious purposes, for the time being, is to be regarded as the church of such society, as to all questions of property depending upon that relation. *Mass. Supreme Ct. 1830, Stebbins v. Jennings*, 10 *Pick.* 171, 192.

52. Denominational changes. A change in the ecclesiastical relations of a religious society for whose benefit property is held in trust, does not necessarily involve any perversion of the trust, or diversion of the fund from its legitimate purpose. *N. J. Chancery*, 1863, *Swedesborough Church v. Shivers*, 16 *N. J. Eq.* (1 *C. E. Green*), 453.

53. Land conveyed to a church for valuable consideration, belongs to the church so long as it subsists, whatever change may take place in its religious tenets, though a minority of the members secede, retaining their primitive doctrines. *N. C. Supreme Ct. 1830, Trustees of the Organ Meeting-house v. Seaford*, 1 *Dev. Eq.* 458.

54. It is not an implied condition of a grant to an incorporated congregation, that the latter shall remain in connection with any particular church judicature; and, therefore, when a religious society, which holds its church edifice and grounds under a grant made to it as a particular congregation, not described as in connection with or under the ecclesiastical jurisdiction of any church, unites with an extra State synod of the same denomination, it does not forfeit its rights under the grant, unless such union is proved to be a violation of a fundamental rule of a church. *Pa. Supreme Ct. 1864, Trustees of Lutheran Congregation v. St Michael's Evangelical Church*, 48 *Pa. St.* 20.

55. Secession of members. But where a portion of the members of the congregation voluntarily withdrew from the church and formed a new congregation,—*Held*, in an action of ejectment to recover the church and ground, from the majority of the old congregation remaining, that such voluntary withdrawal was a relinquishment of all claims on the original church property, even if the ecclesiastical connection of the old congregation were a breach of the conditions of the grant. *Id.*

56. The estate in lands appropriated to the benefit of a parish, or religious society, by whatever description incorporated, remains

with the residue of the original parish or society, and is not in any way transferred or distributed by a separation or change among the members or in the territorial limits. *Mass. Supreme Ct. 1818, Brown v. Porter*, 10 *Mass.* 98.

57. In case of division of a religious corporation, the title to the church property will remain with those who retain their connection with, and continue to conform to the usages and discipline of the organization with which they have been before connected, although they may constitute only a minority. *Ill. Supreme Ct. 1860, Ferrara v. Vasconcelles*, 23 *Ill.* 456.

58. If a majority of the members of a congregational church, separate from the majority of the parish with which it was connected, the minority, who remain with the parish, constitute the church in such parish, to all civil purposes, and retain the rights and property thereof. *Mass. Supreme Ct. 1820, Baker v. Fales*, 16 *Mass.* 488; 1830, *Stebbins v. Jennings*, 10 *Pick.* 171; 1881, *Sawyer v. Baldwin*, 11 *Id.* 491; 1885, *Page v. Crosby*, 24 *Pick.* 211.

59. Seceders from the Methodist Episcopal church, who organize a separate conference, and reject the office of bishop, are not entitled to any part of the property of the society from which they secede.* *Ohio Supreme Ct. 1831, Methodist Episcopal Church of Cincinnati v. Wood*, 5 *Ohio (Ham.)* 283.

60. An organized church cannot be divested of its property, by even a majority of its members entering into a new organization, although they adopt the same name, if the old organization still exists as an organization. Those who withdraw, relinquish all claim to any interest in the property of the original body. *Ky. Ct. of Appeals*, 1853, *Harper v. Straws*, 14 *B. Monr.* 48; *W. Va. Ct. of Appeals*, 1867, *Venable v. Coffman*, 3 *W. Va.* 310. And see *Harmon v. Dreher*, 1 *Spears, Eq.* 87; *Dublin Case*, 38 *N. H.* 459; *Shannon v. Frost*, 8 *B. Monr.* 253; *Hadden v. Chorn*, 8 *Id.* 70.

61. But a minority of a church cannot, by claiming to be the church, exclude the ma-

* Upon the authority of the General Conference of the Methodist Episcopal church, to arrange a plan of separation and a division of property of the church between different branches,—see *Smith v. Swormstedt*, 5 *McLean*, 369; *Gibson v. Armstrong*, 7 *B. Monr.* 481; *Venable v. Coffman*, 3 *W. Va.* 310.

jority, or destroy the identity of the church. *Ky. Ct. of Appeals*, 1847, *Hadden v. Chorn*, 8 B. Monr. 70.

62. Where, however, a minority so seceding while, in good faith, in possession of the church, placed repairs upon the house which were necessary,—*Held*, that they had a good claim for the value of the improvements, which should be paid by the majority, as a condition to the exclusive use by the latter. *Id.*

63. The formation of a society, distinct from the rest of the congregation, for the instruction of a portion of it in the doctrines of the same church, in another language, is not *per se* a separation from the original congregation, though such society has a minister and officers of its own. *Pa. Supreme Ct.* 1824, *Weckerly v. Geyer*, 11 *Serg. & R.* 85.

64. Division of parish. Where property is given to a town in its parochial capacity, the proceeds of the sale of it become the property of the town in this capacity; and, upon the organization of all the inhabitants into one or more parishes, the parochial functions of the town cease, and the parish succeeds to all the parochial property, rights, duties and liabilities of the town. *Mass. Supreme Ct.* 1837, *Inhabitants of Ludlow v. Sikes*, 19 *Pick.* 317; S. P. 1880, *Milton v. First Parish in Milton*, 10 *Id.* 447. And see *First Parish in Shrewsbury v. Smith*, 14 *Id.* 297.

65. A poll parish is within the statute of 1786, ch. 10, § 5,—which provides that the remaining part of a town from which a parish is taken, shall constitute the first parish. *Mass. Supreme Ct.* 1811, *Minot v. Curtis*, 7 *Mass.* 441.

66. And, when incorporated, such poll parish is considered as “set off” from the town. See *Sutton v. Cole*, 8 *Mass.* 96.

67. Where a second parish is organized by setting off a part of a town, or incorporating a “poll parish” within it, the residue of the town, thus forming a distinct parish, succeeds to all the parochial rights and duties of the town, and to the funds of the original parish. [Stat. of Mass. 1786, ch. 10.] *Me. Supreme Ct.* 1821, *Winthrop v. Winthrop*, 1 *Me.* (1 *Greenl.*) 208.

68. If, on the division of a town, the property, instead of being reserved by the ancient town, is divided, and this division is sanctioned by a resolve of the legislature, and long acquiesced in by the towns, the act is

binding on them. *Me. Supreme Ct.* 1821, *Winthrop v. Winthrop*, 1 *Me.* (1 *Greenl.*) 208.

69. When a town is incorporated with boundaries coincident with those of a parish antecedently part of a town, the parish is not thereby abolished. *Mass. Supreme Ct.* 1807, *Dillingham v. Snow*, 3 *Mass.* 276. And see *Dillingham v. Snow*, 5 *Mass.* 547.

70. Under the provision of the constitution of Connecticut (Art. 7, § 1) that “no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church, or religious association,” it is not competent for the legislature to divide a local or territorial ecclesiastical society into two or more such societies, or to divide the fund, owned by such ancient society, for the support of the ministry, and to assign a part of such fund to a new society, formed out of a portion of such ancient one. *Conn. Supreme Ct.* 1854, *Second Eccl. Society of Portland v. First Eccl. Society of Portland*, 23 *Conn.* 255.

III. PROPERTY.

1. *The title generally.*

71. *To lands.* Where land was conveyed to several persons, most of whom were members of an incorporated religious society, *habendum* to the use of such persons as should become pew-holders in the meeting house to be erected thereon, and the guarantees organized themselves as proprietors, under the statute of Massachusetts of 1783, ch. 39,—*Held*, that the legal title, upon such organization, vested in the proprietors as a corporate body, in trust for the pew-holders, the use shifting to those persons who thereafter became pew-holders; and that the incorporated religious society, who occupied the land by the permission of the body of proprietors, for the purpose of public worship, might maintain trespass against an individual proprietor for obstructing them in such occupation. *Mass. Supreme Ct.* 1837, *Second Congr. Soc. in North Bridgewater v. Waring*, 24 *Pick.* 304.

72. A piece of land was conveyed to several persons by name, as “trustees of the H. Baptist Society.” A house of worship was erected thereon by the society, but the society was not incorporated. An action was brought by persons claiming as trustees

of the society, and as successors to those who were named in the grant, to recover possession of the land. *Held*, that the plaintiffs could not maintain the action. Only the original grantees, or the society itself, when incorporated, had any rights in the premises. *N. Y. Supreme Ct.* 1859, *Bundy v. Birdsall*, 29 *Barb.* 31.

73. A lot of land was conveyed to trustees, to erect a church, and lay out a place of burial, with a condition that, if the church was not erected, and the remainder of the lot appropriated for burial purposes, the deed should be void, &c. No church was ever erected upon the lot, but a church was erected, by the same society of Christians, upon a lot in the neighborhood, and the lot in question was used exclusively as a place of sepulture. The municipal corporation in which the church was situated, paved the street adjacent to the land. Being about to sell the lot for non-payment of the paving tax, the pastor of the church and one of the congregation filed a bill for an injunction. *Held*, that neither of the complainants had any interest, legal or equitable, for the protection of which they could claim the intervention of a court of equity. *Md. Ct. of Appeals*, 1846, *Dolan v. Mayor &c. of Baltimore*, 4 *Gill*, 394.

74. When a religious corporation, beneficially interested in lands, should be deemed vested with the title,—see *Jackson v. Nestles*, 3 *Johns.* 115, 135.

75. The title and land granted to the inhabitants of a town, to be held by them as a body corporate, for the use of a minister settled in said town, for and during the term of his ministry, and then for the use of his successor, vested in the town in its parochial, and not in its municipal character. *N. H. Supreme Ct.* 1863, *Town of New Market v. Smart*, 45 *N. H.* 87. Compare *Emerson v. Wiley*, 10 *Pick.* 317.

76. Where the voluntary religious society which existed at the time of such grant, and over which the minister referred to was settled, was afterwards, by statute, organized, and became a body corporate and politic, capable of taking and holding real and personal estate for the use of the society, and the town was no longer charged with any parochial duties in relation to such society,—*Held*, that the legal and beneficial estate in the lands so granted vested in that society as

the successor to the parochial rights and duties formerly belonging to the town. *Id.*

77. The proprietors of a new township appropriated a lot of land for a parsonage, at the same time voting that they would endeavor that a congregational minister should be settled in the township. Subsequently, a congregational society was incorporated in the town as a poll parish. *Held*, that the society was not entitled to the use of the lot and parsonage, but that it remained the property of the first parish, whether of the congregational order or not. *Mass. Supreme Ct.* 1816, *First Parish in Shapleigh v. Gilman*, 13 *Mass.* 190.

78. Where a parish is destitute of a minister, the possession and occupation of the lands belong to the parish, who may maintain an action against intruders and trespassers. *Id.*

79. Where a new society was formed, and entered upon, and took possession of lands formerly granted to a parish, and remained in possession more than thirty years, during which time the parish had no meeting, and exercised no corporate powers,—*Held*, that the parish were dis-seized, and their right of entry tolled by long continued adverse possession. *Mass. Supreme Ct.* 1839, *Second Precinct in Rehoboth v. Carpenter*, 23 *Pick.* 181.

80. The title of lands granted to a territorial parish does not vest in a newly created town having the same limits, if prior to such incorporation, a new religious society has been formed therein, and recognized by statute as an independent organization. *Mass. Supreme Ct.* 1863, *Inhabitants of Essex v. Low*, 5 *Allen*, 595.

81. By the statutes of New Jersey (*N.J. Dig.* 722, § 3; 723, § 13), the power of controlling and disposing of the real and personal estate of the corporation is conferred, not upon the congregation or society at large, but upon the trustees by their name of incorporation. It is trust property, not to be controlled by the will of the *cestuis que trust*, much less by a bare majority of them, but by the trustees, the duly constituted guardians of the rights and interests of the congregation. *N. J. Chancery*, 1864, *Van Houten v. First Reformed Dutch Church*, 17 *N. J. Eq.* (2 *O. E. Green*), 126.

82. In Ohio, when a religious society holds land in fee, the majority may control the use

of it at their pleasure. No supposed error of doctrine will authorize the interference of a court of equity. *Ohio Supreme Ct.* 1884, *Keyser v. Stansifer*, 6 *Ohio (Ham.)* 368.

83. That under the North Carolina act of 1796, religious societies or their trustees can only take for the use of the society, and nothing passes in a conveyance to them for purposes forbidden by the policy of the law, —see *Trustees &c. v. Dickenson*, 1 *Dev. Law*, 189.

84. Church edifice. Upon the right to control the possession and use of the church edifice of a religious corporation,—see *Hamblett v. Bennett*, 6 *Allen*, 140; *Reformed Methodist Soc. of Douglas v. Draper*, 97 *Mass.* 349.

85. Upon the right of a majority of the corporation to pull down the church edifice, for the purpose of rebuilding, or removal,—see *Wentworth v. Canton*, 3 *Pick.* 344; *Howard v. First Parish of North Bridgewater*, 7 *Pick.* 188; *Tilden v. Metcalf*, 3 *Day*, 259.

86. A court of equity will not, on the application of a pew-owner, enjoin the pulling down and rebuilding or removal of the church edifice, by the trustees. Nor will the fact that the application is made by a majority of the church and congregation entitled to vote at its congregational meetings, constitute a distinct ground of relief. *N. J. Chancery*, 1864, *Van Houten v. First Reformed Dutch Church*, 17 *N. J. Eq.* (2 *C. E. Green*), 126.

87. Contributions. The funds of a congregational church, derived from the voluntary contributions of members on communion days, from other donations not specifically appropriated by the donors, and from accumulations of interest, though invested with other funds specifically appropriated, to which such contributions and donations were added by the donors, are held by the church in their own right, to be appropriated at their discretion, both as to principal and interest; and not by the deacons, in trust, for the society connected with the church, or for any purpose of general charity to be enforced by an information filed by the public prosecutor. *Mass. Supreme Ct.* 1850, *Parker v. May*, 5 *Cush.* 336.

88. — and subscriptions. A subscription taken up at a meeting of the teachers of a Sunday school connected with a church, and paid to the treasurer of the church, is not

necessarily the property of the church. *N. Y. Superior Ct.* 1867, *Rector &c. of Church of the Redeemer v. Crawford*, 5 *Robt.* 100.

89. A religious corporation passed a by-law that every subscriber for shares who would pay \$3.00 in addition to the par value of each share subscribed by him, should receive a certificate entitling him to redeem the share whenever he should remove from the place. *Held*, that the by-law was valid, and that a subscription made pursuant to it, constituted, with it, a valid contract. *Mass. Supreme Ct.* 1844, *Davis v. Proprietors of Meeting House in Lowell*, 8 *Metc.* 821.

For the rules governing the Property of religious corporations in common with corporations of other kinds, see *PROPERTY*.

2. *Devises. Trusts.*

90. Power to take. Upon the capacity of religious corporations to take property by devise,*—see *Jackson v. Hammond*, 2 *Cai. Cas.* 387; *Williams v. Williams*, 8 *N. Y.* (4 *Seld.*) 525; *Tucker v. Rector &c. of St Clement's Church*, *Id.* 558; *Goddard v. Pomeroy*, 36 *Barb.* 546; *Ayres v. Methodist Episcopal Church*, 3 *Sandf.* 351; 8 *N. Y. Leg. Obs.* 17; *Sherwood v. American Bible Soc.* 1 *Keyes*, 561; also *DEVISE*.

91. A parish in Massachusetts is legally capable of taking and holding gifts, devises, and bequests of real and personal property, for the purpose of maintaining and supporting schools. *Mass. Supreme Ct.* 1847, *White v. South Parish in Braintree*, 13 *Metc.* 506.

92. Interpretation. A devise of a tract

* In a statute availing devises, &c., made at the point of death, in favor of any religious society, or "for the use of" any institution connected or to be connected with any such church, the words "connected with" mean, not necessarily a merger or a consolidation, but a community of government, or of pecuniary interest more or less extensive, or imply the possession by one body of some right, power, or authority in or over the other. *Mich. Supreme Ct.* 1866, *Allison v. Smith*, 16 *Mich.* 405, 484.

The provision of the N. Y. Laws of 1860, 607,—that a testator leaving husband, wife, child, or parent, shall not devise to benevolent, &c., societies more than one-half his estate, &c., is peremptory, and may be insisted on by any person who would derive a benefit therefrom, although not one of the relatives designated in the statute. And the one-half is to be computed with reference to the estate at the time of the testator's death. *N. Y. Ct. of Appeals*, 1867, *Harris v. American Bible Society*, 4 *Add. Pr. N. S.* 421.

Such statutes are not to be construed as annulling the whole will, though they declare that the heirs at law shall succeed; but only as annulling the provision in favor of the religious society. *Miss. Ct. of Errors*, 1866, *Barton v. King*, 41 *Miss.* 288.

of land "to the church of the north or new Baptist church in the town of S. to lie as a parsonage forever," and of another tract, of which the rents, &c., were directed "to be paid to said church, for the sole purpose of supporting the gospel in the north Baptist meeting house," &c. *Held*, to be a devise to the church, as such, and not to the congregation, nor to the church in trust for the congregation. *Conn. Supreme Ct.* 1817, Lockwood v. Weed, 2 *Conn.* 287.

93. A devise of lands was to the minister, &c., of "the Reformed Protestant Dutch church of the city of New-York," for the support of the ministers "of that church." At that time there was but one church of that denomination in that city. *Held*, that no church, subsequently and separately organized, though of the same denomination, and in the same city, was entitled to any share of the proceeds of these lands; though the fund far exceeded what was needed for the purposes of that one church. *N. Y. Supreme Ct.* 1861, Attorney General v. Reformed Dutch Church, 33 *Barb.* 303. Compare *Dublin Case*, 38 *N. H.* 459.

94. Rights as against trespasser. If a devise be made to certain officers of a religious corporation, capable of taking, and their successors in office, for the use of the corporation, the officers *de facto* of such corporation may recover against one not claiming under the deviser, and showing no title. If by any alteration in their doctrines, worship or discipline, the parish has incurred a forfeiture of the premises, it is for the heirs of the deviser to avail themselves of it. *Mass. Supreme Ct.* 1818, Rector &c. of King's Chapel v. Pelham, 9 *Mass.* 501.

95. Trusts. A grant to trustees, for the use and benefit of a church to be afterwards organized, with no power in the trustees to create the beneficiary, or to appropriate the lands or funds arising therefrom, for any purpose, until such organization, will be upheld, so as to pass the title, if such church shall afterwards be so created or brought into existence, as to acquire and hold property, or be the recipient of a charity. *Iowa Supreme Ct.* 1856, Miller v. Chittenden, 2 *Iowa* (Clarke), 315.

96. Upon the incorporation of a church under 2 Rev. L. 212,—which authorizes the trustees to take possession of the temporalities belonging to such church, whether real

or personal estate, and whether the same may have been conveyed directly to such church or to any other person for their use,—rents conveyed to individuals to the use of a church before its incorporation, vest in the corporation by the statute of uses. *N. Y. Supreme Ct.* 1880, Reformed Dutch Church v. Veeder, 4 *Wend.* 494.

97. Where property is conveyed to a corporation subject to limitations, and for a specified trust, it cannot be diverted from such use and trust. Thus where a conveyance of land was executed to certain persons as "trustees of the Associate Congregation of Pleasant Divide, as subordinate to the Associate Presbytery of Iowa, subordinate to the Associate Synod of North America in trust for said congregation,"—*Held*, that the congregation was entitled to the benefit of such conveyance as long as it remained subordinate, as expressed in the deed, although it changed its name and faith, and united with another church, and although a majority of the congregation refused to join in the union, and formed a separate church by themselves. *Iowa Supreme Ct.* 1864, Mc Bride v. Porter, 17 *Iowa*, 203. Compare *Langdon v. Plymouth Cong. Soc.* 12 *Conn.* 113.

98. Land given to a town for the use of the ministry, may, with the leave of the legislature and the consent of all parties interested, be appropriated to the support of several ministers settled over distinct portions of the inhabitants of the town, the original purpose of the grant being preserved by such a disposition of the property. *Mass. Supreme Ct.* 1825, Humphrey v. Whitney, 8 *Pick.* 158.

99. It is no objection to a deed conveying property in trust for the use of a local religious society that it sanctions the appointment of the ministers thereof, by other modes than by selection by the congregation, especially if it be a Methodist congregation; it being a regulation of the Methodist Episcopal church that ministers shall be appointed by the conference. *Va. Ct. of Appeals*, 1856, Brooke v. Shacklett, 13 *Gratt.* 301.

100. Where property is given to a corporation for a charitable use, the trust is the creature of the donor; and he may impose upon it such character, conditions and qualifications as he may see fit. As the property is a gift, no wrong is thereby done to the creditors. But trustees of a religious, literary, or other benevolent association, cannot,

irrespective of any special power in their charter, purchase and hold real estate under trusts of their own creation, which shall protect their property from their creditors. *N. J. Chancery*, 1860, *Magie v. German &c. Church*, 2 *Beas.* 77.

101. Therefore, where premises, upon which the defendants had erected a church, had been conveyed to them, on the consideration of \$1,000, by an absolute conveyance in fee, upon trusts that the property should be held as a Lutheran church, forever, &c., and prohibiting the grantee from alienating, disposing of, or otherwise changing, or incumbering, by deed, the said property, and the corporation executed a mortgage to secure a legitimate debt,—*Held*, that the corporation had the legal title to the land, and the power at law to mortgage it, and that there was no equity in refusing to enforce the mortgage for the payment of an honest debt of the corporation, under color of protecting a charitable use. *Id.*

For a general view of the law of Trusts as far as applicable to corporations, see TRUSTS.

3. Sales.

102. At common law a religious corporation have an inherent right to part with and transfer their property. Statutes which require the consent of a court to such a transfer, in certain cases, operate as restrictions upon the common law right, and not as the source of the corporate power to sell. And they restrict the power only so far as they impose a requirement that the order of the court shall be obtained. *N. Y. Superior Ct.* 1866, *Madison Ave. Baptist Church v. Baptist Ch. in Oliver St.* 8 *Robt.* 570. See *De Ruyter v. St. Peter's Church*, 8 *N. Y.* (3 *Comst.*) 388; *Wyatt v. Benson*, 23 *Barb.* 327; 4 *Abb. Pr.* 182.

103. Under the N. Y. Statute "It shall be lawful for the chancellor, upon the application of any religious corporation, in case he shall deem it proper, to make an order for the sale of any real estate belonging to such corporation, and to direct the application of the moneys arising therefrom to such uses as the same corporation, with the consent and approbation of the chancellor, shall conceive to be most for the interest of the society to which the real estate so sold did belong." Lands granted by the State for the support of the gospel excepted.* *N. Y. Laws of 1806*,

360, *Ch.* 43, § 3; same Stat. 2 *N. Y. Laws of 1813*, 218, § 11; 3 *N. Y. Rev. Stat.* 293, § 11.

104. The New York act of 1806 (above mentioned) operates to give religious corporations unlimited power to convey real property held by them in trust for the corporators, provided the previous consent of the chancellor, and his direction for the application of the proceeds, has been obtained. *N. Y. Chancery*, 1838, *Dutch Church v. Mott*, 7 *Paige*, 77.

105. A New York religious corporation has power to contract for the sale of its real estate, subject to the approval of the court; and as soon as that sanction is obtained, the corporation is bound by the contract. It is not necessary, nor even desirable, that the sanction of the court should precede the negotiation of the contract. *N. Y. Superior Ct.* 1860, *Bowen v. Irish Presbyterian Congregation*, 6 *Bow.* 245.

106. Under the New York statute a provisional order may be made giving a religious corporation leave to sell its real estate—a. g. an order that the sale may be made for a certain price, and if a proper site for a new church can be obtained. *N. Y. V. Chan. Ct.* 1838, *Matter of Brick Presbyterian Church*, 3 *Edu.* 155.

107. It is only upon an application by the corporation that an order allowing a religious corporation to dispose of its real estate can be made. The corporation consists, not of the trustees, but of every member of the congregation entitled to vote. *N. Y. Supreme Ct. Sp. T.* 1857, *Wyatt v. Benson*, 23 *Barb.* 327; 4 *Abb. Pr.* 182.

108. And so long as an order authorizing such sale made upon application of the trustees, is yet *in fieri* and unexecuted, it is the duty of the court, upon proof that the application was contrary to the views and wishes of a majority of the corporators, to revoke its consent and to vacate the order. *Id.*

109. But it is no objection to an application by the vestry or trustees of a religious corporation for leave to sell its real estate, that such application is not authorized by an express vote of the corporators, where neither the good faith of the application, nor the propriety of the proposed disposition, is questioned. *N. Y. Supreme Ct. Sp. T.*

* Since the New York constitution of 1846, the application for an order authorizing the sale of real property, may be made to the Supreme Court instead of the chancellor.

N. Y. Supreme Ct. Sp. T. 1857, *Wyatt v. Benson*, 23 *Barb.* 327.

1862, *Matter of St. Ann's Church*, 14 *Abb. Pr.* 424; 23 *How. Pr.* 285; S. P. *Sp. T.* 1851, *Matter of Second Baptist Society*, 20 *Id.* 324.

110. The consent of all the *pew-owners*, as such, is not necessary to make out a case for granting the trustees leave to sell the church edifice. *N. Y. V. Chan. Ct.* 1888, *Matter of Brick Presbyterian Church*, 8 *Edw.* 155; *N. Y. Supreme Ct. Sp. T.* 1858, *Matter of Reformed Dutch Church*, 16 *Barb.* 237.

111. And the application may be made by the *trustees* of the corporation; it being shown that a majority of the corporators approve the proposed sale. *N. Y. Superior Ct.* 1866, *Madison Ave. Baptist Church v. Baptist Church in Oliver St.* 3 *Robt.* 570.

112. As the power of the corporation to sell is not derived from the statute, but is a common law right upon which the statute operates as a restriction, a substantial compliance with the directions of the act is all that should be required to sustain an application for leave to sell. *Id.*

113. It is no objection to an order allowing a sale that it does not direct the application of the moneys arising from the sale. The court having acquired jurisdiction by a proper application, any mere irregularity or defect in the proceedings subsequent to the petition is amendable. Moreover, the application of the proceeds may be directed by a separate order. *Id.*

114. The court has, however, no power to approve a sale, for the purpose of closing up the existence of the society, and distributing its property. The trustees have no power to do this, and the court cannot enlarge their powers. *N. Y. Ct. of Appeals*, 1858, *Wheaton v. Gates*, 18 *N. Y.* 395; S. P. *N. Y. Supreme Ct. Sp. T.* 1858, *Matter of Reformed Dutch Church*, 16 *Barb.* 237.

115. Although in New York a religious corporation (organized under the act of 1813) is prohibited from *selling* its real estate, in any other way than the statute provides, yet it may *mortgage* its property without any order of the court. The giving of a mortgage is not a sale. A sale embraces the idea of a transfer of the legal title of the property sold, from the vendor to the vendee, for a consideration passing from the latter to the former. To be complete, in general, it requires delivery. It was a sale in this sense

that the statute was designed to restrain.* *N. Y. Supreme Ct.* 1858, *Manning v. Moscow Presbyterian Society*, 27 *Barb.* 52; S. P. 1853, *South Baptist Society v. Clapp*, 18 *Barb.* 85.

116. That in New Jersey the common law right of alienation by religious corporations has not been restrained by statute,—see *Van Houten v. First Reformed Dutch Church*, 17 *N. J. Eq.* (2 *C. E. Green*), 126.

IV. OFFICERS.

1. The minister.

117. Who is to be deemed a "minister" within statutes providing for the support of ministers, exempting them from taxation, &c.,—see *Washburn v. Fourth Parish of West Springfield*, 1 *Mass.* 32; *Kendall v. Kingston*, 5 *Id.* 524; *Barnes v. First Parish in Falmouth*, 6 *Id.* 461; *Turner v. Second Precinct in Brookfield*, 7 *Id.* 60; *Lovell v. Inhabitants of Byfield*, *Id.* 230; *Gridley v. Clark*, 2 *Pick.* 403; *Baldwin v. Clinch*, 1 *Ma.* (1 *Greenl.*) 102.

118. Both bodies, the church and the society, required to unite in the call and settlement of a minister,—see *Burr v. First Parish in Sandwich*, 9 *Mass.* 297; *Bisbee v. Evans*, 4 *Ma.* (4 *Greenl.*) 875; *German Reformed Dutch Church v. Busche*, 5 *Sandf.* 666.

119. Settlement. If a person called to the rectorship of a Protestant Episcopal church, accepts the call and enters upon his office, no additional ceremony is required; unless by some special requirement of the discipline of the church. If every other requisite for the settlement of the rector is complied with—if the vestry, being clothed with power to settle a minister and fix his salary, have given him a call, and it has been followed by mutual action in acknowledgement of its validity—the absence of the ceremony of "institution" will not prevent his being such. [*Hoffm. Church L.* 291, 293.] *N. Y. Supreme Ct.* 1859, *Youngs v. Ransom*, 31 *Barb.* 49.

120. The contract for salary. A minister

* Under the New York general act for the incorporation of religious societies, the trustees of the society have the power to remove their house of worship from one lot to another, or from one village to another, without any application to the court. It is necessary to apply to the court only in case of a sale of the real estate of the society. *N. Y. Supreme Ct. Sp. T.* 1851, *Matter of Second Baptist Society*, 20 *How. Pr.* 324.

having been settled in a parish at a fixed salary, the parish afterwards voted that the parish committee should annually value the salary according to the price of the necessities of life, so that it should be increased as that price rose. The minister also agreed that it should be decreased as the price fell. *Held*, that the minister was bound by the valuation of the committee, unless he could show that they had acted therein unfairly, partially or corruptly. *Mass. Supreme Ct.* 1812, *Burr v. First Parish in Sandwich*, 9 *Mass.* 277.

121. Evidence of the declaration of a committee of a religious society appointed to offer terms to a minister, is incompetent prove the contract of the society, unless they were authorized by the association to make such admissions. *Mass. Supreme Ct.* 1865, *Johnson v. Trinity Church Society*, 11 *Allen*, 123.

122. A minister cannot prove his contract with a religious society by reading extracts from a sermon preached by him in their church, to the terms of which no open contradiction was made. *Id.*

123. The secretary of a religious society wrote to a minister informing him that the society had voted on January 1, to offer to employ him for one year from that date for a sum in gross. He accepted the offer, stipulating, however, that the year should begin on February 1, and the payments be made quarterly from that date. In December following the society passed a vote, which was duly entered on their records and attested by their secretary, reciting that on the 1st of October they "were not indebted to him in the least, and would not become so indebted to him by the terms of the agreement until November following." *Held*, that there was a sufficient memorandum, within the statute offrauds, of a contract extending to the first of February. *Id.*

124. The plaintiff agreed to officiate as pastor of a church for such sum as could be raised by subscription, the defendant to collect the subscriptions. The society having failed to collect and pay over the subscriptions in full, the plaintiff commenced an action on book account, to recover for his services as pastor; he having continued as such for five years under the same agreement. *Held*, that the contract through the whole time was a contract of hire, under which the

society was bound to pay the plaintiff for his services. *Vt. Supreme Ct.* 1866, *Myers v. Baptist Society*, 38 *Vt.* 614.

125. Where an illegal by-law was made by a vestry requiring payment, from each inhabitant of the parish otherwise entitled to vote, of a certain sum as a voting qualification, and, an election being held under it, a vestry were chosen who appointed a minister with a stipulated salary,—*Held*, that the minister was entitled to recover the amount; the contract having been made with officers *de facto*, and without collusion. Otherwise, if he had had notice of the illegality. *S. C. Chancery*, 1815, *Vestry of St. Luke's Church v. Mathews*, 4 *Dessauss*, 578.

126. Action to recover it. If the salary of a minister is not paid out of the revenues of the church, the minister may recover by action against the corporation. *N. Y. Com. Pl.* 1854, *Ebaugh v. German Reformed Church*, 8 *E. D. Smith*, 60.

127. In an action by a minister of the gospel to recover his salary, it is not necessary, in order to support the action, to show that the trustees have acted as a corporation in engaging his services. *N. J. Supreme Ct.* 1837, *Miller v. Baptist Church in Alloways-town*, 1 *Harr.* 251.

128. Where a minister has been regularly settled over a parish and has been always ready to perform all the duties growing out of the relation so created, and has performed such parochial duties as they would permit him to perform, he is entitled to recover his stipulated salary so long as the relation continues. *Mass. Supreme Ct.* 1827, *Thompson v. Catholic Congregational Soc. in Rehoboth*, 5 *Pick* 469; 1836, *Sheldon v. Congregational Parish in Easton*, 24 *Id.* 281. And see *Whitney v. Brooklyn*, 5 *Conn.* 495.

129. In an action by a minister against a parish for his salary, after the parish have voted to dismiss him, it is not competent to prove irregular conduct or immorality, in answer to his claim, if it was not alleged in the vote of dismissal. *Mass. Supreme Ct.* 1827, *Thompson v. Catholic Congregational Soc. in Rehoboth*, 5 *Pick* 469.

130. — against individuals. A written call addressed to a minister, drawn in the form prescribed by the rules of the Presbyterian church, contained the words "we promise to pay to you the sum of \$500;" was subscribed by three individuals in their

own names simply. It appeared, however, that the call was issued as the act of the congregation, and that the mode of signing adopted was conformable to the rules and usage of the church. *Held*, that the subscribers were not individually liable, but were to be deemed to have acted as agents of the congregation. *N. Y. Supreme Ct. 1844, Paddock v. Brown, 6 Hill, 580.*

131. The officers of a church which was not incorporated, made an agreement with the minister for the payment of his salary; the church was afterwards incorporated, he being a party to the act of incorporation, and from time to time he received his salary from the officers of the church for the time being, and charged his salary to the corporation. *Held*, that the original agreement was waived, and the individual officers, who were parties to it, were not liable. *N. Y. Supreme Ct. 1810, Van Vlieden v. Welles, 6 Johns. 85.*

132. Dismissal. What grounds will justify the dismissal of a minister against his consent,—see *Burr v. Sandwich, 9 Mass. 277; Thompson v. Catholic Cong. Soc. in Rehoboth, 5 Pick. 469; Sheldon v. Cong. Parish in Easton, 24 Id. 281; Youngs v. Ransom, 31 Barb. (N. Y.) 49.*

133. The relation of a minister duly chosen and ordained, is not to be dissolved, against the will of the minister and of a majority of the congregation, by the proceedings of any ecclesiastical tribunal. *Vt. Supreme Ct. 1846, Smith v. Nelson, 18 Vt. 511.*

134. Nothing can be added by implication to the express terms of the contract between a minister and his people. The parties may make conditions and qualifications as they deem necessary. When a minister ceases to be able to perform his ministerial duties, in consequence of any immorality, or a church censure for such immorality, it may afford a sufficient reason for the parties mutually to dissolve the relation, or for one of them to treat the contract as forfeited, and rescinded by the other. But when both parties to the contract are satisfied, and neither desires the relation to be dissolved, a court of chancery will not, at the instance of others, not parties to the contract, seek for implications by which to avoid it, nor inquire whether it would conduce to the satisfaction of others to have a minister

more closely connected with the denomination to which he belongs. *Id.*

135. Where a minister, having stated that certain members of the presbytery, to which he belonged, were unfit to sit in any court, was, by vote of the presbytery, censured and suspended, and the vote was passed by the very men, as to whom the statement was made,—*Held*, that the sentence of suspension could not be said to have been pronounced by impartial judges, and that it was not deserving of consideration, as a valid and effectual sentence. *Id.*

136. The congregation to which the suspended minister belonged, having petitioned the presbytery again to take into consideration the affair, a *pro re nata* meeting of the presbytery was called, at which there was a full attendance and a majority of two in favor of restoring the minister. A resolution having been offered, that two of the members should be excluded from participating in the proceedings of the meeting on the ground of affinity and partiality, the right of voting on the case of each separately, although they were entirely distinct in their nature, was denied, and so both were prevented from voting on the resolution. The resolution being then passed by the casting vote of the moderator, the same four men—who were the accusers of the suspended minister, voted in the affirmative. It appeared that there was in fact no proper objection to one of the two members, thus excluded; and the presbytery, a majority being thus obtained, proceeded and voted to affirm the sentence of suspension, the same four persons voting in the affirmative. *Held*, that these proceedings rendered the sentence of the presbytery utterly void. *Id.*

137. Where, however, a minister and his parish submit a controversy between them to an ecclesiastical council, the decision of such council, if not impeached for good cause, is a justification of the party conforming to it, though it does not, *ex proprio vigore*, operate as a judgment. *Mass. Supreme Ct. 1844, Proprietors of Hollis Street Meeting House v. Pierpont, 7 Metc. 495.*

138. A minister and his parish submitted to an ecclesiastical council the question whether he should be dismissed. Among other causes assigned by the parish for his dismissal, was a certain alleged immorality. The council decided that the alleged im-

morality was not proved, and that there was no sufficient cause for a dismissal. The minister conformed to the decision, continued to perform his parochial duties, and brought an action against the parish to recover his salary. The parish thereupon filed a bill of discovery, alleging that he had forfeited his office of minister of the parish, by reason of the aforesaid immorality, and that proof thereof was essential to their defence against said action; and praying that he might be compelled to answer on oath respecting the same. The minister pleaded the decision of said council, and his conformity thereto, as a bar to the bill. *Held*, that the minister was not bound to make the discovery sought, because the decision of the council precluded the parish from giving any evidence in support of said charge of immorality, by way of defence to said action. *Id.* Compare *Thompson v. Catholic Cong. Soc. in Rehoboth*, 7 *Pick.* 160.

2. Trustees. Church wardens and vestrymen.

139. Time of electing them. The trustees of a religious corporation were required, by statute, to be divided into three classes, and the seats of one class were to be vacated at the expiration of every year, so that one third should be "annually chosen," and the time of the annual election was required to be at least six days before the vacancies should happen. *Held*, that an election on *Pinxter* Monday (i. e. the Monday after *Whitsunday*), in each year, though that day was a movable holiday, and not a day certain, was valid. The church having fixed upon a yearly religious epoch, it would be revolting to hold the corporation dissolved from the very first time that the elections were so held, and that all its subsequent elections and acts were void, merely because the holiday selected for the election did not correspond with the solar year. The statute must receive a liberal and reasonable construction, for the benefit of the churches. An election in such case may be valid, if made after the statute time, if an integral part of the corporation remains. *N. Y. Supreme Ct.* 1812, *People v. Runkel*, 9 *Johns.* 147.

140. The omission of a parish, for one year, to elect parish officers, does not necessarily operate as a dissolution of the parish; and, if it did, the parish property would not therefore vest in the town, although the

town held the property, in its parochial capacity, before the parish was separately organized. *Mass. Supreme Ct.* 1847, *Tobey v. Wareham Bank*, 18 *Metc.* 440.

141. Notice. An election of trustees of a religious corporation is not necessarily void because the notice given by the trustees to the minister was less than the required time; did not contain the names of the trustees whose seats became vacant; was not announced for two successive Sabbaths, &c.; provided the election was fairly conducted and all in fact had notice. If the omission was fraudulently made, or the election was thereby prejudiced, the omissions invalidate the election. *N. Y. Supreme Ct.* 1884, *People v. Peck*, 11 *Wend.* 604.

142. Who may vote at an election of trustees,—see *Robertson v. Bullions*, 11 *N. Y. (1 Kern.)* 248; *Jackson v. Nestles*, 3 *Johns.* 115, 135; *State v. Crowell*, 4 *Halst.* 390.

143. Where the charter of a church authorized the making of by-laws for its good government, and directed that the elections of ministers, &c., should be conducted agreeably to certain rules, one of which was, that no persons were to have votes except those who had been regularly admitted, and had been members for twelve months preceding the election,—*Held*, that a by-law enacting that no member of the church, whose pew-rent was in arrear for a longer time than two years, should be entitled to vote for officers, was valid; for no person was excluded from voting unless he was in default in a matter essential to the support of the church; and he was not precluded from reinstating himself in his privilege, by paying his debt. *Pa. Supreme Ct.* 1820, *Commonwealth v. Cain*, 5 *Serg. & R.* 510.

144. The charter of a religious society provided that "all and every member of the said church, having subscribed to building the same, or who shall hereafter contribute any sum of money not less than ten shillings annually towards the support of said church, shall meet on a certain day in every year, and choose, by ballot, eight trustees by a majority of those members qualified to vote as aforesaid." *Held*, that those who came to the election and paid ten shillings, though with the *bona fide* intention of becoming members of the church, were not entitled to vote; but those only were entitled who had contributed to the erection

of the church, or contributed ten shillings towards its support at least a year before the election. *Pa. Supreme Ct.* 1853, *Yuker v. Commonwealth*, 20 *Pa. St.* 484.

145. Two elections were held in a corporation originally organized as a Congregational society, but in which an attempt had been made to organize a Presbyterian church instead of the Congregational one. At one of these elections (conducted mainly by persons interested in maintaining the original character of the society), those members of it who adhered to the Presbyterian organization were excluded from voting, on the ground that they were seceders from the society. *Held*, that this was fatal to the validity of that election, and that the persons claiming under it as trustees had no title as such, but those chosen at the other election were the legitimate trustees. *N. Y. Supreme Ct.* 1844, *Watervliet Turnpike Co. v. McKean*, 6 *Hill*, 616.

146. How the vote should be taken. The vote of a religious society, assembled at its annual meeting for the election of officers, that the officers shall be always chosen by ballot, does not invalidate an election of officers by hand vote at a subsequent annual meeting. Such a vote has no binding efficacy upon those subsequently assembled to perform similar duties. The successors have an equal right to determine the mode of electing the officers for the year ensuing as their predecessors had. *Mass. Supreme Ct.* 1857, *Wardens of Christ Church v. Pope*, 8 *Gray*, 140.

147. The election, by hand vote, of officers of a religious society, in which each proprietor has a vote for every pew which he owns, cannot be objected to, upon the ground of the inherent difficulty of thus ascertaining the result, after the election has taken place and the result has been declared. *Id.*

148. A certificate of the election of wardens and vestrymen, made by the rector, is, under the New York statutes, presumptive evidence of the right of the party receiving it to hold the office and exercise its functions. *N. Y. Ct. of Appeals*, 1867, *People v. Lacoste*, 37 *N. Y.* 192.

149. Upon the sufficiency of a certificate of the election of trustees,—see *Methodist Episcopal Union Church v. Pickett*, 19 *N. Y.* 482.

150. Powers and duties. The trustees of a religious corporation are its managing

agents, and may act for it as fully as the directors or agents of other corporate bodies. *N. Y. Supreme Ct. Sp. T.* 1862, *Matter of St. Ann's Church*, 14 *Abb. Pr.* 424; 23 *How. Pr.* 285.

151. In New York the trustees of a church or society, when it is legally incorporated, become by force of the statute (3 *N. Y. Rev. L.* of 1813, 212), entitled to the possession of the property of the church, though before held in trust for the society; for the statute transfers the legal title of such property to the corporation. *N. Y. Supreme Ct.* 1830, *Reformed Dutch Church v. Veeder*, 4 *Wend.* 494; 1853, *Voorhees v. Presbyterian Church*, 17 *Barb.* 103; *N. Y. Chancery*, 1832, *First Baptist Church v. Witherell*, 3 *Paige*, 296; S. P. 1838, *Reformed Dutch Church v. Mott*, 7 *Id.* 77; *N. Y. A. V. Chan. Ct.* 1844, *Cammeyer v. United German Lutheran Churches*, 2 *Sandf. Ch.* 186.

To same effect in Louisiana,—see *German Evangelical Congregation of Lafayette v. Pressler*, 17 *La. Ann.* 127.

152. Persons claiming to be trustees of a religious corporation, who have not been in possession of the edifice or temporalities of the church, nor exercised any duties of the office, cannot maintain an action in the corporate name to restrain those in possession from closing the edifice, preventing meetings, &c. They must first gain possession of the office, or must have established their title thereto by a direct proceeding brought for that purpose. *N. Y. Supreme Ct.* 1862, *North Baptist Church v. Parker*, 36 *Barb.* 171.

153. A religious corporation formed under the Maryland Act of 1802, ch. 8, to incorporate religious societies,—which provides that certain persons in such associations elected trustees shall be deemed a body corporate, and shall have perpetual succession, and power to sue and be sued in the name of incorporation,—cannot be sued in the name of its trustees individually. *Md. Ct. of Appeals*, 1865, *Tartar v. Gibbs*, 24 *Md.* 328.

154. The vestry of a Protestant Episcopal church, in the absence of any provision repugnant to such powers, have authority to call meetings of the proprietors. *Mass. Supreme Ct.* 1857, *Wardens of Christ Church v. Pope*, 8 *Gray*, 140.

155. The vestry of a Protestant Episcopal church may transact business in the absence of both wardens, if a majority of all their

members is present; even if it has been voted at several annual meetings, "that one warden and four vestrymen constitute a quorum for transacting business." *Id.*

156. A vote of a Protestant Episcopal church to increase the number of vestrymen does not affect the rights and powers of the former vestrymen, until the additional members have been chosen. *Id.*

157. — of committee. The articles of association of a society formed for the purpose of erecting a meeting house provided, that the whole expense of the house should be estimated on the whole number of pews, by appraisal, and that the subscribers should bid for their choice of pews, but that the average price of the pews should not exceed a certain sum. *Held*, that this provision was not designed as an absolute limit to the amount to be expended by the building committee in erecting the house; and that a member of the committee might recover for services and expenditures in erecting the building, notwithstanding the whole expense exceeded the amount which the pews would bring at the average price specified; it not appearing that the committee had departed from the general plan prescribed for the building. *Vt. Supreme Ct.* 1846, *Sawyer v. Methodist Epis. Soc. in Royalton*, 18 *Vt.* 405.

158. A contract made by one of five members of a committee chosen by a parish to build a church, in the name of the whole, is not binding on the corporation, even if the building committee had authority to enter into the contract; and therefore cannot be enforced against the other contracting party. *Ma. Supreme Ct.* 1839, *Adams v. Hill*, 16 *Ma.* 215.

159. A treasurer of a religious society is not justified from the nature of his duties, or the business to be done, in giving negotiable instruments binding the society, without being authorized by a special vote to that effect; and such officer has no authority, having accepted a draft on him, drawn by the standing committee, payable to A. or order, to bind the parish by accepting A.'s draft on him, in favor of a third person, for part of the amount of the first draft; though the amount of the second draft is indorsed on the first, as part payment thereof. *Mass. Supreme Ct.* 1845, *Packard v. Universalist Society in Quincy*, 10 *Metc.* 427.

160. Compensation. Where it appeared

that the secretary and treasurer of the vestry and wardens of a church had never made any charge for his services in taking care of the trust funds in his hands, and it was entered upon the records kept by him, that the thanks of the vestry had from time to time been voted him for his able and gratuitous services,—*Held*, that he could not afterwards charge a commission for such services. *S. C. Ct. of Appeals*, 1847, *Vestry & Wardens v. Barksdale*, 1 *Strobh. Eq.* 197.

161. How far controlled by courts. The court has no authority to control the discretion of the vestry and wardens of a church in the management of its funds, so long as they do not violate their charter; they are responsible to their constituents alone; and the remedy in case of a loss by misjudgment, merely, is to be found in the power of the corporation by new elections to confide its interests to other managers. *Id.*

162. Whenever the trustees of an incorporated religious society perform any act, which obstructs the enjoyment of the property for the purposes, and in the mode, authorized by the usages of the church as an organized body, they are guilty of a violation of the trust, which chancery will correct. A trust of this character is not distinguishable in this respect from others, over which courts of chancery exercise a supervisory power; and to the exercise of such jurisdiction, it cannot be interposed, as matter of defense, that a *mandamus* might lie, or that the power of removal has been vested by statute in the members of the society. Therefore, where the trustees, by direction of a minority of the members of a religious society, closed the church edifice against the minister, contrary to the wishes of the majority,—*Held*, that it was competent for a court of chancery to intervene, to prevent the trustees from thus obstructing the use of the corporate property for the appropriate objects of the trust. *Ill. Supreme Ct.* 1863, *Brunnenmeyer v. Buhre*, 32 *Ill.* 183.

163. It is no objection to the issuing of an injunction in such cases, that the particular act of closing the church edifice had been already done. *Id.*

As to Enjoining corporations generally, see INJUNCTION.

164. Withdrawal from office. Trustees must belong to the society. If they withdraw from it after election, they thereby

cease to be trustees; and though receiving letters of dismissal from the church may not operate of itself as a withdrawal from the society, yet where taking such letters is followed by acts incompatible with the duties of a trustee—*e. g.* co-operating in the organization of another society, and in attempts to close the place of worship of the former society—the trustee will be held to have vacated his office. *N. Y. Supreme Ct. Sp. T. 1855, Laight Street Baptist Church v. Noe, 12 How. Pr. 497. Compare Doremus v. Dutch Reformed Church, 2 Green, Ch. 882.*

For rules applicable to Trustees of corporations generally, see BOARD; DIRECTORS; OFFICERS.

V. PEWS.

165. The property in a pew in a meeting house, is not an absolute, but a qualified property; it is an exclusive right to occupy a certain part of the meeting house, for the purpose of attending upon public worship, and for no other purpose; and is necessarily subject to the right in the parish to take down and rebuild the meeting house, and make such alterations as the good of the society requires. The owner cannot convert it to any other use; nor can he injure other holders of pews in the enjoyment of their property. *Mass. Supreme Ct. 1822, Daniel v. Wood, 1 Pick. 102.*

166. The right of a pew-owner is a usufructuary right merely; it does not entitle him to an injunction restraining the trustees from pulling down the edifice, when it becomes necessary, for the purposes of the society, to erect a new one. *N. Y. V. Chan. Ct. 1836, Heeney v. St. Peter's Church, 2 Edw. 608. S. P. Supreme Ct. 1853, Voorhees v. Presbyterian Church of Amsterdam, 17 Barb. 103; Bronson v. St. Peter's Church, 7 N. Y. Leg. Obs. 861; Sp. T. 1860, Cooper v. First Presbyterian Church, 82 Barb. 222.*

167. Although a pew in a church has been purchased and a title given to the purchaser, he has but a qualified interest. His right is subject to that of the trustees or owners of the church, who may take down, rebuild, or remove the church for the purpose of more convenient worship, without making compensation to the pew-holders for the temporary interruption. *N. J. Chancery, 1864, Van Houten v. First Reformed Dutch Church, 17 N. J. Eq. (2 C. E. Green), 126.*

168. A parish is sole owner of the soil upon which the meeting house stands, and of the building itself. A pew-holder has an exclusive right to occupy his pew, and to maintain trespass, or a writ of entry, against any one who disturbs him. But he does not own the soil over which his pew is built, nor the space above. The building and the soil being the property of the parish, they may, when necessary, take it down and rebuild upon the same spot, or may alter the form and shape of it, for the purpose of making it more convenient; and if, in taking down or rebuilding the house, the pews are destroyed for a useful purpose, an indemnity must be provided for the pew-holders*. *Mass. Supreme Ct. 1821, Gay v. Baker, 17 Mass. 485; 1884, Kimball v. Second Cong. Parish in Rowley, 24 Pick. 347.*

169. The trustees of a religious corporation (under N. Y. Laws of 1801, 1 Kent & R. 336, Webster's Ed. 1802; re-enacted, 1 Rev. Laws, 212; 8 Rev. Stat. 244,) have not the power to sell and convey, by an absolute deed in fee, a slip or pew. Their power is limited to a demise or lease. *N. Y. Supreme Ct. 1849, Vielie v. Osgood, 8 Barb. 180; 1853, Voorhees v. Presbyterian Church of Amsterdam, 17 Id. 108.*

170. The interest of the lessee of a pew in perpetuity, is, however, an interest in real estate, and is subject to all the incidents thereof. [16 Wend. 28; 8 Hill 26; 8 Barb. 180; 4 Kent, Com. 367.] *N. Y. Supreme Ct. 1860, St. Paul's Church v. Ford, 34 Barb. 16. And see Bates v. Sparrell, 10 Mass. 323.*

171. The sale of a pew in a church is a sale of an interest in real estate, within the rules requiring the contract to be in writing, and subscribed by the vendor or his agent. *N. Y. Supreme Ct. 1849, Vielie v. Osgood, 8 Barb. 180; 1836, Trustees of First Baptist Church v. Bigelow, 16 Wend. 28.*

172. A sale of pews is not a sale of real estate, within the act—New York Act of

* Procuring interments of deceased relatives in a church burying ground, although upon payment of fees to the corporation or its officers, carries merely a privilege of sepulture, and does not vest a title to the land, nor entitle the purchaser to restrain a sale of the ground by the corporation, and a removal of the remains to another place. *Winds v. German Reformed Church, 4 Sandf. Ch. 471; Price v. Methodist Church, 4 Ohio (4 Ham.) 515.*

Vault-owners in a churchyard.—*Held*, under the terms of their deeds, owners of the fee of their lots, and entitled to veto a proposed sale of the property by the trustees. *Matter of Brick Presbyterian Church, 8 Edw. 155.*

1806 (*supra* 108), requiring the sanction of court to a sale of real property of a religious corporation. As the grantee acquires a limited usufructuary right only, no order is necessary to authorize such a sale. *N. Y. Supreme Ct.* 1826, *Freligh v. Platt*, 5 *Cow.* 494.

178. Assessments upon pews. Where the power of a religious society to assess a tax upon the pews in their church is derived from and limited by the deeds of the society to the pew-owner, a tax assessed in part for purposes not specifically named in the deeds is invalid. *Mass. Supreme Ct.* 1864, *First Methodist Episcopal Society v. Brayton*, 9 *Allen*, 248.

174. An act of incorporation of a religious society provided that "the pew-holders in the society shall have power to assess a tax not exceeding ten per cent. per annum on all pews, for the needful repair and insurance of their house of worship, and for the purpose of raising such sum or sums of money yearly, therefrom, as may be thought expedient, for the support of the pastor of the church and congregation, and for the payment of other incidental expenses to which the society may be subjected, in maintaining and supporting religious worship regularly in said house." An amendment to the act provided that any pew-holder might surrender the occupancy of his pew to the society, by giving three months' notice, in writing, to the treasurer; "after the expiration of which time the owner shall be exempt from all assessments on said pew or pews for the support of a pastor, and the same may be occupied and used by the society, or by them let; provided, however, any owner or owners of such pew or pews may resume the occupancy of said pew or pews, and hold the same in the same manner, and under the same terms, and subject to the same liabilities as before said surrender, after three months' written notice to the treasurer of said society, of the intention to do so." *Held*, that the only restrictions upon the power of the society to assess the surrendered pews, were, that they should not be assessed beyond ten per cent. per annum, and should be exempt from all assessments for the support of the pastor. *R. I. Supreme Ct.* 1861, *Second Universalist Society v. Cooke*, 7 *R. I.* 69.

175. The power of a Massachusetts religious corporation to lay an assessment for the corporate expenses upon the pews in their church edifice; and to sell a pew for non-

payment; and the validity of their by-laws relating to such assessment,—determined. *Mussey v. Bulfinch St. Society*, 1 *Cush.* 148.

176. Pew-holder—*Held*, not liable for assessment levied by the trustees to defray minister's salary; in a peculiar case. *Trustees of First Presbyterian Congregation v. Quackenbush*, 10 *Johns.* 217.

REMOVAL.

As to removal of Officers, see *AMOTION*.

As to removal of Members, see *EXPULSION*.

RESIDENCE.

1. In general the word "resident," in statutes relative to remedies, taxation, &c., includes corporations created by and carrying on business within the State. *U. S. Supreme Ct.* 1844, *Louisville &c. R. R. Co. v. Letson*, 2 *How.* 497; *N. Y. Supreme Ct. Sp. T.* 1855, *Conroe v. National Protection Ins. Co.* 10 *How. Pr.* 403; *Hubbard v. Same*, 11 *Id.* 149; *U. S. Circ. Ct. (Ind.)* 1847, *Vallette v. White-water Valley Canal Co.* 4 *McLean*, 192; (*Ohio*), 1853, *New York & Erie R. R. Co. v. Shepard*, 5 *Id.* 455. And see, to same general effect, *Cape Sable Co.'s Case*, 3 *Bland*, 606; *Central Bank of Georgia v. Gibson*, 11 *Ga.* 453; *United States Bank v. Devaux*, 5 *Cranck*, 84; *King v. Gardner*, *Covp.* 70. But compare *Hinds v. Canandaigua & Niagara Falls R. R. Co.* 10 *How. Pr.* 487; *Sherwood v. Buffalo & N. Y. City R. R. Co.* 12 *Id.* 136.

2. A corporation for the improvement of a river, which formed the boundary between two States, was chartered by a law passed in each State. *Held*, that it might be regarded as having its residence in the State in which the first charter was passed, and in which its principal officers resided, and its principal business was transacted, and that actions might be maintained against it there. *U. S. Circ. Ct. (Ind.)* 1849, *Culbertson v. Wabash Navigation Co.* 4 *McLean*, 544.

3. The place of residence of a corporation is deemed to be the place where its principal office is located, or where its principal operations are carried on. *N. J. Supreme Ct.* 1856, *Thorn v. Central R. R. Co.* 2 *Dutch.* 121; *N. Y. Supreme Ct. Sp. T.* 1855, *Conroe v. National Protection Ins. Co.* 10 *How. Pr.* 403; *Hubbard v. Same*, 11 *Id.* 149. See to the same ef-

fect, *Androscoggin &c. R. R. Co. v. Stevens*, 17 *Me.* 484.

4. The fact that a corporation has a secondary office in another county, where some of its business is done, does not make it a resident there. The residence is where the general business is transacted. *N. Y. Supreme Ct. Sp. T.* 1855, *Hubbard v. National Protection Ins. Co.* 11 *How. Pr.* 149.

5. A corporation which has several places of business, may be deemed a resident of each. *N. Y. Supreme Ct. Sp. T.* 1858, *Pond v. Hudson River R. R. Co.* 17 *How. Pr.* 543.

6. In New York a corporation created by the laws of that State is deemed a resident thereof, although the bulk of its property and business lies in a foreign State. *N. Y. Supreme Ct.* 1859, *Crowley v. Panama R. R. Co.* 80 *Barb.* 99. And see *International Life Assurance Co. v. Sweetland*, 14 *Abb. Pr.* 240.

7. With reference to suits. The dwelling of a corporation, within the meaning of statutes regulating the jurisdiction of courts, is the place which is occupied as their home—that is to say, where their profits come home to them, whence orders emanate, and where the chief officers are to be found. *Each.* 1861, *Adams v. Great Western Railw. Co.* 6 *Hurlst. & N.* 404; 80 *Law J. N. S.* *Each.* 124; 8 *Law Times, N. S.* 681.

8. The legal residence of a corporation is not confined to the locality of its principal office of business, but extends to the territorial limits of the jurisdiction which granted its charter. And such corporation may be made a party to a suit, by service of a writ on its president, in any district, where the plaintiff resides, or the cause of action accrues; and its appearance may be enforced, when necessary, by a *distringas* on its property in such district. *S. C. Ct. of Appeals*, 1846, *Glaize v. South Carolina R. R. Co.* 1 *Strobh. Law*, 70. See *Cromwell v. Ins. Co.* 2 *Rich.* 512.

As to Service, see *Suits*.

9. A railroad corporation, in legal contemplation, resides in the counties through which its road passes, and in which it transacts its business; and it may be sued in any county through which the road passes, or in which its corporate powers are exercised. *Iowa Supreme Ct.* 1857, *Baldwin v. Mississippi &c. R. R. Co.* 5 *Clarke, (Iowa)*, 518; 1859, *Richardson v. Burlington. &c. R. R. Co.* 8 *Id.* 260. Compare *People v. Pierce*, 31 *Barb.* 138;

Bement v. Plattsburgh & Montreal R. R. Co. 47 *Barb.* 104.

10. A railroad company is not to be deemed a non-resident of a county through which its road passes, so as to be liable to be sued by short summons under a statute providing for a short summons against non-residents, and a longer one against residents. It is entitled to a long summons. *N. Y. Supreme Ct.* 1857, *Belden v. N. Y. & Harlem R. R. Co.* 15 *How. Pr.* 17.

11. Upon an application for the removal of a cause from a State court to a United States court on the ground of citizenship or residence of a corporation which is a party thereto, the corporation will not be deemed a non-resident of a State, although chartered by the laws of another State, if it has a regular place of business within the State in which the action is pending, and has there an agent, upon whom, by law, process may be served, and who has agreed to admit service of process. *N. Y. Superior Ct. Sp. T.* 1867, *N. Y. Piano Co. v. New Haven Steamboat Co.* 2 *Abb. Pr. N. S.* 357.

12. A corporation is a resident subject or citizen of the State in which it is created, irrespective of the residence of its members or shareholders; and although the corporation can have no legal existence beyond the boundaries of that State, but must dwell there, and cannot migrate to another State, it may act by agents beyond the territorial limits of its existence. It may therefore become liable to service of process in foreign States; and its property locally situated there may be subject to taxation. *Mo. Supreme Ct.* 1867, *City of St. Louis v. Wiggins Ferry Co.* 40 *Mo.* 580. Compare *Wood v. Hartford Fire Ins. Co.* 18 *Conn.* 202; *Lexington Manuf. Co. v. Dorr*, 2 *Litt.* 256.

13. With reference to taxes. Under a statute which declares non-residents doing business within the State liable to taxation upon the capital employed in such business, corporations doing business within the State, but created under the laws of another State, are liable to be taxed. A corporation is deemed a citizen of the State by which it is created. *N. Y. Supreme Ct.* 1858, *International Life Ass. Soc. v. Commissioners of Taxes*, 28 *Barb.* 318; 17 *How. Pr.* 206.

14. A railroad corporation should be regarded as a resident of the several towns and wards through which its road extends,

within the meaning of the tax laws, and assessed therein for its real estate, the same as taxable inhabitants are assessed for their real estate situated therein. The real estate of railroad companies which is occupied and used by them for railroad purposes is not required to be assessed as non-resident lands. *N. Y. Supreme Ct.* 1866, *People v. Fredericks*, 48 *Barb.* 173; 83 *How. Pr.* 150.

As to how far corporations are deemed Persons, see FOREIGN CORPORATIONS, 9-11. INCORPORATION, 14-25.

For decisions upon Suits by and against corporations and Taxes upon them.

For decisions upon the Proper place for laying venue of actions by or against corporations, or of assessing their property for taxation, not depending on the force of the term "resident," see Suits; Taxes.

RESOLUTION.

1. When obligatory. Where a thing is ordered to be done at a meeting of the directors of a bank, and no objection is subsequently made* to the regularity of the meeting, by any person who is interested in the direction of the bank, an act authorized by resolution passed at such meeting cannot be objected to in a suit in equity to test the legality of the thing done, on the ground of irregularity; although the power to do the thing is in such a case a question properly before the court. *N. Y. V. Chan. Ct.* 1843, *Leavitt v. Yates*, 4 *Edw.* 184.

2. Thus a deed of a corporation executed pursuant to the direction of a quorum of the directors, no objection being taken at the time, nor afterwards, by any member of the board, must be considered as the corporate act, whether the meeting was duly convened or not. *Ib.*

3. In a suit by a bank against its cashier, on his bond, to recover damages for neglecting to protest a bill of exchange left with the bank for collection, it was proved that it was the duty of the cashier to attend to this department. It also appeared that, the directors having passed a resolution requiring

the cashier to regulate the duties of the officers of the bank, so as to give a certain other officer the necessary assistance in his department, a memorandum, arranging the duties of the several officers, and giving to the second bookkeeper the charge of the collecting department, was drawn up, signed by all the officers except two, and laid before the board of directors when in session; but it was not shown that it was read, or acted upon. *Held*, that it was a reasonable inference that the board of directors assented to the arrangement, and approved of it; and that the memorandum was properly admitted in evidence, to show that the default was not the defendant's, but that of the second bookkeeper. *Ala. Supreme Ct.* 1848, *Bank of the State of Alabama v. Comegys*, 12 *Ala. N. &* 772.

4. The mere presence of a person at a lawful meeting does not make him responsible for a resolution there passed, if he protests against it. Thus, where a director of a company at a meeting of the subscribers opposed a resolution looking to amalgamation with another company, but, finding himself in a minority, insisted on the insertion of certain terms, believing that those terms would prevent the plan of the majority from being carried out,—*Held*, that he was not responsible if the plan was carried out on those terms. *Chancery*, 1855, *Re Direct &c. Railway Co.* 31 *Eng. L. & Eq.* 430.

5. A vote of a corporation, which affects the liability of those of its members who are its debtors, cannot be regarded as assented to by them, if they were not present at the meeting at which the vote was passed, although they had legal notice of the meeting. *Mass. Supreme Ct.* 1842, *American Bank v. Baker*, 4 *Metc.* 164.

6. Where a municipal corporation passed a resolution directing payment of a sum which had been awarded by arbitrators for extra work by contractors,—*Held*, that this was an acknowledgment, on the part of the corporation, of an indebtedness to that extent, and a promise to pay it, and that, after being assented to by the contractor, it became binding upon the corporation, and could not be rescinded except by mutual agreement. *N. Y. Supreme Ct.* 1847, *Brady v. Mayor &c. of Brooklyn*, 1 *Barb.* 584.

7. How interpreted. The intention of a corporation can only be learned by the

* When a member of the board of trustees of a corporation, at a session of the board, makes a statement in respect to its action, and such statement is allowed to pass uncontradicted, such statement, although evidence against the board, is not conclusively binding upon it. *Mo. Supreme Ct.* 1860, *Williams v. Christian Female College*, 39 *Mo.* 250.

language of its recorded acts; and neither the private views nor the public declarations of individual members of such corporation are, for this purpose, to be inquired after. [6 Cranch, 87.] *Conn. Supreme Ct.* 1843, *Bartlett v. Kinaley*, 15 *Conn.* 327.

8. A bank cashier cannot be asked "what he understands" by a term—*e. g.* New York State currency—used in a resolution of the directors. His individual understanding is immaterial. The term must be held to mean what the ordinary signification of the word implies, unless, by some general knowledge, some other technical meaning can be attached to it. *N. Y. Ct. of Appeals*, 1862, *Ehle v. Chittengo Bank*, 24 *N. Y.* 548.

9. Instances of interpretation. A vote of the proprietors of a township, "that the collector be empowered to give deeds of lands sold for taxes," empowers him to sell the lands of delinquent proprietors in the mode provided by law. *Ms. Supreme Ct.* 1828, *Farrar v. Eastman*, 5 *Ms.* (5 *Greenl.*) 845.

10. A vote authorizing an agent to settle with the plaintiffs at an amount not exceeding a specified sum, provided the company be released from all claim,—*Held*, not a mere offer to compromise with the plaintiffs, but proper evidence, to be submitted to the jury, in support of their claim. *Conn. Supreme Ct.* 1853, *Howard Ins. Co. v. Hope Mut. Ins. Co.* 23 *Conn.* 394.

11. A resolution that a specified periodical allowance be appropriated to an officer for the payment of the expenses of keeping a horse and wagon, which is required to enable him to discharge his duties, appropriates the entire sum, not merely what may be necessary for the expenses. *N. Y. Supreme Ct.* 1857, *People v. Northrop*, 15 *How. Pr.* 152.

12. Sealing. A vote of the directors of a corporation, to authorize its president to execute a mortgage in its behalf, need not, in order to confer such authority, be under the seal of the corporation. [8 *Conn.* 191.] *Conn. Supreme Ct.* 1842, *Beckwith v. Windsor Manuf. Co.* 14 *Conn.* 594.

As to Sealing corporate instruments generally, see *SEAL*.

13. Recording. Nor is it necessary that such vote should be recorded, with the deed, in the town records. *Id.*

SAVINGS BANKS.

1. They are "banks." The receiving of deposits by a chartered company, and loaning or investing the same for the benefit of depositors, is a business of banking. Banks, in the commercial sense, are of three kinds: 1. Of deposit; 2. Of discount; 3. Of circulation. It may be that all, or any two of these functions, are exercised by the same association; but there are banks of deposit, without authority to make discounts, or issue a circulating medium. Thus an institution for receiving savings, though established for the encouragement of thrift among laborers and others, and required by the charter to invest all moneys, and divide among depositors all the net income, without compensation to its managers, may be regarded as a bank; and such an institution is "a bank or company engaged in the business of banking," within the purview of the United States internal revenue laws. *U. S. Supreme Ct.* 1865, *Bank for Savings v. The Collector*, 3 *Wall.* 495. Compare *State v. Louisiana Savings Co.* 12 *La. Ann.* 568.

2. Relations of depositors. That depositors of money in a savings society are not, as such, stockholders or members of that society,—see *Savings Bank of New London v. New London*, 20 *Conn.* 111.

3. An action at law is maintainable in behalf of a depositor in a savings bank against the corporation, to enforce his right under the by-laws to reclaim his deposits. Where many persons have, individually, deposited money with such corporation, the relation of partners does not exist between the parties; and the law of partnership is not applicable. *Ms. Supreme Ct.* 1844, *Makin v. Savings Institution*, 23 *Ms.* 350.

4. Liability. The constitution of an incorporated savings fund society, organized for the purpose of receiving and investing deposits made by members, provided that the joint fund should alone be liable for the debts or engagements of the association; that no creditor should have recourse to the separate property of any member; and that no engagement could be legally made in behalf of the society, or check, draft or order be given, unless the same contained such limitations and restrictions. A former member of the society made large special deposits, for which he received certificates of deposit,

which were without limitation or restriction as to personal liability. In an action by his representatives to recover upon such certificates subsequent to the insolvency of the association,—*Held*, that the members of the society, in the absence of an express stipulation with the depositor, to the contrary, were individually liable for the debt; and that the former membership of the depositor, continuing through a long period, was not alone sufficient to affect him with knowledge of the constitutional restrictions, so as to avoid this result. *Pa. Supreme Ct. 1865, Beaver v. McGrath, 50 Pa. St. 479.*

5. **Right to recover deposits.** A depositor in a savings institution, agreed with the institution, that his deposits, which he was at liberty to withdraw at pleasure, should be converted into permanent stock. He afterwards received increased dividends thereon, and participated in the entire profits of the institution, and large amounts of special deposits were made on the security of this stock.—*Held*, that, under these circumstances, he was bound by an equitable estoppel from claiming, on the insolvency of the institution, an equality with the special depositors in the payment of claims based on the original deposit, or from making any attempt to shield the fund created by the conversion of his deposits into stock, from a liability to debts of the institution, contracted on the faith of its responsibility therefor. *Md. Ct. of Appeals, 1886, Maryland Savings Institution v. Schroeder, 8 Gill & J. 93.*

6. A depositor in a savings bank may maintain an action to recover the amount of his deposit, although the bank has paid the same, upon production of the deposit book, to one who has been appointed administrator of the depositor under the erroneous belief that he was dead, after he had been absent for more than seven years without having been heard from. *Mass. Supreme Ct. 1861, Jochumsen v. Suffolk Savings Bank, 3 Allen, 87.* See also, *Eaves v. People's Savings Bank, 27 Conn. 229.*

7. **Regulation requiring production of book.** The plaintiff at the time of making a deposit in a savings bank, accepted as evidence thereof a book stating the deposit and containing this clause: "Depositors are alone responsible for the safe keeping of the book, and the proper withdrawal of their money. No withdrawal will be allowed

without the book, and the book is the order for the withdrawal." *Held*, that the clause must be taken to have made part of the contract between the plaintiff and the bank, and that an action of assumpsit could not be maintained for such deposit without sufficient indemnity being offered to the bank. *N. H. Supreme Ct. 1865, Heath v. Portsmouth Savings Bank, 46 N. H. 78.*

8. A regulation adopted and publicly posted, by a savings bank—that on repayment of any moneys deposited, the pass-book shall be produced, to the end that such payment may be entered therein,—is not unreasonable. It will not be construed so as to work injustice. If the depositor, when he wishes to withdraw his money, cannot do what the regulation requires, he must account for the non-production of the book and show its loss or destruction. If he makes such proof he will be entitled to his money on demand; and if the bank refuses payment of it, an action can be maintained. *N. Y. Ct. of Appeals, 1860, Warhus v. Bowery Savings Bank, 21 N. Y. 543.*

9. But if money is deposited in a savings bank by the hand of an agent, who signs on the books of the bank the name of the principal only, and receives from the bank and delivers to his principal a deposit book in which the principal is credited with the amount, the principal, after demanding payment from the bank and being refused, and giving them his own affidavit of his ownership, and of the circumstances attending the deposit, may maintain an action against the bank for the money, without tendering them a bond of indemnity; although it is the custom of the bank to require depositors to sign their names when making their first deposit, and not to receive any deposits by one person for the benefit of another unless so entered on their books. *Mass. Supreme Ct. 1856, Wallace v. Lowell Institution for Savings, 7 Gray, 184.*

10. The administrator of one who has deposited money in a savings bank, upon terms and conditions set forth in the by-laws contained in the deposit book, one of which provides that "no persons shall receive any part of their principal or interest, without producing the original book," cannot maintain an action against the savings bank for such deposit, without producing the book, or tendering, in lieu thereof, a satisfactory

bond of indemnity. *Mass. Supreme Ct.* 1861, *Wall v. Provident Institution*, 3 *Allen*, 96.

11. But upon proving that the depositor fraudulently disposed of the book in his life time, and that the deposit is needed for the payment of debts; and giving a sufficient bond of indemnity, the administrator may recover, notwithstanding he cannot produce the book. *Mass. Supreme Ct.* 1863, *Wall v. Provident Institution for Savings*, 6 *Allen*, 320.

12. A certificate of deposit, issued by a savings institution, payable to the depositor, or order, is a negotiable instrument, and must be produced and delivered up upon demand for payment. *Md. Ct. of Appeals*, 1862, *Fells Point Savings Institution v. Weedon*, 18 *Md.* 320.

13. Effect of suspending payment. The business of a savings company is of such character that a temporary suspension of payment which is almost necessarily connected with its organization, and must have been contemplated by the legislature, cannot be regarded as an absolute cause of forfeiture; but otherwise as to a fraudulent suspension of payment, or gross negligence in loaning money without sufficient guaranty by which temporary suspension of payment might ensue. *La. Supreme Ct.* 1857, *State v. Louisiana Savings Co.* 12 *La. Ann.* 568.

SCHOOL DISTRICTS.

1. They are corporations. A school district is a public, territorial corporation, required by statute to establish and maintain necessary schools within its limits. *Conn. Supreme Ct.* 1866, *Gilman v. Bassett*, 33 *Conn.* 298. And see *Williams v. Franklin Township Academical Assoc.* 26 *Ind.* 310; *Whitmore v. Hogan*, 23 *Me.* 564.

2. A school society is a corporation competent to take a bequest, or devise, in trust, for educational purposes; and it is no objection to such devise or bequest, that the trustees, who are to have the management of the fund, are required to be selected from certain ecclesiastical societies, such societies being in our law mere incorporated bodies, and their members not necessarily members of the churches connected therewith. *Conn. Supreme Ct.* 1854, *First Congregational Society of Southington v. Atwater*, 23 *Conn.* 56.

3. The trustees of schools and school lands, in Mississippi, are corporate bodies, and, as such, may maintain an action against a member of their own bodies.* *Miss. Ct. of Errors*, 1841, *Connell v. Woodard*, 5 *How.* 665.

4. The inhabitants of a school district, although, like towns and other municipal societies, they are deficient in many of the powers incident to the general character of corporations, yet, may be considered, under our institutions, as *quasi* corporations; with limited powers, co-extensive with the duties imposed upon them by statute or usage; and they have sufficient corporate powers to maintain an action on a contract to build a school house, and to make a lease of land to them. *Mass. Supreme Ct.* 1816, *Inhabitants of Rumford v. Wood*, 13 *Mass.* 193. See also *Burgess v. Pue*, 2 *Gill*, 254, 288.

5. That the trustees of a school district in Missouri are not a corporation, in such sense as to be liable to an action subjecting the school property to execution,—see *Allen v. Trustees of School District*, 23 *Mo.* 418.

6. Organization. What acts are sufficient evidence of the exercise of the franchise and privileges of a school district to authorize the presumption that it has been legally organized,—see *Collins v. Inhabitants of School District No. 7 in Liberty*, 53 *Me.* 522.

7. Where a school district has been organized, in fact, for a number of years, and has chosen its officers from time to time, the selectmen cannot organize it again, as an unorganized district, because doubts were entertained of the regularity of the former organization; and a person is not prevented from contesting the proceedings under such organization, or the authority of the officers, from the fact of his having been a moderator of a meeting under the new organization. *Vt. Supreme Ct.* 1889, *Thomas v. Gibson*, 11 *Vt.* 607.

8. Alteration. By statute, school districts in Massachusetts are placed on the same footing, in regard to the objects for which they are created, as towns, parishes, or other municipal corporations; and, as the legislature cannot disfranchise or destroy a town without its consent, neither has a town power

* As a consequence of their statutory power to sue and to be sued, school districts may appoint and instruct agents to prosecute and defend, or to withdraw defences and confess judgment. *N. H. Superior Ct.* 1845, *Denniston v. School District No. 11*, 17 *N. H.* 492.

to alter the limits of a school district, so as to destroy the corporation, without its consent, nor so as to impair contracts made with the corporation. *Mass. Supreme Ct.* 1827, *Waldron v. Lee*, 5 *Pick.* 328.

9. Under the New Jersey statute of March 14, 1851,—prescribing that no incorporated school district shall be abolished or altered without the consent of a majority of its taxable inhabitants—to alter a school district; all the inhabitants of the district who are entitled to vote must consent to the alteration, and the fact that such majority consented to the alteration, must be set forth in the proceedings and certificate purporting to alter the district. *N. J. Supreme Ct.* 1855, *State v. Deshler*, 1 *Dutch.* 177.

10. That a school district loses none of its rights by being divided, and changing its name, but the various districts into which it is divided may unite in a suit in the name which the district had before division, to maintain any rights which accrued to the district before such division,—see *School District No. 3 v. Macloon*, 4 *Wis.* 79.

11. Union. That under the power to alter the limits of school districts, a town may unite two existing districts,—see *Converse v. Porter*, 45 *N. H.* 885.

12. Where two new school districts are formed from one old one, the title to the existing school houses vests in those of the new districts within whose territory they may happen to fall by the division. *Me. Supreme Ct.* 1843, *Whitmore v. Hogan*, 22 *Me.* 564.

13. Where two school districts are united in pursuance of statute, the district so formed is alone liable for the antecedent debts of each. *Mich. Supreme Ct.* 1865, *Brewer v. Palmer*, 18 *Mich.* 104.

14. Powers and duties of a new school district created by the union of two existing districts—considered. *Bacon v. School District in Barnstable*, 97 *Mass.* 421.

15. Power to contract. Prior to the New Hampshire act of July 9, 1855, school districts in that State had no power to borrow money for the purpose of building school houses, or to bind themselves by a promissory note therefor; and, therefore, where a school district meeting called prior to the enactment of such enabling statute was adjourned to a time subsequent to its coming in force,—*Held*, that a vote at such adjourned

meeting, to borrow money on the promissory note of the district, was not valid. *N. H. Supreme Ct.* 1862, *Weare v. School District*, 44 *N. H.* 189; *Weare v. Sawyer*, *Id.* 198.

16. In Rhode Island, a school district may give, and is bound by, a promissory note, for money borrowed to pay debts legally incurred. And this power incidental to a district as a corporation, is not taken away by the power given to raise money by taxation. *R. I. Supreme Ct.* 1855, *Clarke v. School District No. 7*, 3 *R. I.* 199.

17. Officers. Trustees of school districts are municipal officers, and those who vote for them must have the qualifications prescribed for legal voters under the constitution of the State. *N. J. Supreme Ct.* 1855, *State v. Deshler*, 1 *Dutch.* 177.

18. A committee, appointed by a school district according to the statute, to purchase and repair a school house, are public officers, and a majority of them have authority to act for the whole. *N. H. Supreme Ct.* 1857, *Keyser v. School District No. 8 in Sunapee*, 35 *N. H.* 477.

19. That school directors cannot divest themselves of the powers which have been conferred on them for a public purpose,—see *Conley v. School Directors*, 32 *Pa. St.* 194.

20. Their liability. Committee men of a school district, describing themselves as such in a promissory note, but signing merely with their individual names, are personally liable. *Iowa Supreme Ct.* 1863, *Bayliss v. Pearson*, 15 *Iowa*, 279.

21. Location of the school house. That, under the statutes of Vermont, a school district has the power by a majority vote to locate a school house,—see *Bean v. Prudential Committee*, 33 *Vt.* 177.

22. Where it appears that a site for a school house has been chosen, it will not be invalidated because the clerk has made irregularities or omissions in describing the site selected. *Ill. Supreme Ct.* 1859, *Merritt v. Farris*, 22 *Ill.* 303.

23. The power of a district school board to fix the site of a school house, carries with it the power to change the site. *Iowa Supreme Ct.* 1867, *Vance v. District Township of Wilton*, 23 *Iowa*, 408.

24. Erection, &c. A building committee chosen in pursuance of a vote passed at a school meeting to build a new school house

or enlarge the old one, and instructed "to proceed forthwith to complete the work which is on their hands," have power, at their election, to build a new school house or to enlarge the old one. *Mass. Supreme Ct. 1862, Morse v. School Dist. No. 7 in Newbury, 3 Allen, 807.*

25. The power given to a committee of a school district to build a school house, gives, by implication, such a control of the land and materials, and work, as to authorize them to give notice to the contractor to remove a building placed thereon by him, but not built according to contract. *Me. Supreme Ct. 1840, Hill v. School District No. 2 in Milburn, 17 Me. 816.*

26. Where a school district accepted the proposals of a builder, to erect a school house for a certain sum, with liberty to build a public hall over the same, as the builder's property, he allowing the district to have the use of the hall, free of charge, for meetings of the district, and for examination of the schools, &c., and the house was so built,—*Held*, that the district had not exceeded its authority, and that a tax was legally assessed to pay for the house. *Mass. Supreme Ct. 1848, George v. School District in Mendon, 6 Mete. 497.*

27. The building committee of a school district erected a school house on land to which a perfect title had not been secured to the district, and the district with full knowledge of the facts, ratified the action of the committee. In an action by one of the committee against the district, for money paid out by him for the district under the direction of the building-committee,—*Held*, that the fact that a perfect title to the land had not been secured to the district was no defence to the action; and that a ratification of the acts of the committee in expending more money than they were authorized to expend, would avail as between the parties, although such ratification was subsequent to the commencement of the suit. *N. H. Supreme Ct. 1862, Davis v. School District in Haverhill, 44 N. H. 898.*

28. Control and use. The inhabitants of a school district have no right to use the school house of the district for religious meetings and Sunday schools against the objection of any tax-payer of the district, even though the district may have voted to allow such use. And an injunction will be

granted against such use, on the application of such tax-payer, although the injury to him may be very slight, since he has no other remedy. *Conn. Supreme Ct. 1858, Scofield v. Eighth School District, 27 Conn. 499.*

29. If a prudential committee agree to let a party have the district school house for a private school, during a vacation of the regular district school, and such party act upon the agreement, the committee cannot revoke it, without cause. Nor can the latter allege his want of authority to make it, in an action of trespass against him, for forcibly preventing the party from continuing his school during the period agreed upon. *Vt. Supreme Ct. 1865, Russell v. Dodda, 37 Vt. 497.*

30. Employment of teachers. That, under the North Carolina statutes regulating schools, a school committee have no authority to employ a teacher for a period extending beyond the time when their office expires,—see *Taylor v. School Committee, 5 Jones, Law, 98.*

31. The school district committee must conform to the action of the district, whenever the district acts, in relation to the appointment and removal of teachers. Therefore, where a teacher, without the action of the district, was discharged by the committee, and the district, at a special meeting called for that purpose, directed the committee to reinstate such teacher, but the committee refused to comply with the direction or to resign,—*Held*, on a return to an alternative *mandamus*, that it was the duty of the committee to obey or resign, and in failure thereof a *mandamus* would lie to compel such obedience. *Conn. Supreme Ct. 1866, Gilman v. Bassett, 38 Conn. 298.*

32. Their qualifications. That the school committee of a town, under the statutes of Massachusetts, are the sole judges of the qualifications of teachers in all respects to teach and govern the school for which they are selected,—see *School District No. 10 in Uxbridge v. Mowry, 9 Allen, 94.*

33. Under the school laws of Maine, the production of a certificate issued by a school committee, authorizing the holder to teach, is an indispensable prerequisite to a legal employment as teacher, and it is no excuse for want of such certificate that all the members of the committee neglected or wantonly refused to grant an examination. *Me. Supreme Ct. 1841, Jackson v. Hampden, 20 Me. 37.*

Compare *Crosby v. School District*, 35 *Vt.* 628; *Doyan v. School District*, *Id.* 520.

34. Their right to compensation. A teacher cannot hold a school district liable for his wages, under a contract made with him, by the prudential committee. *N. H. Superior Ct.* 1845, *Stebbins v. School District in Columbia*, 16 *N. H.* 510. And see *Jewell v. Inhabitants of Abington*, 2 *Allen*, 592.

35. The authority and duty conferred by the statute of Ohio upon the local directors of sub-school districts, to employ teachers, and certify the amount due them for services, cannot be controlled or interfered with by any order, resolution, or rule of the township board, fixing a maximum compensation, not to be exceeded by the local directors in employing teachers in any sub-district. *Ohio Supreme Ct.* 1860, *State v. Wilcox*, 11 *Ohio St.* 326.

36. That, under the statutes of New Hampshire, a school district cannot, by vote deprive the prudential committee of the power to provide board for teachers,—see *School District No. 7*, in *Danbury v. Currier*, 45 *N. H.* 578.

37. Dismissal. A prudential committee of a school district has authority to dismiss a teacher; but it should be for just cause or the contract will continue operative and binding upon the district. *Vt. Supreme Ct.* 1866, *Holden v. Shrewsbury School District No. 10*, 38 *Vt.* 529.

38. The contract between a teacher and a school district contained a stipulation "that she should leave if the school was not satisfactory,"—*Held*, that the committee under such stipulation was not warranted in dismissing her on account of her personal unpopularity in the district, or for any reason other than dissatisfaction with her school. *Vt. Supreme Ct.* 1866, *Richardson v. School District No. 10*, 38 *Vt.* 602.

39. In an action against school directors for maliciously conspiring in the removal of a teacher, it is incumbent on the plaintiff to prove malice, an intent to injure, and an unlawful conspiracy on the part of the directors, as public officers; and merely negative evidence of want of probable cause for removal by showing general good conduct and capacity as a teacher, is not sufficient proof of malice in the directors or the committee exercising the powers committed to them by the board, in relation to the removal. *Pa.*

Supreme Ct. 1865, *Burton v. Fulton*, 49 *Pa. St.* 151.

40. Employment of counsel. The prudential committee of a school district have no authority, without a vote of the district to that effect, to employ counsel in the name of the district to defend a suit against an officer of the district, in which the latter may be interested. And the fact that the pendency of such a suit, and even the employment of an attorney by the prudential committee without authority to defend it, are known to the officers of the district and to the voters therein generally, has no legal tendency to show, on the part of the district, any acquiescence in or adoption of the employment of the attorney. *Vt. Supreme Ct.* 1858, *Harrington v. Sixth School District in Alburgh*, 30 *Vt.* 155.

41. School moneys cannot be applied to any other purpose than the support of schools. *N. J. Supreme Ct.* 1860, *City of Hoboken v. Phinney*, 5 *Dutch.* 65.

42. Notice of school district meeting. Under a statute requiring seven days' notice of the meetings of school districts, a notice dated on the 1st day of the month, for a meeting to be held on the 7th, is insufficient. *Vt. Supreme Ct.* 1842, *Hunt v. School District No. 20*, in *Norwich*, 14 *Vt.* 300.

43. What it must specify. In Vermont it is essential to the legality of a vote of a school district that the warrant for a meeting should specify the business to be done. *Id.*

44. In a warning of a meeting of a school district to be held for a special purpose, all that is requisite is, that it should be so expressed as that the inhabitants of the district may fairly understand the purpose for which they are convened. Thus, where the purpose of the meeting was to decide whether the inhabitants would direct a suit to be commenced for the damage then lately done to the school house and its furniture, and appoint agents to conduct a suit, if necessary; and the notice, after mentioning the time and place of the meeting, stated this purpose, nearly in these words,—*Held*, that such notice was sufficient, although it did not specify the nature or amount of the damage, or when or by whom it was done. *Conn. Supreme Ct.* 1839, *South School District v. Blakeslee*, 13 *Conn.* 227.

45. Where the warning of a school society meeting stated the object of the meeting to

be "to take into consideration the expediency of raising money for the use of schooling for the year ensuing,—*Held*, that such warning was sufficient to authorize the laying of a tax for the purpose specified. It is not necessary in the warning or notice of a public meeting, to state the business so fully and precisely, that no opportunity of choice and no variation of mode shall be left to the meeting. *Conn. Supreme Ct.* 1848, Bartlett v. Kinsley, 15 *Conn.* 827.

46. Where a person appointed to warn a school district returned that he warned the inhabitants, but without stating the time or manner of warning, and the inhabitants met and voted to raise a sum of money, which vote was duly certified to the assessors,—*Held*, that the assessors were obliged to assess the tax; and that neither they nor the town treasurer could inquire into the regularity of the proceedings antecedent to the meeting. *Mass. Supreme Ct.* 1827, Waldron v. Lee, 5 *Pick.* 323.

47. Where an application for calling a meeting of a school district contains, in precise and enumerated articles, the objects of the meeting, and such application is annexed to the warrant for calling the meeting, and the person, to whom the warrant is addressed is therein directed to warn the inhabitants of the district to meet for the purpose of acting on the articles named in such annexed application, those articles are a part of the warrant, as effectually as if they were embodied in it. *Mass. Supreme Ct.* 1843, George v. School District in Mendon, 6 *Metc.* 497.

48. Under the school law of New Jersey the notices should set forth distinctly the objects of the proposed meeting; the resolutions adopted at the meeting should conform to the notice, and should show on their face for which of the objects named the tax is voted to be raised; and the certificate of the trustees to the assessor should set out, and show that all the prerequisites of a lawful taxation have been complied with. *N. J. Ct. of Errors*, 1860, State v. Browning, 4 *Dutch.* 556, 570.

49. Effect of vote. A vote of a town to set-off the plaintiff's farm upon which he resides from one school district to another, no time of severance and annexation being specified, takes effect from its passage. But the property represented by the plaintiff's

list, being a part of the basis of taxation in the former district, is subject to all school district taxes legally voted or assessed upon it previously in that district. *Vt. Supreme Ct.* 1864, Ovitt v. Chase, 87 *Vt.* 196.

50. If a school district in Massachusetts vote that the money, raised by them for the purpose of building or repairing a school house, shall be paid within a certain time, the assessors may, notwithstanding such vote, make the assessment after the expiration of the time of payment expressed in the vote. *Mass. Supreme Ct.* 1807, Pond v. Negus, 8 *Mass.* 230.

51. Rescission of vote. *It seems* that a school district, after having voted to raise money for building or repairing a school house, may, at a legal meeting at any time before the assessment, rescind their vote. *Id.*

52. A school district, at a meeting legally held, voted to build a school house, chose a building committee, and instructed said committee to make a written contract with M. to build the house for a certain sum, pursuant to M.'s proposal. The meeting was then adjourned. At another meeting, called and held prior to the day to which the former meeting was adjourned, the district voted to build a school house on a plan then first proposed by D.; to purchase a site therefor, according to a proposal then first made; to raise and appropriate a certain sum for building the house, and purchasing the site thereof; and chose a building committee to oversee the erection of the house, to enter into a contract with D. for the building thereof, according to the plan proposed by him, and to take a deed of the site. *Held*, that the votes passed at the second meeting were legal and binding, and that they, by necessary implication, rescinded the votes passed at the former meeting. *Mass. Supreme Ct.* 1843, George v. School District in Mendon, 6 *Metc.* 497.

53. If, after the inhabitants of a school district have voted to raise money for building a school house, and before the same be assessed, the limits of the district be altered, and a new district be formed by the town, the vote to raise the money is annulled, and the assessment cannot be legally made. *Mass. Supreme Ct.* 1808, Richards v. Dagget, 4 *Mass.* 534.

SCIRE FACIAS.

1. When proper. At common law, *scire facias* is the proper mode of proceeding to repeal a charter or enforce a dissolution of a corporation, wherever there exists a legal body corporate, which has become liable to have its powers taken away. *Quo warranto* is proper, where the body assuming to act as a corporation has not a lawful corporate existence. See *Rex v. Pasmore*, 8 *Durnf. & E.* 199; *Smith's Case*, 4 *Mod.* 57; *Rex v. Wynne*, 2 *Barnard.* 391; *State v. Moore*, 19 *Ala. N. S.* 514.

As to proceedings upon *Quo warranto*, see *QUO WARRANTO*.

2. The reservation, in a charter, of a power to avoid it for non-compliance with its directions or conditions, either absolutely or upon terms, does not limit the power of repealing the charter by *scire facias*. *Exch. Cham.* 1862, *Eastern Archipelago Co. v. Regina*, 2 *El. & Bl.* 856; 22 *Eng. L. & Eq.* 328; 23 *Law J. N. S. Q. B.* 82.

SEAL.

[This chapter treats of what is a sufficient corporate seal, by whom and how it may be affixed, and its effect generally. The necessity of a corporate seal to attest corporate acts in general, being regarded as a restriction upon the exercise of corporate powers, is under *POWERS*; and the necessity of a seal to a particular instrument is treated under the title embracing that instrument;—*a. g.* *ASSUMPTIONS*; *BONDS*; *DEEDS*; *LEASES*; *MORTGAGES*.

1. What is a corporate seal. Although a corporation have adopted a particular seal, yet they will be bound by a deed otherwise sufficient, which is sealed with any seal. *N. H. Supreme Ct.* 1861, *Tenney v. East Warren Lumber Co.* 43 *N. H.* 343. And see *Case of Sutton's Hospital*, 10 *Co.* 30, b; *Goddard's Case*, 2 *Co.* 5.

2. A corporation aggregate must answer under the corporate seal; a paper signed by counsel and verified by the oath of the secretary of the corporation in usual form is not sufficient. And the fact that the corporation has no common seal affords no ground for relaxing the practice, for it may adopt and use any seal *pro hac vice*. *N. J. Chancery*, 1860, *Ransom v. Stonington Savings Bank*, 2 *Beas.* 212.

3. The fact that a seal with a particular device has been used by a manufacturing corporation on three occasions, does not make

that the exclusive seal of the company; the records showing that no particular seal had ever been adopted by vote of the company. And, if an instrument is executed by a duly authorized agent, the seal, though mere paper and wafer without any specific stamp, will be presumed to be the corporate seal. *Mass. Supreme Ct.* 1852, *Stebbins v. Merritt*, 10 *Cush.* 27.

4. To an "indenture" between a corporation and an individual, the parties "set their hands," no reference in terms being made to the seals, which were mere bits of paper attached to the instrument by wafers, and set against each signature. *Held*, that this was a deed, sealed. * *Mass. Supreme Ct.* 1839, *Mill-Dam Foundry v. Hovey*, 21 *Pick.* 417. Compare *Ernst v. Bartle*, 1 *Johns. Cas.* 319.

5. The treasurer of a corporation, being authorised by a vote of the directors, procured "a corporate seal, bearing the title of the corporation with the year of its charter," as required by statute; and the scrip issued by the corporation, duly authorised and signed, bore a printed impression of this seal with the title and date inscribed, and contained the words "in testimony of which" "the seal of said company," &c., is "hereunto affixed." *Held*, in an action of covenant broken, that the instruments thus executed were sealed with the corporate seal. Although at common law the impression of a seal is not a seal, yet, under a statute providing, that whenever a seal is required to be affixed to a paper, the word seal shall be construed to mean the impression of such seal made on paper alone, bonds issued by a corporation impressed with a seal declared on their face to be sealed, and accepted as such by the holders, are deemed to be under the corporate seal. [15 *N. Y.* 9, 90.] *Ma. Supreme Ct.* 1861, *Woodman v. York & Cumberland R. Co.* 50 *Me.* 549.

6. A fac-simile of the seal of a corporation, printed upon blank forms of obligations prepared to be executed by the corporation, at the same time when the blank is printed and by the same agency, is not a seal at common law. Nor will such forms, when executed by the corporation, be contracts

* A contract executed in behalf of the territory of Wisconsin by a commissioner who affixed to it a seal composed of a piece of paper fastened to a wafer, is, as to the territory, an unsealed instrument. The seal must be regarded as that of the commissioner individually. *Wis. Supreme Ct.* 1862, *Baxter v. State*, 15 *Wis.* 438.

under seal, although their language calls for a seal. *Mass. Supreme Ct.* 1865, *Bates v. Boston & New York Central R. R. Co.* 10 *Allen*, 251.

7. The impression of a distinctive corporation seal, on an instrument calling for the seal of the corporation, although without the intervention of wax or wafer, is a lawful corporate seal.* *N. J. Chancery*, 1845, *Corrigan v. Trenton Delaware Falls Co.* 1 *Halst. Ch.* 52. See also *Regina v. St. Pauls*, 7 *Q. B.* 231; *Davidson v. Cooper*, 11 *Mess. & W.* 778; and 13 *L.* 348.

8. Scroll. The President and Secretary of an incorporated company, having authority to convey, executed a deed in their own names, signing it officially, and added scrolls, which were declared by the legislature to be sufficient. *Held*, that it was a good, sealed deed of the corporation. *Ga. Supreme Ct.* 1858, *Johnston v. Crawley*, 25 *Ga.* 316.

9. A scroll suffices as a copy of the corporate seal in records of court. *Ill. Supreme Ct.* 1864, *McMillen v. Bethold*, 40 *Ill.* 84.

10. Where the majority of the trustees of a corporation executed a deed purporting to be the deed of the corporation, and signed it with their several names, with a scrawl to each, without specially designating them as their individual seals, and it did not appear that the corporation had any regular seal,—*Held*, that the scrawls must be taken each as the seal of the corporation, the repetition of them on the same deed not being a matter of any importance. *Ky. Ct. of Appeals*, 1837, *Reynolds v. Trustees of Glasgow Academy*, 6 *Dana*, 87.

11. Individual seals of officers or agents. Where agents acting for a corporation, contract under their own seals, they do not bind the corporation as if by corporate deed, for the corporation have but one common seal. But, if the agents had authority to make the contract, it may be binding on the corporation as evidence of the contract. [19 *Johns.* 65; 1 *Cranch*, 305.] *Mass. Supreme Ct.* 1824, *Damon v. Granby*, 2 *Pick.* 345.

* In New York, a stamp or impression of the seal of a corporation, like that of an individual, made directly on the paper, was formerly—*Held*, a mere nullity. *N. Y. Supreme Ct.* 1842, *Farmers' & Manufacturers' Bank v. Haight*, 3 *Hill*, 498.

But now, in that State the seal of a corporation may be made by impression directly on the paper. *N. Y. Laws of* 1843, 896, ch. 197, § 1; same stat. 3 *Rev. Stat.* 5 ed, 687, § 77.

12. The private seals of a committee, professing to act for a corporation, are not the seals of the corporation; and though the corporation may have authorized the committee to contract, and may, therefore, be liable in some form of action, yet covenant is not the proper remedy. *Fla. Supreme Ct.* 1851, *Mitchell v. St. Andrew's Bay Land Co.* 4 *Fla.* 200.

13. The private seal of an agent is not sufficient within the rule that to bind a corporation by specialty, the corporate seal should be affixed to the instrument. Therefore an action of covenant will not lie against the State on a contract entered into by her agents and sealed with their private seals. *Ark. Supreme Ct.* 1857, *State v. Allis*, 18 *Ark.* 269; *Pa. Supreme Ct.* 1855, *Farmers' & Mechanics' Turnp. Co. v. McCullough*, 25 *Pa. St.* 303.

14. A paper executed by the president and cashier of a bank, purporting to convey a lot of ground held by the bank, but sealed with the seals of the officers, and not with that of the corporation, is not the deed of the corporation. *U. S. Supreme Ct.* 1840, *Bank of Metropolis v. Gutschlick*, 14 *Pet.* 19.

15. But, upon the contract of a corporation, signed by its officers with their individual seals, and without the seal of the corporation, an action of *assumpsit* lies against the corporation. It makes no difference, in regard to a corporation, whether the agent is appointed under seal or not, or whether he puts his own seal to a contract which he makes in their behalf. *Id.*; *S. P. Me. Supreme Ct.* 1853, *Porter v. Androscoggin & Kennebec R. R. Co.*, 37 *Me.* 349; *Mich. Supreme Ct.* 1863, *Regents of University v. Detroit & Co.* 12 *Mich.* 138; *Miss. Ct. of Errors*, 1838, *Deberry v. President & Co. of Holly Springs*, 35 *Miss.* 385. And see *Wiley v. Board of Education*, 11 *Minn.* 371; *Randolph v. Van Vechten*, 19 *Johns.* 60.

16. The individual seals of agents of a corporation attached to an instrument intended to be executed in behalf of the corporation, but which is signed by their own names, are merely nugatory; and the instrument will be treated as an unsealed instrument or simple contract in writing, and, as such, will be deemed binding on the corporation, if it is in other respects valid.* *Mich.*

* A deed or contract under the common seal of the cor-

Supreme Ct. 1863, Regents of University v. Detroit &c. Soc. 12 *Mich.* 138.

17. Where a corporation has no corporate seal, the execution of a bond of arbitration, by the president, by authority of the board of trustees, to which he attaches his individual seal in scroll, binds the corporation. *Cincinnati Superior Ct.* 1857, Western Female Seminary v. Blair, 1 *Disney*, 370.

18. Under a statute, which provides that all deeds and contracts executed by an authorized agent for a corporation either in the name of the principal by such agent, or in the name of such agent, for the principal, shall be considered the deed or contract of such principal,—a contract made by a corporation through an agent who puts to it a seal, becomes the deed of the corporation, though it is not signed by a corporate seal. *Me. Supreme Ct.* 1853, Porter v. Androscoggin & Kennebec R. R. Co. 37 *Me.* 349.

19. Agents may be appointed without seal. *Ky. Ct. of Appeals*, 1839, Lathrop v. Commercial Bank of Scioto, 8 *Dana*, 114; *Ill. Supreme Ct.* 1864, Board of Education v. Greenebaum, 39 *Ill.* 612.

20. Who may affix the seal. That the corporate seal must be affixed by the officer to whose custody it is confided, or by some person specially authorized; and such officer or special agent must act in consequence of the directory vote of the body or managing board of the corporation,—see Derby Canal Co. v. Wilnot, 9 *East*, 360; Bank of United States v. Dandridge, 12 *Wheat.* 63; Clarke v. Imperial Gas Co. 4 *Barn. & Ad.* 315; 1 *Nev. & M.* 206; Anon, 12 *Mod.* 423; Rex v. Haughley, 4 *Barn. & Ad.* 650.

21. The mere fact that a mortgage or deed, purporting to be executed by a corporation has the corporate seal attached to it, does not make it the act of the corporation, if it be shown that the seal was not affixed by a person duly authorized. *U. S. Supreme Ct.* 1862, Kochler v. Black River Falls Iron Co. 2 *Black*, 715; *N. Y. Supreme Ct.* 1830, Jackson v. Campbell, 5 *Wend.* 572. And see Harscot's Case, *Comb.* 203.

oration, is not vitiated by the act of the trustees in signing their separate names to it; although such signatures are unnecessary. The seal is enough. *N. Y. Supreme Ct.* 1808, Jackson v. Walsh, 3 *Johns.* 226; 1836, Clark v. Farmers' Woolen Manuf. Co. 15 *Wend.* 256.

Nor is it vitiated by affixing the corporate seal separately to each name, so signed. *N. Y. Supreme Ct.* 1808, Jackson v. Walsh, 3 *Johns.* 226.

22. A deed by a banking corporation is properly executed when sealed, subscribed, and acknowledged by the cashier on behalf, and with the authority of the corporation; and such deed should be recorded, although the terms of the statute prescribing registration relate only to deeds of natural persons. *Ohio Supreme Ct.* 1867, Sheehan v. Davis, 17 *Ohio St.* 571.

23. Where by charter, a certain number of a board are required to concur in entering into a special contract, or making a deed, the affixing of the seal, which is merely a ministerial act, may be done by a less number than was at first competent to enter into the contract, provided it is done by the direction of a legal quorum. *Pa. Supreme Ct.* 1820, President, &c. of the Berks & Dauphin Turnpike Road v. Myers, 6 *Serg. & R.* 13; *K. B.* 1833, Hill v. Manchester & Salford Water Works Co. 5 *Barn. & Ad.* 366; 2 *Nev. & M.* 578.

24. The president and cashier of a bank cannot use the common seal without the authority of the board of directors. *N. Y. Ct. of Appeals*, 1851, Hoyt v. Thompson, 5 *N. Y. (1 Seld.)* 320.

25. Compelling it. An officer having the custody of the corporate seal may be compelled by mandamus to affix it to a corporate act, in writing, which has been approved by the competent body in the corporation. *K. B.* 1765, Rex v. Cambridge, 3 *Burr.* 1647; 1 *Wm. Blacks.* 547; 1792, Rex v. Mayor, &c. of York, 4 *Durnf. & E.* 699; *Q. B.* 1841, Regina v. Kendall, 1 *Q. B.* 386; 1847, Gosling v. Velez, 7 *Q. B.* 406, 457. And see People v. Connolly, 2 *Abb. Pr. N. S.* 315.

26. The negligence of trustees in allowing the corporate seal to be in the exclusive custody of a person authorized to use it, and who forges an instrument therewith and procures witnesses to attest it as duly executed, is not, in the absence of anything to constitute an estoppel or a ratification, such negligence as will preclude the trustees from treating the instrument as void and recovering the value of property transferred on the faith of it. Such negligence is too remotely connected with the act in question; which was not its necessary, ordinary, or probable result. *H. of Lords*, 1855, Bank of Ireland v. Evans, 32 *Eng. Law & Eq.* 23.

27. Effect of the seal. The effect of affixing

the corporate seal to a contract is the same as when an individual affixes his seal; it makes the instrument a specialty. *Clark v. Woolen Manuf. Co. of Benton*, 15 *Wend.* 256; *Mo. Supreme Ct.* 1848, *Benoist v. Inhab. of Carondelet*, 8 *Mo.* 250; *Mo. Supreme Ct.* 1853, *Porter v. Androscoggin & Kennebec R. R. Co.* 37 *Mo.* 349.

28. That the rule that an instrument under seal imports a consideration, applies as strongly to one made by a corporation acting within its powers as to a natural person. *U. S. Circ. Ct. (Ill.)* 1844, *Sturtevant v. City of Alton*, 3 *McLean*, 393.

29. Proving execution. According to the rule adopted by the American authorities, it is enough, in order to establish a sealed contract in the name of a corporation as their act, to show authority on the part of the agent, who executed it, to execute such a contract on behalf of the company under seal, and the fact of attaching some seal to the name of the company with the intent to seal on their behalf. It is not necessary to show an authority given by the directors at a meeting, where it is the usage of corporations to act by the separate assent of their directors; nor that the seal be the common seal of the corporation. A corporation may adopt any seal they choose for the time being. *Vt. Supreme Ct.* 1858, *Bank of Middlebury v. Washington & Rutland R. R. Co.* 30 *Vt.* 159.

30. As to the necessity and sufficiency of affirmative evidence that the seal of a corporate instrument offered in evidence is the seal of the corporation,—see *Jackson v. Pratt*, 10 *Johns.* 381; *Mann v. Pentz*, 2 *Sandf. Ch.* 257; *Den v. Vreelandt*, 3 *Halst.* 352; *Foster v. Shaw*, 7 *Berg. & R.* 156; *Leazure v. Hillegas*, *Id.* 313; *Chew v. Keck*, 4 *Rawls*, 163; *Farmers' & Mechanics' Turnp. Co. v. McCullough*, 25 *Pa. St.* 303; *Crossman v. Hilltown &c. Co.* 3 *Grant's Cas.* 225; *Darnell v. Dickens*, 4 *Yerg.* 7; *City Council of Charleston v. Moorhead*, 3 *Rich. Law*, 430; *Moises v. Thornton*, 8 *Durnf. & E.* 303; *Woodmas v. Mason*, 1 *Exp.* 53; *Bank of England v. Chambers*, 4 *Ad. & E.* 412.

31. The presumption is, where an instrument is produced bearing the corporate seal attested by genuine signatures of the proper corporate officers, that such officers were duly authorized, on behalf of the corporation, to affix the seal. And the burden of proof to show want of authority, is upon the

party who seeks to impeach the instrument on that ground. *N. H. Supreme Ct.* 1861, *Tenney v. East Warren Lumber Co.* 43 *N. H.* 343; *N. J. Chancery*, 1832, *Leggett v. New Jersey Manuf. & Banking Co.* 1 *Saxt.* 541; *N. Y. Chancery*, 1836, *Lovett v. Steam Saw Mill Assoc.* 6 *Paige*, 54; *Ill. Supreme Ct.* 1856, *Reed v. Bradley*, 17 *Ill.* 321; *Md. Ct. of Appeals*, 1852, *Susquehannah &c. Co. v. General Ins. Co.* 3 *Md.* 305; *Tenn. Supreme Ct.* 1847, *Levering v. Mayor &c. of Memphis*, 7 *Humph.* 553; *Mo. Supreme Ct.* 1859, *St. Louis Public Schools v. Risley*, 28 *Mo.* 415.*

32. So, a seal affixed to a deed purporting to be the deed of a corporation, will be presumed to have been intended as the seal of the corporation. *Ill. Supreme Ct.* 1855, *Phillips v. Coffee*, 17 *Ill.* 154. And see *Mill Dam Foundry v. Hovey*, 21 *Pick.* 428; *City Council of Charleston v. Moorhead*, 2 *Rich.* 430.

33. The presumption arising from its use on three occasions, that the seal accompanying the signature of an authorized agent is the seal of the corporation for which he has acted, is not overcome by showing that on several other occasions a different seal was used by the same corporation. *Mass. Supreme Ct.* 1852, *Stebbins v. Merritt*, 10 *Cush.* 27.

SECRETARY.

1. Duties. The secretary of a joint stock company is the servant of the directors of the company, who are presumed to have control over him as such; and this presumption is not rebutted by the circumstance that the company has ceased working. *Rich.* 1851, *Elmes v. Ogle*, 2 *Eng. L. & Eq.* 379; 15 *Jur.* 180.

2. Powers relative to records. The secretary of a corporation, though a stockholder, is, from the necessity of the case, competent to identify the books and records of the company; and such books are competent evidence of their contents. *Ill. Su-*

* For other illustrations of this rule, see *Burrill v. Nantank Bank*, 2 *Metc.* 163; *Filnt v. Clinton Co.* 12 *N. H.* 484; *Baptist Church v. Mulford*, 3 *Halst.* 188; *President &c. of Berks & Dauphin Turnp. Road v. Myers*, 6 *Serg. & R.* 12; *St. Mary's Church Case*, 7 *Serg. & R.* 530; *St. John's Ch. v. Steinmetz*, 18 *Pa. St.* 273; *Johnson v. Bush*, 3 *Bard. Ch.* 207; *Hopkins v. Gallatin Turnpike Co.* 4 *Humph.* 408; *Darnell v. Dickens*, 4 *Yerg.* 7; *Adams v. His Creditor*, 14 *Lu.* 455; *Benedict v. Denton*, 1 *Walk. Ch.* 338.

prems Ct. 1856, *Peake v. Wabash Railroad Co.* 18 *Ill.* 88. See also **RECORDS**.

3. The secretary of a banking corporation is not a certifying officer; and copies certified by him must, therefore, be sworn to before they can be given in evidence. *Mass. Supreme Ct.* 1817, *Hallowell & Augusta Bank v. Hamlin* 14 *Mass.* 178.

See **RECORDS**.

4. Power to bind the company. The purchaser of shares in a joint stock company filed a bill to set aside his contract on the ground of alleged misrepresentations by the secretary in his interviews with him prior to the purchase. *Held*, that the evidence showed that the purchaser was not sufficiently apprized by the secretary, who was their agent for negotiating with the purchaser, of the position of the company; that he had not the means of acquiring proper information about it, or of discerning the misrepresentation; that the company were bound by the acts of its secretary; and that the purchase should be set aside, the money to be repaid with interest. *Chancery*, 1860, *Conybeare v. New Brunswick &c. Land Co.* 6 *Jur. N. S.* 518; 29 *Law J. N. S. ch.* 435; 8 *Week. Rep.* 508; 2 *Law Times, N. S.* 814.

5. The secretary of an English railway company has of himself no independent authority to bind the company by letters or documents signed by him. *Exch.* 1851, *Williams v. Chester & Holyhead Railway Co.* 5 *Eng. L. & Eq.* 497; 15 *Jur.* 828.

6. That the secretary of an English railway company, may bind the company, by signing the appointment of an arbitrator for a land compensation inquiry, whether the arbitration is compulsory, or not,—see *Collins v. South Staffordshire Railway Co.* 12 *Eng. L. & Eq.* 565; 7 *Exch.* 5; 21 *Law J. N. S. Exch.* 247; 16 *Jur.* 848.

7. As to the authority of a secretary of an English railway company to bind the company by an admission,—see *Bell v. London & Northwestern Railway Co.* 21 *Eng. L. & Eq.* 566.

8. The act of a secretary of a proposed railway company, not authorized by the board of management, does not bind the board; and, if authorized by it, binds only those members of it present at the time and actually concurring in giving authority to the secretary. No authority can be implied from the mere fact of the party being secretary.

Exch. 1849, *Burnside v. Dayrell*, 6 *Eng. Railw. Cas.* 67; 19 *Law J. N. S. Exch.* 46.

As to rights, powers and duties of secretaries of corporations in common with other Officers, see **OFFICERS**.

SECURITIES.

[Under this title are collected cases upon obligations taken by corporations to secure themselves against breach of duty by agents, officers and servants.]

1. Interpretation of statute provisions. In general, provisions of a charter prescribing a kind or form of security to be given by a corporate officer, are deemed directory; and, although neglect to follow them may be culpable on the part of the directors of the company, the bond may be enforced, notwithstanding the non-conformity.* *Pa. Supreme Ct.* 1825, *Bank of Northern Liberties v. Cresson*, 12 *Serg. & R.* 306.

2. Validity. The fact that a bond is not required by any law does not necessarily invalidate it, although given by an officer as a security for the discharge of his duties; if it was not unlawfully exacted. *N. J. Supreme Ct.* 1862, *Mayor &c. of Hoboken v. Harrison*, 30 *N. J. Law* (1 *Vroom*,) 73; *S. P. Mass. Supreme Ct.* 1862, *Bank of Brighton v. Smith*, 5 *Allen*, 413.

* For English cases to the same effect, see *Postern v. Hanson*, 2 *Saund.* 60; *Maleverer v. Redshaw*, 1 *Mod.* 85; *Rex v. Loxdale*, 1 *Burr.* 447; *Peppin v. Cooper*, 2 *Barn. & Ald.* 431; *Austen v. Howard*, 1 *J. R. Moore*, 63; 7 *Traut.* 28; *Id.* 379.

The charter of a banking company directed that its banking house should be situated, and its banking operations conducted at a certain specified place. *Held*, that this provision was directory only; and that a violation of it did not discharge the sureties upon the cashier's bond. *N. J. Supreme Ct.* 1847, *Morris Canal & Banking Co. v. Van Vorst*, 1 *Zabr.* 100.

A statute of Pennsylvania required all foreign insurance companies, establishing agencies within the State, to publish a report of their condition for three months in every year in certain cities named, and all agents of such companies, before commencing business, to file copies of their powers of attorney in the office of the Secretary of State. In a suit brought by such a company against such an agent and others, his sureties, upon a bond for the faithful discharge by such agent of his duty in said State,—*Held*, that the publication of such report not being made by the act a condition precedent of the right to commence business, the requirement was merely directory, and the neglect of the company to comply with it did not render the business transacted by the agent illegal, and the bond in consequence void; and that the filing of a copy of the power of attorney with the Secretary of the State was the duty of the agent himself, of the neglect of which neither he nor his sureties could take advantage. *Conn. Supreme Ct.* 1857, *Washington County Ins. Co. v. Colton*, 26 *Conn.* 42.

As to validity of contracts generally, see CONTRACTS.

4. A bank, authorized to make by-laws, and to take a bond from the cashier for the "faithful discharge of the duties of his office," may take a bond with condition that he shall perform the duties of his office according to law and the by-laws of the institution, and that he shall not make known any secrets, or the state of the funds, &c., to any person except the directors, &c. *Ky. Ct. of Appeals*, 1824, *Bank of Carlisle v. Hopkins*, 1 *T. B. Monr.* 245. See also, *State Bank v. Locke*, 4 *Dev.* 529.

5. Under a statute which forbids the director of a bank from signing as a surety the bond of its cashier, the obligation of a director to indemnify others against loss, to induce them to become sureties, is void. And a mortgage to secure the performance of such an obligation is also invalid. *Ms. Supreme Ct.* 1861, *Jose v. Hewett*, 50 *Ms.* 248.

6. Where a bank chartered in one State creates a branch in another State, and transfers capital thither, to be employed there in banking, in violation of the laws thereof, in order to avoid the restrictions of its charter, and obtain a circulation which it would be less liable to redeem, a bond given by the agent appointed to manage such branch is void, and the bank cannot recover against the sureties, even as to money received. The consideration being single and unlawful, the entire bond is void. *Miss. Ct. of Errors*, 1866, *Bank of Newberry v. Stegall*, 41 *Miss.* 142.

7. A cashier's bond is not void, as against the policy of the law, because three of the directors of the bank, whose duty it was to examine and approve the cashier's bond, were themselves his sureties. *Mass. Supreme Ct.* 1841, *Amherst Bank v. Root*, 2 *Metc.* 522.

8. Acceptance. Where the charter requires an officer of a corporation to give bond with sureties, to be approved by the directors, a bond given by him with sureties, and found in the possession of the bank, he having acted in his office, may be presumed to have been accepted and approved, although no vote of acceptance by the directors is found on the records of the corporation. The same presumptions apply to corporations as to natural persons; and unless the charter requires approval in writing, it is not essential.* *U. S. Supreme Ct.* 1827, *Bank of U. S. v. Dandridge*, 12 *Wheat.* 64; *S. P. Mass. Su-*

preme Ct. 1864, *Lexington & West Cambridge R. R. Co. v. Elwell*, 8 *Allen*, 871; *Md. Ct. of Appeals*, 1827, *Union Bank of Maryland v. Ridgely*, 1 *Harris & G.* 324. And see *Burgess v. Pue*, 2 *Gill*, 254, 287.

9. Were a writing necessary, a vote of the directors, approving proposed sureties, followed by the execution of the bond by them, and its being found in possession of the president is a sufficient acceptance of it. *So held* where the provision of the charter was, that the officer should give "bond with two sureties, to the satisfaction of the directors," in the sum, &c. *Mass. Supreme Ct.* 1825, *Dedham Bank v. Chickering*, 8 *Pick.* 335.

10. Thus, if a cashier is duly appointed, and permitted to act in his office for a long time, under the sanction of the directors, it is not necessary that his bond be accepted according to the terms of the charter, to render his exercise of the duties of the office lawful, or his sureties responsible for his misconduct. The bank under such circumstances would be bound by his acts in favor of third persons, acting upon the faith of his public character. The provisions of the charter and by-laws, in respect to accepting the bond, must be considered as directory to the board, and not as conditions precedent to its validity. *U. S. Supreme Ct.* 1827, *Bank of United States v. Dandridge*, 12 *Wheat.* 64.

11. Interpretation of conditions. An official bond which stipulates "for the faithful performance" of the duties of an officer, does not, in legal effect, differ from one stipulating that the incumbent will "well and truly, faithfully, firmly and impartially, execute and perform the duties of his office during his continuance therein." The words "well," "truly," "firmly," and "impartially," are simply redundant, being comprised in their legal significance in the word "faithfully." *N. J. Supreme Ct.* 1865, *Mayor &c. of Hoboken v. Evans*, 81 *N. J. Law* (2 *Vroom*.) 342.

12. A bond well and truly to execute the duties of cashier or teller, includes not only honesty, but reasonable skill and diligence. If, therefore, he perform those duties negligently and unskillfully, or if he violate them from want of capacity and care, the

* The same rule applied in the case of an official bond delivered to a judge. *Mass. Supreme Ct.* 1817, *Apthorp v. North*, 14 *Mass.* 167. And see *Smith v. Bank of Scotland*, 1 *Dow, P. C.* 272.

condition of his bond is broken, and his sureties are liable for his misdoings.* *U. S. Supreme Ct.* 1828, *Minor v. Mechanics Bank*, 1 *Pet.* 46; *Mass. Supreme Ct.* 1882, *American Bank v. Adams*, 12 *Pick.* 803; *N. J. Supreme Ct.* 1824, *State Bank at Elizabeth v. Chetwood*, 8 *Halst.* 1; *Pu. Supreme Ct.* 1826, *Barrington v. Bank of Washington*, 14 *Serg. & R.* 405.

13. Where the by-laws provide that the officer shall perform such duties as may be assigned him by the board, the latter may assign to him the duties of another corporate office, not incompatible; and for wrongful acts in that capacity his sureties may be held liable. The bond of a cashier "well and truly to execute the duties of his office," must be construed to cover all defaults in any duties which are annexed to the office from time to time, by those who are authorized to control the affairs of the bank—*e. g.* where the board assign to a cashier the duties of a teller;—and sureties are presumed to enter into contract with reference to the rights and authorities of the president and directors, under the charter and by-laws. *U. S. Supreme Ct.* 1828, *Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46, 72. And see *Bank of United States v. Brent*, 2 *Cranch* C. Ct. 696; *Planters' Bank v. Lambkin*, *R. M. Charlt.* 29.

14. An assistant bookkeeper of a bank having been required to take charge temporarily of a book that had been uniformly kept by the teller, called the "Teller's Credit Journal," in which deposits were entered, made false entries in this book and in the bank account, to conceal an embezzlement by himself. *Held*, that making such false entries was a breach of an undertaking by himself and surety that he would faithfully discharge the trust reposed in him as such assistant bookkeeper; and that his surety was liable therefor. [14 *Serg. & R.* 405.] *N. Y. Ct. of Appeals*, 1860, *Rochester City Bank v. Elwood*, 21 *N. Y.* 88.

15. What is a breach. It is no forfeiture of a bond conditioned for the faithful service of a cashier of a banking company, and to indemnify against all loss by his malfeasance, misfeasance, willful neglect, or wrongful act, that a loss has occurred by

mere accident or mistake, or by his being unable to perform all the duties put upon him.* *N. J. Supreme Ct.* 1847, *Morris Canal & Banking Co. v. Van Verst*, 1 *Zabr.* 100.

16. That a cashier's bond, with condition "safely to keep all moneys," &c., does not render the obligor responsible for money violently robbed from him while in the discharge of his duty,—see *Huntsville Bank v. Hill*, 1 *Stow. (Ala.)* 201.

17. The surety on the bond of a clerk of a banking house,—*Held*, liable for his carelessly losing money sent by him, under a special authority to receive it, from a customer to the banker, although the jury found that the transaction was out of the ordinary course of banking business in the part of the country in which the transaction occurred. *C. P.* 1848, *Melville v. Doidge*, 6 *C. B.* 450; 18 *Law J. N. S. C. P.* 7.

18. Where it is a cashier's duty to be sworn before entering on the performance of his official business, his bond is not avoided in favor of the sureties, by his omission to be sworn; but such omission is rather a breach of the condition of the bond, "to perform all the duties of cashier." *N. J. Supreme Ct.* 1824, *State Bank at Elizabeth v. Chetwood*, 3 *Halst.* 1.

19. Where a cashier exceeded his power, by changing the securities of the bank, without the knowledge of the directors,—*Held*, that his sureties were liable; but, that the measure of damages, in a suit on the bond, was not the absolute amount of the original securities, but the probable amount that would have accrued from them, if they had not

* *S. P.* in a case turning somewhat on the language of the particular bond. *Ohio Ct. D. C.* 1827, *Union Bank of Georgetown v. Forrest*, 8 *Cranch* C. Ct. 218.

* In an action upon a bond given by G. and the defendant and another as his sureties, to a railway company, for the due performance by G. of the duties of chief clerk to the booking office at a railway station, the condition of the bond was, that G. should render to the railway company, or to their committee a true account of all receipts and payments, and should pay to the company, or to the committee, all sums received by him on account of the company or committee, and also such sums as he should receive from the booking clerks, or on account of the said company or committee. The breach relied upon was, that G. did not pay over to the company what he had received from the booking clerks. And it was shown that, instead of making up his accounts in the evening of each day, G. had allowed the clerks to be in arrears, and had balanced the accounts on the following day by appropriating a portion of that day's receipts to the deficiency of the previous day, but had in fact paid over all that he had received. *Held*, that this was a breach of the condition, for he had not paid over the sums received truly. *Exch.* 1849, *London & C. Railway Co. v. Goodwin*, 3 *Exch.* 220, 736; 6 *Eng. Railw. Cas.* 177; 18 *Law J. N. S. Exch.* 174, 237. Compare *Kreter Bank v. Rogers*, 6 *N. H.* 142.

been changed. *Pa. Supreme Ct.* 1826, *Barrington v. Bank of Washington*, 14 *Serg. & R.* 405.

20. Instances of particular acts,—*Held*, breaches of a bank cashier's bond. *Bank of Washington v. Barrington*, 2 *Pa.* 27; *Pendleton v. Bank of Kentucky*, 1 *T.B. Monr.* 171; *State Bank v. Locke*, 4 *Der.* 529; *Ingraham v. Maine Bank*, 18 *Mass.* 208.

21. The cashier of a bank is not liable on his bond, for faults in a collecting department, given in charge, by the directors, to another officer. *Ala. Supreme Ct.* 1848, *Bank of State of Alabama v. Comegys*, 12 *Ala. N. S.* 772.

22. Where a bond was given by an accountant of a bank, for the faithful discharge of the duties of his office,—*Held*, that the sureties on the bond were not responsible for moneys taken by their principal, and from the teller's drawer, without the latter's consent or knowledge, it appearing that the accountant was not intrusted with any moneys of the bank, nor put in possession of them as accountant. *Va. Ct. of Appeals*, 1828, *Allison v. Farmers' Bank of Virginia*, 6 *Rand.* 204.

23. Extent of sureties' liability. The sureties of a cashier of a bank are not liable on his bond, for his not accounting to the bank for their money collected by him as an attorney at law; nor for his surreptitiously conveying his shares in the bank to a third person, by means of blank certificates signed by the president, and deposited in the cashier's hands, though he had previously pledged the shares to the bank as security for the payment of his note. *Mass. Supreme Ct.* 1826, *Dedham Bank v. Chickering*, 4 *Pick.* 814.

24. The sureties of a bank cashier are not responsible for the cashier's embezzlements of new bills, made by consent of the directors, and intended to be privately kept and surreptitiously issued by him, in direct violation of law; it appearing that such bills were not intended to make a part of the ostensible funds of the bank; nor to be entered on the books; nor to be noticed in the half-yearly returns to the governor and council. As between the bank and the surety, the illegal conduct of the directors is binding on the bank. *Id.*

25. Sureties who are bound for the fidelity of an agent of an insurance company cannot

be held liable for an embezzlement by the agent, of the funds of the corporation intrusted to his care whilst engaged in the unlawful business of banking for the corporation. *Mo. Supreme Ct.* 1847, *Blair v. Perpetual Insurance Co.* 10 *Mo.* 559.

26. Where a statute prohibited any bank from issuing bills payable at any place except at the bank, and a cashier, upon receiving bills not proved to have been issued after the statute was passed, the bills having been paid and taken up by another bank at which they were made payable, put them again in circulation for his own use,—*Held*, that such acts amounted a breach of his bond for the faithful performance of his duties, for which his sureties were liable. *Mass. Supreme Ct.* 1826, *Dedham Bank v. Chickering*, 4 *Pick.* 814.

27. If a cashier permit a transfer of stock to be made to the bank beyond the amount permitted by the charter, he and his sureties are answerable to the stockholders on his bond for any loss caused thereby, although such transfer was authorized by a resolution of the directors. *Pa. Supreme Ct.* 1830, *Bank of Washington v. Barrington*, 2 *Pa.* 27.

28. Where an officer, holding his position under different appointments with several sets of sureties, becomes a defaulter, the sureties on the bond at the time the defalcation occurred will be alone liable. Therefore, where the principal in a bond given to secure the faithful performance of his duties as teller of a bank, had, previous to the execution of the bond appropriated moneys of the bank, and subsequent to the giving of the bond had applied moneys received to wrong accounts to cover up his defalcation,—*Held*, that the surety was not liable for the conversion committed before the execution of the bond; and, that for the mere misapplication of the moneys, subsequently received, to wrong accounts, the damages to the bank could be only nominal. *Mo. Supreme Ct.* 1867, *State v. Atherton*, 40 *Mo.* 209.

29. — In respect to time. Where an act of incorporation, under which a bond is taken to secure the good conduct of one of the officers of the corporation, is limited in its duration to a certain period, the bond must have the same limitation. The extension of the charter beyond the period of its first limitation by legislative enactment, does

not enter into the contract, and cannot enlarge it. In construing such a bond, the court will look to the intention of the parties at the time of its execution, and the contract will be expounded as the law was when the contract was made. *Md. Ct. of Appeals*, 1827, *Union Bank of Maryland v. Ridgely*, 1 *Harr. & G.* 324, 483; *S. P. Ohio Supreme Ct.* 1826, *Thompson v. Young*, 2 *Ohio (Ham.)* 384. To the contrary, *Circ. Ct. D. C.* 1827, *Union Bank of Georgetown v. Forrest*, 8 *Cranch C. Ct.* 218; *N. H. Superior Ct.* 1834, *Exeter Bank v. Rogers*, 7 *N. H.* 21.

80. Where a bond is given to directors of a company, who are chosen yearly, for the fidelity of an agent of the company, the obligors are liable after the year has expired; and the obligees, though out of office, may maintain an action on the bond. *U. S. Supreme Ct.* 1816, *Anderson v. Longden*, 1 *Wheat.* 85.

81. Where the term of office in a corporation is limited to a particular period, as a year, or five years, and the person appointed cannot continue in office for a longer period without a new appointment, then the official bond, if nothing appear to the contrary, is presumed to be intended to be confined to the particular term; and, if the officer be re-appointed, there must be a new bond.* *N. H. Superior Ct.* 1834, *Exeter Bank v. Rogers*, 7 *N. H.* 21; *Conn. Supreme Ct.* 1859, *Welch v. Seymour*, 28 *Conn.* 387; *Pa. Supreme Ct.* 1864, *Manufacturers' & Co. v. Odd Fellows Hall Association*, 48 *Pa. St.* 446.

82. But, when an office is held at the will of those who make the appointment, and is not limited to any certain term, then the bond is presumed to be intended, if nothing appear to the contrary, to cover all the time the person appointed shall continue in office under the appointment. *N. H. Superior Ct.* 1834, *Exeter Bank v. Rogers*, 7 *N. H.* 21.

83. Where a bond was given for the faithful performance of a cashier's duties, "so long as he should continue in said office," and such officer was duly chosen cashier several times, and acted as such ever since his first election,—*Held*, that the liabilities of the sureties extended to a breach of duty

committed nine years after its date; it not appearing in the bond, nor in the charter, nor in the regulations of the bank, that his office was annual. *Mass. Supreme Ct.* 1825, *Dedham Bank v. Chickering*, 3 *Pick.* 335. Compare *Union Bank of Maryland v. Ridgely*, 1 *Har. & G.* 324; *State Treasurer v. Mann*, 34 *Vi.* 371.

84. In 1831, a cashier of a banking corporation was appointed, and gave bond, under a statute, which provided that a cashier should retain his place until removed therefrom, or another should be appointed in his place. In 1832 he was re-appointed; but gave no new bond. In 1836, and 1837, he was guilty of defaults. *Held*, that his sureties were liable on the official bond, although it appeared from the records of the directors, that in 1831, and also in 1832, such cashier was appointed "for the year ensuing." *Mass. Supreme Ct.* 1841, *Amherst Bank v. Root*, 2 *Metc.* 522.

85. The treasurer of a manufacturing corporation was directed by statute to be chosen annually and to hold his office until a successor should be chosen and qualified. *Held*, under this provision, that the sureties on the bond of such officer were bound only for the year for which he was chosen, and for such further time as was reasonably sufficient for the election and qualification of his successor, and no longer; although the corporation might fail to elect at their next annual meeting. *Mass. Supreme Ct.* 1856, *Chelmsford Co. v. Demarest*, 7 *Gray*, 1. See also *Lexington & West Cambridge R. R. Co. v. Elwell*, 8 *Allen*, 371.

86. A condition which provides for a faithful discharge of the duties of an office "during the term for which he has been elected, and for and during such further time as he may continue therein by any re-election or otherwise," applies only to defaults during continuous holding of the office, and does not embrace a case of resumption of the office after having ceased to hold it and after another person has exercised its duties upon an election and qualification therefor by giving an official bond. *Mass. Supreme Ct.* 1861, *Middlesex & Co. v. Lawrence*, 1 *Allen*, 339.

87. No action can be maintained against the sureties of an official bond of the cashier of a bank, where the breaches assigned are all for unfaithfulness in office after a re-appointment, and after the giving and accept-

* See this rule applied when the bond recited the contemplated duration of the principal's office; notwithstanding the words of the bond stipulated for his fidelity so long as he should "continue." *Arlington v. Merrick*, 2 *Saund.* 404; *Liverpool Waterworks Co. v. Atkinson*, 6 *East*, 507.

ance of a new bond. *Ms. Supreme Ct.* 1843, Frankfort Bank v. Johnson, 23 *Me.* 322.

88. In respect to alterations of the principal's contract. Where the bond recites that the agent is employed at a fixed salary, and the sureties bind themselves for his fidelity during the time of his continuance in "such agency," they are released from responsibility by changing his compensation to an uncertain one—*e. g.* commissions on sales,—without the sureties' consent. *Exch.* 1854, Northwestern Railway Co. v. Whinray, 10 *Exch.* 77; 26 *Eng. L. & Eq.* 488; 23 *Law J. N. S. Exch.* 261.

89. A bond, given to a manufacturing company was conditioned that A. should act faithfully as agent for the corporation in selling their hats, while he should be agent and should account and pay over on demand. He received a commission on the sales, and guaranteed them. A few years afterwards, the company voted to give up their store, and sell the imperfect hats on hand, at auction. A. then agreed to deliver hats to the proprietors, in cases, at his own store, and keep the books of the company, and was to be supplied by them with hats, at the wholesale price, to retail. *Held*, that the bond did not cover the acts of A. under the new arrangement. *Mass. Supreme Ct.* 1824, Boston Hat Manuf. Co. v. Messinger, 2 *Pick.* 228.

40. In a bond for the faithful discharge of the duties of an agent of a bank, it was provided "that he should have no other business of any kind, nor be connected in any shape with any trade, &c., nor be security for any individual or copartners in any manner of way whatsoever." The bank subsequently, without the knowledge of the sureties, increased the salary of the agent, he undertaking to bear one-fourth part of all losses which might be incurred by his discounts. *Held*, that this was such an alteration of the contract, and of the liability of the agent, that the sureties were discharged, notwithstanding the loss arose, not from discounts, but from improper conduct of the agent. *H. of Lords*, 1850, Bonar v. Macdonald, 1 *Eng. L. & Eq.* 1; 14 *Jur.* 1077.

41. A penal bond was given to a railroad company, conditioned for the faithful performance of the duties of a ticket and freight agent, at a certain station of the road, so long as he should hold the same. At the date and delivery of the bond, the station was a

second class station, but the company subsequently made it a first class station. At the latter a greater amount of freight was paid than at the former stations, but the duties of the ticket and freight agent were the same at both, *viz.*: to receive all sums payable at his station both for freight and passengers. *Held*, that the change of the regulations of the company by which this was made a first class station, did not discharge the sureties on the bond. *Md. Ct. of Appeals*, 1859, Strawbridge v. Baltimore & Ohio R. R. Co. 14 *Md.* 360.

42. In a suit against the principal of a cashier's bond, it does not constitute a sufficient defence, that, since the bond was given, the capital of the bank has been increased; since the cashier's duties are no more altered or increased by such augmentation of the capital, than by an increase of the deposits. *Del. Superior Ct.* 1840, Bank of Wilmington & Brandywine v. Wollaston, 3 *Harring.* 90; *N. J. Supreme Ct.* 1847, Morris Canal & Banking Co. v. Van Vorst, 1 *Zabr.* 100.

43. Defences to sureties. Where the bond of a cashier is given to secure a bank against previous delinquencies, the fact that he is already a defaulter, known to the president and directors, but not communicated to the surety, will discharge the surety. *Ms. Supreme Ct.* 1855, Franklin Bank v. Stevens, 39 *Me.* 532; Franklin Bank v. Cooper, *Id.* 542; *Pa. Supreme Ct.* 1866, Wayne v. Commercial National Bank, 52 *Pa. St.* 343.

44. But where the bank has no reason to suspect a teller, and there is no request by the surety to investigate his accounts, an omission by the bank to make such investigation will not discharge the surety. *Pa. Supreme Ct.* 1866, Wayne v. Commercial National Bank, 52 *Pa. St.* 343.

45. In an action by an insurance company against the sureties of its agent, who gave a bond conditioned for his duly accounting and paying over to the company, the moneys received by him for the company, the fact that the plaintiffs took the bond in pursuance of a uniform custom, fraudulently concealing from the sureties that the agent was at the time a defaulter to the company, constitutes no defence, if there is no allegation that the bond was executed at the solicitation of the company, or its officers, or that the sureties had applied to them for information concerning the accounts of the princi-

pal. *Wis. Supreme Ct.* 1864, *Ætna Life Ins. Co. v. Mabbett*, 18 *Wis.* 667.

46. The culpable neglect of the directors and agents of a bank to make frequent examinations of the affairs of the bank, to count the money, and generally to watch over its concerns, according to the direction of the by-laws, is no defence to the sureties of its cashier in a suit on an official bond. The negligence of one agent, or set of agents, cannot deprive the corporation of its remedy for the default of another agent. *Mass. Supreme Ct.* 1841, *Amherst Bank v. Root*, 2 *Meta.* 522; *S. P. N. J. Supreme Ct.* 1847, *Morris Canal & Banking Co. v. Van Vorst*, 1 *Zabr.* 100; *Mo. Supreme Ct.* 1867, *State v. Atherton*, 40 *Mo.* 309; *Circ. Ct. D. C.* 1827, *Union Bank of Georgetown v. Forrest*, 3 *Cranch C. Ct.* 218. Compare *Taylor v. Bank of Kentucky*, 2 *J. J. Marsh.* 568.

47. Mere delay of private persons or officers of a corporation to call their debtor to account does not discharge the surety. Though a corporation neglect for seven years to call its treasurer to an account, when, by its by-laws, he was bound to account every six months, the sureties in his bond are not thereby discharged. [10 *East*, 85; 7 *Johns.* 388.] *N. Y. Supreme Ct.* 1835, *Albany Dutch Church v. Vedder*, 14 *Wend.* 165.

48. Neglect on the part of municipal officers to enforce the collection of the taxes and the paying over of the money, until some time after the expiration of the year, or to take the tax bills from the collector, will not release the sureties on the collector's bond. *Mo. Supreme Ct.* 1861, *Inhabitants of Readfield v. Shaver*, 50 *Mo.* 36.

49. In order to charge a cashier's sureties it is not necessary to give them notice of his defaults; and retaining him in office after knowledge of his defalcation, does not excuse his sureties from liability for previous defaults. *N. J. Supreme Ct.* 1824, *State Bank at Elizabeth v. Chetwood*, 3 *Halst.* 1.

50. Where a charter was forfeited by a cashier's omission to forward to the State treasurer duties on dividends, and by a subsequent statute the charter was "revived and continued in as full force and ample a manner as if no forfeiture had taken place,"—*Held*, that his sureties were not liable for his defaults after the passing of that statute. *Pa. Supreme Ct.* 1880, *Bank of Washington v. Barrington*, 2 *Pa.* 27.

51. Where a bank, pursuant to its by-laws, required the cashier to renew his bond, and the order requiring the renewal provided that the previous bond should not be impaired, until given up to be canceled,—*Held*, that the first bond, remaining uncanceled, continued in force as security to the bank, until the second was executed. *Ky. Ct. of Appeals*, 1824, *Pendleton v. Bank of Kentucky*, 1 *T. B. Monr.* 171.

52. Taking the principal's note for his indebtedness, and thereby extending his time, is a discharge of the sureties; but it must appear that the note was accepted in full satisfaction. *N. J. Supreme Ct.* 1847, *Morris Canal & Banking Co. v. Van Vorst*, 1 *Zabr.* 100.

53. When they are estopped. The sureties upon a bond given to an insurance company for the faithful performance of the duties of an agent, will be estopped in an action on the bond, from showing that the agency under which the breach of the bond was claimed to have been committed, was different from that described in their own instrument. *Conn. Supreme Ct.* 1857, *Washington Co. Ins. Co. v. Colton*, 26 *Conn.* 42.

54. Where, in debt on a cashier's bond, the defendant, on oyer, set forth a bond which recited, that "C. is cashier,"—*Held*, that he was estopped from denying the fact of C.'s being a cashier, properly appointed and qualified for all the purposes of the suit. *N. J. Supreme Ct.* 1824, *State Bank at Elizabeth v. Chetwood*, 3 *Halst.* 1.

55. Where an officer of a municipal corporation gave his official bond with sureties, which bond recited that he had been appointed collector of assessments for street improvements, with condition that "he should well and truly pay to the treasurer of said city all moneys which he might collect or receive as such collector," &c.,—*Held*, that the sureties were estopped from denying that such officer was *de facto* a collector of assessments, and their liability to pay over what he had collected was co-extensive with his. *N. J. Supreme Ct.* 1862, *Mayor &c. of Hoboken v. Harrison*, 30 *N. J. Law* (1 *Vroom*.) 73.

56. When the corporation is estopped. A corporation is not estopped from maintaining an action upon their treasurer's bond by having accepted a report of an auditing committee who had approved his accounts, and by making a report founded thereon to

the legislature. *Mass. Supreme Ct.* 1864, *Lexington v. West Cambridge R. R. Co. v. Elwell*, 8 *Allen* 871.

SEMINARIES.

1. Taking bequest. The trustees of an incorporated theological seminary being declared, by the charter, to be capable of taking and holding real and personal property and managing the same for the benefit of the institution, viz., the education of pious young men for the gospel ministry, the charter also providing for the appointment of tutors and professors,—may take a bequest for the purpose of endowing a professorship. *N. Y. Ct. of Appeals*, 1857, *Auburn Theological Seminary v. Kellogg*, 16 *N. Y.* 83.

2. Removing professor. As to what are sufficient grounds to warrant the trustees of a theological seminary in removing a professor, and what proceedings should be had to accomplish the removal,—see *Murdock's Appeal*, 7 *Pick.* 308; *Murdock v. Phillips Academy*, 12 *Pick.* 244.

Compare also the titles of other Educational Corporations; such as ACADEMIES; COLLEGES; SCHOOL DISTRICTS.

SERVANTS.

1. Who is a "servant." The secretary of a corporation, being an officer or agent of the company, is not a "servant" within the meaning of a statute (*e. g.* *N. Y. Laws of 1848*, ch. 54, § 18), declaring stockholders liable for debts owing from certain corporations to their laborers, servants and apprentices, for services performed for such corporations. The scope of such a statute is to protect those engaged in manual labor. *N. Y. Ct. of Appeals*, 1868, *Coffin v. Reynolds*, 37 *N. Y.* 640. To the contrary was, *N. Y. Supreme Ct.* 1864, *Richardson v. Abendroth*, 43 *Barb.* 162.

2. One who was employed by a manufacturing company to perform a variety of services; who was an overseer and yet worked with the men; worked in the mills of the company, and had a general supervision of their business and kept their books,—*Held*, entitled to recover against stockholders as a servant of the company, under the statute

above mentioned. The word "laborer" in such a provision must probably be restricted to mean manual work, but "servant," cannot be confined to a mere menial service. "Laborer" is more distinctive than "servant," and embraces a smaller class; the former comprehending such only as perform labor with their hands, while the latter includes also such as do menial services. The plaintiff was both a laborer and a servant; much that he did was manual and some of it menial. *N. Y. Superior Ct.* 1865, *Hovey v. Ten Broeck*, 3 *Robt.* 316.

3. A person employed by a corporation as its civil engineer and traveling agent, at a fixed salary, is a servant of the corporation, within the meaning of an act making stockholders liable for debts due to their servants. A state of subordination to the commands of those under whose direction and authority one is acting, constitutes the relation of master and servant. *N. Y. Supreme Ct.* 1867, *Williamson v. Wadsworth*, 49 *Barb.* 294.

4. A consulting engineer is not a laborer or operative within a charter rendering stockholders individually liable to such servants. *N. Y. Supreme Ct.* 1862, *Ericsson v. Brown*, 38 *Barb.* 300.

5. That a contractor is not a servant,—see *Aikin v. Wasson*, 24 *N. Y.* 481.

6. That a drover traveling in a freight train of a railroad company with his live stock, without paying any fare other than what was included in the amount of freight paid on his stock, is not an employee or servant of the railroad company,—see *Flinn v. Philadelphia, Wilmington & Baltimore R. R. Co.* 1 *Houst.* 469.

7. The servants of a contractor for the construction of a work are not the servants of the company,* within the maxim, *respondent superior*. And it is not enough to charge the company with their negligence in the manner of burning rubbish, that the contract provided that it should be removed or burned as the company's engineer should direct, and

* A day laborer upon defendant's railroad, employed by a foreman, but upon an understanding with the company, that if at any time after the expiration of his regular hours, he should see anything amiss, he should attend to it and be allowed extra time therefor, took down a pair of bars, and neglected to put them up, by which cattle strayed on the road. A finding that he was the servant of the company to put up the bars, and that they were liable for his neglect, was sustained, though questioned. *N. Y. Supreme Ct.* 1860, *Chapman v. N. Y. Central R. R. Co.* 31 *Barb.* 399.

that he directed it to be burned. *Iowa Supreme Ct.* 1887, *Callahan v. Burlington & Missouri River R. R. Co.* 23 *Iowa*, 562.

8. Liability for servants' neglect. A railroad corporation is liable, as a common carrier, for delay in delivering goods, although the delay was caused purely by the act of their employees,—e. g. by a general strike of the engineers, &c. The fidelity of their servants is at the risk of the employers. *N. Y. Supreme Ct.* 1857, *Blackstock v. N. Y. & Erie R. R. Co.* 1 *Bow.* 77.

9. — or act. A corporation is responsible, ordinarily for the consequences resulting to others from the negligence or want of skill with which its employees do its business. But a willful and malicious trespass of a servant not commanded or ratified by the corporation, but perpetrated to gratify the private malice of the servant, under mere color of discharging the duty which he has undertaken for his principal, gives no right of action against the corporation. But if the act of the servant was necessary to accomplish the purpose of his employment, and was intended for that purpose, then it was implied in the employment, and the corporation is liable, though the servant may have executed it willfully and maliciously. *Ind. Supreme Ct.* 1866, *Evansville & Crawfordsville R. R. Co. v. Baum*, 26 *Ind.* 70.

10. — for injury to fellow servants. The rule of the law of master and servant, that a master is not liable to one servant for an injury sustained through a neglect of duty on the part of a fellow servant (no fault on the part of the master appearing), applies to servants of corporations. *Ma. Supreme Ct.* 1857, *Carle v. Bangor &c. R. R. Co.* 43 *Ma.* 269; *Mass. Supreme Ct.* 1842, *Farwell v. Boston & Worcester R. R. Co.* 4 *Metc.* 49; *Ohio Supreme Ct.* 1858, *Whaalan v. Mad River &c. R. R. Co.* 8 *Ohio St.* 249. And see *Coon v. Syracuse & Utica R. R. Co.* 5 *N. Y. (1 Seld.)* 492; 6 *Barb.* 281; *Cannon v. Rowland*, 34 *Ga.* 422; *Louisville & Nashville R. R. Co. v. Collins*, 2 *Duv.* 114; *Flinn v. Phila. &c. R. R. Co.* 1 *Houst.* 469; *Murray v. South Carolina R. R. Co.* 1 *McMull.* 385. Compare *Haynes v. East Tennessee & Georgia R. R. Co.* 3 *Coldw.* 223.

11. Where a common laborer on a railroad was injured, while riding on a gravel train to his place of labor, by a collision caused by the negligence of the company's servants in charge of the train,—*Held*, that no action

would lie against the company therefor, although both servants were not in a common employment. *Mass. Supreme Ct.* 1852, *Gillshannon v. Stony Brook R. R. Corp.* 10 *Cush.* 228.

12. A manufacturing corporation which lays out and maintains a street upon its own land contiguous to its mills, and builds boarding houses thereon, for the use of its operatives, is not liable in damages for injuries sustained by one of these operatives by reason of a defect in such street. *Mass. Supreme Ct.* 1866, *Palmer v. Lawrence Manuf. Co.* 12 *Allen*, 69.

13. The rule that a corporation is not liable for an injury to a servant, resulting from the negligence of a fellow servant, does not apply where the servant was not, at the time of the injury, acting in the service of the master. In such case, the servant injured is substantially a stranger, and entitled to all the privileges he otherwise would have had. It is no objection to a recovery in such action, that the servant injured was improperly absent without leave, if he was received, without objection, by the conductor, on board the train on which the accident occurred; nor is the fact that he was riding in the baggage car with the knowledge of the conductor, or riding free, although he might or would not have been injured if he had remained in the passenger car. [1 *Am. Railw. Cas.* 568, note; 14 *How. U. S.* 468.] *Tenn. Supreme Ct.* 1859, *Washburn v. Nashville & Chattanooga R. R. Co.* 8 *Head*, 638.

14. The rule that the principal or master is not liable to his agent or servant for an injury inflicted through the negligence of another servant employed in the same general business, applies only where the injury happened without any actual fault of the principal or master, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it happens. Where the fireman on a locomotive was injured by the explosion of the boiler, which was defective and dangerous,—*Held*, that the railroad corporation were liable for the injury, if they knew the condition of the boiler, it not being shown that its condition was known to the plaintiff also. *N. Y. Ct. of Appeals*, 1858, *Keegan v. Western R. R. Co.* 8 *N. Y. (4 Seld.)* 175; 8 *P. N. Y. Supreme Ct.* 1855, *McMillan v. Saratoga & Washington R. R. Co.* 20 *Barb.* 449;

1858, *Wright v. N. Y. Central R. R. Co.* 28 *Barb.* 80; *Mass. Supreme Ct.* 1842, *Farwell v. Boston & Worcester R. R. Co.* 4 *Metc.* 49, 57. To the contrary effect, *N. Y. Supreme Ct.* 1857, *Byron v. N. Y. State Printing Telegraph Co.* 28 *Barb.* 89.

15. Removal of servants. That mere servants of a corporation are not liable to be removed by the courts upon *quo warranto*,—see *Commonwealth v. Dearborn*, 15 *Mass.* 125.

For the rules relative to Agents and Officers of corporations, see AGENTS; OFFICERS; also titles of the various officers.

STATES.

1. That the United States may be deemed a corporation,—see *United States v. Hillegas*, 3 *Wash. C. Ct.* 78.

2. States of the Union. The individual States having submitted their interfering territorial claims to the judiciary of the United States, are, in respect to those rights, to be deemed to have ceded their sovereignty to the United States, and to be, so far, considered as corporations. The right of a State to grant lands so situate, must, therefore, be judged by the same rules of common law as the rights of other persons; so that a conveyance of the lands, if adversely held, is void. *N. Y. Ct. of Errors*, 1800, *Woodward v. Janes*, 2 *Johns. Cas.* 417. Followed, *N. Y. Supreme Ct.* 1800, *Whitaker v. Cone*, *Id.* 58. And see *Belding v. Pitkin*, 3 *Cal.* 147.

3. That other States are entitled, as corporations, to institute suits in the courts of Mississippi,—see *Hines v. State of North Carolina*, 10 *Smed. & M.* 529.

4. A foreign republic may maintain an action in the courts of the State of New York, in the name by which it is known as a State. *N. Y. Superior Ct.* 1856, *Republic of Mexico v. De Arangoiz*, 5 *Duer*, 684.

STEAMBOAT COMPANIES.

1. Liability. Steamboat companies are liable as common carriers. *Ala. Supreme Ct.* 1866, *Boon v. Steamboat Belfast*, 40 *Ala. N. S.* 184. Compare *Cox v. Peterson*, 80 *Ala. N. S.* 608; *Hibler v. McCartney*, 81 *Id.* 501.

2. The charter of a steamboat company provided that its members should be indi-

vidually liable as carriers for all goods, wares, and merchandise delivered to the agents of the corporation. *Held*, that this did not, in itself, make them liable for bank bills delivered to the captain of their boat; the company having always refused to carry money.* *N. Y. Ct. of Errors*, 1830, *Sewall v. Allen*, 6 *Wend.* 385.

STOCK.

[This title embraces matters relating to the capital considered with reference to the *shareholders*. It includes the nature of shares in a capital,—the power of a corporation to increase or diminish the number of shares, and to hold shares of its own stock,—the certificate which represents stock,—its issue, negotiability, transfer, and withdrawal,—the apportionment of stock among subscribers,—the remedies within the administration of the corporation to enforce payment for stock, *s. g.*, by forfeiture,—and the lien of a corporation upon stock for a debt due from a shareholder. But the power of a corporation to require payment of subscriptions for stock, is under SUBSCRIPTIONS; and its power to assess its stockholders, is under ASSESSMENTS. And matters relating to the capital as towards the *sovereign power*;—*s. g.* how it must be paid in and invested, are under CAPITAL.]

- I. NATURE AND OWNERSHIP.
- II. ISSUE AND SURRENDER.
- III. ENFORCING PAYMENT.
- IV. RIGHTS OF HOLDERS.
- V. TRANSFER.
 - 1. General Right of.
 - 2. Necessary formalities
 - 3. Effect of transfer.
- VI. CORPORATE DUTY.
- VII. LIEN OF THE CORPORATION.
- VIII. CONTRACTS FOR SALE OF STOCK.
- IX. MEASURE OF DAMAGES.
- X. PLEDGES AND MORTGAGES.

I. NATURE AND OWNERSHIP.

1. Meaning of the term. Stock (as used in reference to a corporation), when it means any thing else than the capital of a corporation, can refer to nothing else than the interests of the shareholders or individuals. Such interests are called "stock;" and the sum total of them is appropriately enough

*Where gold dust was received on board a steamboat, with express notice from the clerk of the boat, that he would receive it only upon condition that no charge was to be made, and no responsibility incurred, and stolen from the boat, without any negligence on the part of its officers,—*Held*, that the owners were not liable. *Cal. Supreme Ct.* 1850, *Fay v. Steamer New World*, 1 *Cal.* 848.

called the stock of a corporation. *People v. Commissioners of Taxes*, 23 *N. Y.* 192, 220.

2. The profits and surplus funds of a bank, whenever they may have accrued, are, until separated from the capital by the declaring of a dividend, a part of the stock itself, and will pass with the stock under that name in a transfer or bequest. *Conn. Supreme Ct.* 1857, *Phelps v. Farmers' & Mechanics' Bank*, 26 *Conn.* 269.

3. If the charter of a corporation set apart a fund as capital, out of which debts are to be paid, it amounts to a contract with those who become creditors on the faith of it, that the fund shall not be withdrawn and appropriated to the use of the owner or owners of the capital stock. [1 *How.* 311; 2 *Id.* 608.] *U. S. Supreme Ct.* 1858, *Curran v. Arkansas*, 15 *How.* 304; 8 *P. U. S. Circ. Ct. (Me.)* 1824, *Wood v. Dummer*, 3 *Mass.* 308.

4. A purchase of all the stock of a corporation by two persons jointly, does not dissolve the corporation, nor render them joint tenants, tenants in common, nor partners. They become, or remain, corporators. *Mass. Supreme Ct.* 1838, *Russell v. M'Lellan*, 14 *Pick.* 68.

5. Nature of the property. Shares in incorporated companies holding land for the purposes of their business, such as canal, waterworks, and gas companies, are not "an estate or interest in land" within the mortmain act, notwithstanding there is no clause in their acts declaring the shares to be personal property. *Chancery*, 1855, *Edwards v. Hall*, 6 *DeGex, M. & G.* 74; 35 *Eng. L. & Eq.* 433; *Exch.* 1836, *Bligh v. Brent*, 2 *You. & C. Exch.* 294. And see *Tippetts v. Walker*, 4 *Mass.* 595; *Bradley v. Holdsworth*, 3 *Mees. & W.* 422; 1 *Horn. & H.* 156; *Mercer v. Lachmere*, 2 *Deac.* 337; *Thompson v. Thompson*, 13 *Law J. N. S. Chan.* 455.

6. By the deed of a joint stock company, it was declared "that all the property thereof should always be considered personal estate." A shareholder, by his will, gave his shares to trustees to invest the proceeds in securities for the benefit of certain charities. At this time the property of the bank consisted of freehold and copyhold hereditaments, &c. *Held*, that the bequest was good, and not void for mortmain. *Chancery*, 1853, *Myers v. Perigal*, 17 *Eng. Law & Eq.* 109; 17 *Jur.* 145; 22 *Law J. N. S. Ch.* 431.

7. Where lands are vested in the individual shareholders, and the management is only in the corporation, the shares are real estate. See *Drybutter v. Bartholomew*, 2 *P. Wms.* 127; *Weekley v. Weekley*, 2 *You. & C. Exch.* 281, note.

8. Stock considered as a chose in action. *Rex v. Capper*, 5 *Price*, 217.

9. Shares in railroad companies are personal property.* *Ohio Supreme Ct.* 1853, *Johns v. Johns*, 1 *Ohio St.* 350. To the contrary was *Price v. Price*, 6 *Dana*, 107; *Welles v. Cowles*, 2 *Conn.* 567.

10. The shares of railway companies are regarded as personal estate, and, as such, are not within the meaning of the mortmain act; but mortgages of the undertakings and the tolls proceed from the corporation directly, and are an incumbrance, within the act, on the tolls and the land itself from which the tolls are obtained. *V. Chan. Ct.* 1851, *Ash-ton v. Langdale*, 4 *Eng. L. & Eq.* 80; 20 *Law J. N. S. Ch.* 234.

11. Shares in the stock of a corporation are personal property and choses in action, or of the nature of choses in action. *R. I. Supreme Ct.* 1837, *Arnold v. Ruggles*, 1 *R. I.* 165.

12. Where, by a judgment in partition, certain shares in the stock of a corporation were set off to the husband and wife, in her right, the shares having come to the wife by devise previous to marriage,—*Held*, that the judgment only suspended her power over them, during her husband's life, by recognizing his marital rights; and that, to have made the property absolute in himself, he should have transferred them in his own name. *R. I. Supreme Ct.* 1837, *Arnold v. Ruggles*, 1 *R. I.* 165. To similar effect, *Slaymaker v. Gettysburgh Bank*, 10 *Pa. St.* 373.

13. Charter declaration. The clause in the charter of a railroad company declaring its stock personal property, merely relates to the nature of the property the stockholders are to be deemed to have in the company, and not to the character of the property held by the company in its corporate capacity, for

* See also the following cases: *Howe v. Starkweather*, 17 *Mass.* 243; *Bank of Waltham v. Waltham*, 10 *Wetc.* 234; *Hutchins v. The State Bank*, 19 *Id.* 421; *Denton v. Livingston*, 9 *Johns.* 100; *Planters' Bank v. Merchants' Bank*, 4 *Ala. N. S.* 703; *Union Bank of Tennessee v. State*, 9 *Yerg.* 490; *Brightwell v. Mallory*, 10 *Id.* 196; *Heart v. State Bank*, 3 *Dev. Ch.* 111; *State v. Franklin Bank*, 10 *Ohio*, 91; *Gilpin v. Howell*, 5 *Pa. St.* 57.

the benefit of such stockholders. *N. Y. Chancery*, 1834, *Mohawk & Hudson R. R. Co. v. Clute*, 4 *Paige*, 384.

14. Under a charter which provided that all the property of the company, land, tenements, stock, property, and estate, should be held as real estate, and descend as such, —*Held*, that it was to be so regarded in respect to the interests of the stockholders themselves; but that, in respect to others, the legal character of the property was not thereby changed. *Md. Chancery*, 1829, *Cape Sable Co.'s Case*, 3 *Bland*, 606. But compare *Robinson v. Addison*, 2 *Beav.* 515; *Cooper v. Dismal Swamp Canal Co.* 2 *Murph.* 195.

15. Stock is not regarded as money. *K. B.* 1770, *Nightingal v. Devisme*, 5 *Burr.* 2589; 2 *W. Black.* 684. And see *Jones v. Brinley*, 1 *East*, 1; *King v. Churchwardens &c.* 6 *Id.* 182.

16. Value. Shares in a railway company, in actual operation, are property in respect of which bail may justify. *Exch.* 1846, *Pierpoint v. Brewer*, 3 *Dowl. & L.* 487; 15 *Law J. N. S. Exch.* 81; 10 *Jur.* 79.

17. A finding of fact that a mine owned by a corporation is worthless does not necessarily show that the stock of the corporation is valueless. *Gifford v. Carvill*, 29 *Cal.* 589.

18. A scrip certificate in a railway company is not an "accountable receipt" nor "an acquittance or receipt" within the statutes making the forgery of such document a felony. *Exch.* 1847, *Clark v. Newsam*, 1 *Exch.* 181; 16 *Law J. N. S. Exch.* 296.

19. Vote. Stock which has been voted, but for which certificates have not been issued, is nevertheless within the statute forbidding wager contracts. *K. B.* 1798, *Brown v. Turner*, 7 *Durnf. & E.* 630; 2 *Exp.* 681. And see *Oliverson v. Coles*, 1 *Stark.* 496.

20. Sale. Stock in a banking incorporation is incorporeal personal property; and when it is sold and there is nothing in the contract or in the circumstances to repel the presumption, the vendor warrants its title and that it is legally what it purports to be in fact; but not its quality or value. *Iowa Supreme Ct.* 1864, *Allen v. Pegram*, 16 *Iowa*, 163.

21. Seizure on legal process. Shares of stock in an incorporated company not subject to levy by attachment, unless so made by statute. *Foster v. Potter*, 87 *Mo.* 525;

Planters' & Merchants' Bank v. Leavens, 4 *Ala. N. S.* 753.

22. In Pennsylvania, stock standing in a debtor's name on the books of a corporation, may be seized and sold, either on *fiore facias* or by attachment-execution process; but where such stock is subject to a charge or lien upon the title as in the case of bank stocks, the proceeding by attachment should be resorted to. *Pa. Supreme Ct.* 1865, *Weaver v. Huntingdon &c. R. R. Co.* 50 *Pa. St.* 314.

23. Shares in a turnpike or other incorporated company are not chattels. They have more resemblance to choses in action, being merely evidence of property; and the sale of them upon execution not being justifiable at common law, the statute directing the mode of attaching them, &c., must be strictly pursued to give any property to the purchaser. *Mass. Supreme Ct.* 1821, *Howe v. Starkweather*, 17 *Mass.* 240.

24. What law governs. From the nature of the stock of a corporation, which is created by and under the authority of a State, it is necessarily, like every other attribute of the corporation, to be governed by the local law of the State, and not by the local law of any foreign State. *U. S. Supreme Ct.* 1845, *Black v. Zacharie*, 3 *How.* 488, 511.

25. A corporation may own and sell its own stock. *United States Trust Co. v. Harria*, 2 *Bow.* 75; *State Bank of Ohio v. Fox*, 3 *Blatchf.* 431; *Robinson v. Beall*, 26 *Ga.* 17. To the contrary was, *Barton v. Port Jackson Plank-road Co.* 17 *Barb.* 397.

26. A corporation may, from necessity, take its own stock in pledge or payment, as a lawful exercise of its corporate franchise. *Pa. Supreme Ct.* 1865, *Coleman v. Columbia Oil Co.* 51 *Pa. St.* 74.

27. In an action against the maker, by the indorsee of a note given to an insurance company, and by them transferred in payment for bank stock, purchased by them, the defendant cannot controvert the right of the company to purchase the stock. *Me. Supreme Ct.* 1860, *Brown v. Donnell*, 49 *Me.* 421.

28. A sale of shares with a stipulation to give debentures in lieu of them, —*Held*, unauthorized and illegal. *V. Chan. Ct.* 1848, *West Cornwall Railway Co. v. Mowatt*, 17 *Law J. N. S. Ch.* 366.

29. A company bought in shares of its own capital stock and subsequently divided them among the existing share-holders, *pro rata*. A stockholder who had between the time of the purchase and the time of the distribution assigned part of his stock, brought an action against the company for a *pro rata* of the shares on the basis of the number held by him at the time of the purchase. It appeared that he had never taken any steps to enjoin or disaffirm the purchase. *Held*, that the distribution was an equitable one, and that his action amounted to an affirmation of the purchase, and estopped him from alleging a misapplication of the corporate funds. *Pa. Supreme Ct.* 1865, *Coleman v. Columbia Oil Co.* 51 *Pa. St.* 74.

30. Employment by a corporation of its corporate funds in the market to buy up its stock, a breach of trust. *In re London & C. Railway Co. Ex p. Carpenter*, 12 *Eng. L. & Eq.* 201; 5 *De Gex & S.* 402. But compare *In re Northern Coal Mining Co.* 18 *Beav.* 472; 4 *Eng. L. & Eq.* 72, 78, 79.

31. If the purchase of its own stock by a corporation operates, in such a case, as a fraud on the stockholders, the remedy is against the directors by whom it is committed. *N. Y. V. Chan. Ct.* 1831, *Verplanck v. Mercantile Ins. Co.* 1 *Edw.* 84.

32. A bank, under the provisions of its charter, authorizing the president and directors to dispose of the funds of the company in such manner as they shall think most advantageous to the company, may receive transfers of stock in payment of debts previously contracted by stockholders; and a court of chancery will not, at a remote subsequent time, compel the stockholder to reinstate his stock. *Ohio Supreme Ct.* 1833, *Taylor v. Miami Exporting Co.* 6 *Ohio (Ham.)* 176, 218.

33. Where a person purchased of a bank a large amount of stock to increase the number of votes he was entitled to throw at an election for directors, made use of it for that purpose, and immediately afterwards returned the same, receiving the purchase money from the directors,—*Held*, that a court of equity would not compel the purchaser to refund the money and take back the stock, where the proof showed that no injury resulted from the transaction. *Ib.*

34. A bequest to a corporation of its own stock is valid. *Va. Ct. of Appeals*, 1840,

Rivanna Navigation Co. v. Dawson, 3 *Gratt.* 19.

35. Purchase and reissue. In the absence of any statute restriction, a corporation may purchase shares of their own stock, hold them unextinguished, and reissue the same; and such reissue may be in the form of issuing new stock upon a new subscription, without reference to the requirements of the charter as to the terms of original subscriptions. *N. Y. Ct. of Appeals*, 1858, *City Bank of Columbus v. Bruce*, 17 *N. Y.* 507.

36. And upon a re-sale by the corporation, the stockholders have no right of pre-emption. *Ga. Superior Ct.* 1828, *Hartridge v. Rockwell*, *R. M. Charlt.* 260; *Md. Chancery*, 1851, *Williams v. Savage Manuf. Co.* 3 *Md. Ch. Dec.* 418.

37. Merger. A transfer of its own stock directly to a corporation, unless there is some provision in the charter to the contrary, will operate as a merger of the stock so transferred; but it does not follow that the shares may not be subsequently revived. *Md. Chancery*, 1851, *Williams v. Savage Manuf. Co.* 3 *Md. Ch. Dec.* 418.

38. Evidence of ownership. A person becomes legally entitled to shares in a bank, by having them transferred to him on the books of the bank. The certificate of ownership is but additional evidence of title. The legal title, evidenced by the records of the corporation, is not divested by the owner's permitting the bank to treat them as its own property. *Ma. Supreme Ct.* 1844, *Agricultural Bank v. Burr*, 24 *Ma.* 256.

39. Stock pledged to the corporation. A stockholder of a bank transferred his shares to the corporation by a writing absolute in form, and surrendered his certificate of stock, leaving with the cashier an agreement, in which, after reciting that he had transferred the shares as collateral security for the payment of a certain note to the bank, he covenanted that if the note should not be duly paid, the bank might sell the shares and apply the proceeds to the payment of the note, and hold the surplus to his use. He paid interest from time to time upon the note after it fell due, and continued to receive the dividends upon the shares. *Held*, that he was still a member of the corporation. *Mass. Supreme Ct.* 1826, *Merchants' Bank v. Cook*, 4 *Pick.* 405.

40. Nominal owners. Under the pro-

vision of a bank charter, that subscriptions and shares shall be deemed and held to be for the sole and exclusive use and benefit of the persons, copartnerships or bodies politic, subscribing, or in whose behalf the subscriptions, respectively, shall be declared to be made, at the time of making the same; and all bargains, contracts, promises, agreements and engagements, in anywise contravening this provision, shall be void;—the stock is not to be deemed to belong to the person in whose name it stands upon the books of the bank, when he is merely a nominal holder. The bank is bound to recognize the interest of any *cestui que trust*, and the debt of the merely nominal holder does not authorize the bank to refuse to allow the stock to be transferred, if the real party interested is not indebted, and if the interest in the stock was known to the bank when the debt was contracted. *U. S. Supreme Ct. 1828, Mechanics' Bank of Alexandria v. Seton, 1 Pet. 299.*

41. Stock of an insolvent bank held by an individual in trust for the bank,—*Held*, not thereby extinguished, but valid in the hands of the trustee, so as to render him liable, as a stockholder, to be assessed therefor, in proceedings to charge stockholders with debts of the bank. *N. Y. Ct. of Appeals, 1858, Case of Empire City Bank, 8 Abb. Pr. 192; 18 N. Y. 199.*

As to the Liabilities of stockholders consult also INDIVIDUAL LIABILITY.

42. In national banking associations, persons holding stock as executors, administrators, guardians and trustees, are not personally subject to liabilities as stockholders, but the estates are liable as the decedent, ward or person interested in the fund would be if living and competent to act and hold the stock in their own names. Act of Cong. June 3, 1864, § 63, 13 Stat. at L. 100; 2 *Bright*, 65.

43. *Prima facie* evidence. A power of attorney indorsed by the owner on a certificate of stock, in blank as to the attorney's name, expressed to be for value received, and irrevocably authorizing him to sell and transfer the stock to any person, and to substitute one or more persons with like power, is *prima facie* evidence of an equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate; and the holder may insert his own name and execute the power, and thus obtain the legal title whenever entitled to do so by the contract under which he received

the stock. *N. Y. Superior Ct. 1852, Fatman v. Lobach, 1 Duer, 354; 1854, Leavitt v. Fisher, 4 Id. 1.* But compare to the contrary, *Mechanics' Bank v. N. Y. & New Haven R. R. Co. 13 N. Y. (3 Kern.) 599, 625; Stebbins v. Phenix Fire Ins. Co. 3 Paige, 350.*

44. Such a power is not limited to the person to whom it may first have been delivered, but inures to the benefit of each *bona fide* holder into whose hands the certificate and power may subsequently pass—each successive holder having the right to fill up the blanks, and execute the power, or cause it to be executed, whenever the protection of his own interests, as a pledgee or absolute owner, may require it. *N. Y. Superior Ct. 1854, Leavitt v. Fisher, 4 Duer, 1.*

45. The certificate of stock in a corporation, accompanied by the power of attorney authorizing the transfer of the stock to any person, is *prima facie* evidence of equitable ownership in the holder, and renders the stock transferable by the delivery of the certificate. And when the party in whose hands the certificate is found, is shown to be a holder for value, and without notice of any intervening equity, his title as such owner cannot be impeached; and a provision in the charter or by-laws of the corporation, that the stock is transferable only on the books of the corporation will not in any manner affect the title, such provision being designed merely for the protection and benefit of the corporation. *N. J. Chancery, 1864, Mount Holly &c. Turnpike Co. v. Ferree, 17 N. J. Eq. (2 C. E. Green,) 117.*

46. A purchaser of a certificate of shares of stock in a corporation containing an irrevocable power of attorney from the owner, has a perfect right, without notice of any intervening equity, to fill up the power to himself, and to recover at law against the company for refusing to assign the stock upon his demand. *N. J. Chancery, 1864, Mount Holly &c. Turnpike Co. v. Ferree, 17 N. J. Eq. (2 C. E. Green,) 117.*

47. Under a charter declaring the book of shares, under the seal of the company, to be *prima facie* evidence that a party is proprietor of shares, in an action for calls, it appeared that the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1830, from claims sent in by different parties, but that the seal was not af-

fixed to it till November, 1886. *Held*, that this book was no evidence that the defendant was a proprietor of shares at the time of the call, in October, 1886.* *Q. B.* 1889, Cheltenham Railway Company v. Price, 9 *Car. & P.* 55. Compare *Wolverhampton, &c. Co. v. Hawksford*, 7 *C. B. N. S.* 795.

II. ISSUE AND SURRENDER.

48. When commissioners appointed by a charter to receive subscriptions and distribute stock, neglect to do so, parties aggrieved should seek redress by *mandamus*. *N. Y. Chancery*, 1833, *Walker v. Devereaux*, 4 *Paige*, 229.

49. Unsubscribed stock. If a part of the authorized capital stock of a corporation remains untaken at the time of its incorporation, the right to issue the remainder of it is a corporate franchise, held by the corporation in trust for the incorporators, and it is to be disposed of for the benefit of all; and the directors have no right to distribute such shares of stock among those of the stockholders merely who are not in arrear on the shares already taken by them, and excluding those who are, when such are ready and have offered to take their proportions of the new stock. *Pa. Supreme Ct.* 1855, *Reese v. Bank of Montgomery Co.* 31 *Pa. St.* 78.

50. If the directors of an incorporated company dispose of stock, remaining untaken at the time of incorporation, to the incorporators unequally, and in violation of the rights of any, each incorporator injured by

their act may have his remedy in assumpsit against the corporation.* *Id.*

51. Where a corporation is created subject to the provisions of a general law, without the appointment of commissioners to receive subscriptions for stock, and a part only of its authorized capital is disposed of, the directors may receive subscriptions for all the untaken stock and issue certificates therefor; and the new subscribers become stockholders, and are entitled to equal rights with the original stockholders. *Pa. Supreme Ct.* 1867, *Curry v. Scott*, 54 *Pa. St.* 373. Compare *McMillan v. Maysville &c. R. R. Co.* 15 *B. Monr.* 218.

52. In the absence of express legislative provision governing the case, a corporation has the same power of disposition over its unsubscribed capital stock, as any ordinary owner; it may be used in the payment of debts, or exchanged for labor or property, as the purposes of the company may require. *Cincinnati Superior Ct.* 1855, *Dayton & Cincinnati R. R. Co. v. Hatch*, 1 *Disney*, 84.

To similar effect, *Pa. Supreme Ct.* 1867, *Curry v. Scott*, 54 *Pa. St.* 270.

53. Over subscription. Under the act of South Carolina of 1853, (13 *Stat.* 212,) chartering certain banks, the commissioners appointed to take subscriptions, had no power in case of over subscription to the stock, to apportion it among the subscribers. It belonged to the corporation to reduce the subscriptions, *pro rata*. *S. C. Ct. of Appeals*, 1854, *State v. Lehre*, 7 *Rich.* 234.

54. Issue limited. A corporation, whose capital is, by its charter, limited, either in amount or in number of shares, cannot issue valid certificates in excess of the limit. *N. Y. Ct. of Appeals*, 1850, *Mechanics' Bank v. N. Y. & New Haven R. R. Co.* 13 *N. Y. (3 Kern.)* 599.

Compare *Michigan, &c. R. R. Co. v. Auditor General*, 9 *Mich.* 448; *Bridgeport Bank v. New York &c. R. R. Co.* 30 *Conn.* 231.

* S. a shareholder in a joint stock banking company, sold his shares, and his name was erased from the books and that of the purchaser inserted. The bank subsequently suspended payment, and upon a call being made, the purchaser of the shares neglected to pay it, in consequence of inability. The bank then made an entry in the share register list, stating that the transfer was invalid for want of the consent of a board of directors duly constituted, and they made a fresh return to the stamp office, in which they inserted the name of S. as a shareholder. *Held*, upon a bill filed by S. that he was not bound to inquire whether the provisions of the deed had been observed, and that he had ceased to be a shareholder; and that after his name had been removed from the books, the directors had no power, under the clauses of the deed, to again introduce it. *Rolls Ct.* 1852, *Shortridge v. Bosanquet*, 17 *Eng. L. & Eq.* 331; 23 *Law J. N. S. Ch.* 48; 16 *Jur.* 919.

Merely placing the name of a party, with others, as shareholders of a company on a sheet of paper, none of the essentials required by the 8 and 9 *Vict. c. 16*, being complied with,—*Held*, not to constitute sufficient evidence under § 27, of the parties being shareholders. *Wolverhampton &c. Co. v. Hawksford*, 7 *C. B. N. S.* 795. Compare *Irish East Co. v. Phillips*, 30 *Law J. N. S. Q. B.* 306; 9 *Week. L.* 874.

* A claim by promoters of a joint stock company for the balance of a sum of money to which they were to be entitled under the articles as soon as the allotment of shares should take place, disallowed in the winding up, on the ground that by a secret agreement with the directors, the directors were to receive a portion of that sum, and that they had too speedily allotted a small number of shares and commenced business, their pecuniary interest biasing their *bona fide* discretion. *Rolls Ct.* 1866, *In re Madrid Bank*, *Exp. Williams*, 2 *Law Rep. Eq. Cas.* 210; 35 *Law J. N. S. Ch.* 474.

55. A power to create preferred shares is not necessarily implied in a power to increase the capital stock. *Chancery*, 1865, *Hutton v. Scarborough Cliff Hotel Co.* 11 *Jur. N. S.* 551.

56. Benefit of increase. If a corporation having the privilege of increasing its capital, decides to do so, the existing stockholders have the right to subscribe for and hold the new stock, in proportion to their interests in the old stock. The corporation cannot exclude stockholders from this privilege. A share in the stock is a share in the power of increasing it, when the corporation determines to do so. The augmentation of the capital is intended for the profit of the joint concern.* *Mass. Supreme Ct.* 1807, *Gray v. Portland Bank*, 8 *Mass.* 384; *S. P. State v. Franklin Bank*, 10 *Ohio*, 91.

The contrary held where the charter gave the directors power to increase the stock in the manner they should think best. *Ohio Ins. Co. v. Nunnemacher*, 15 *Ind.* 294.

57. Where a registered proprietor of shares who was resident abroad was not apprised of the resolutions giving the option to subscribe for new stock, until after the day limited by the resolutions had passed; but immediately he wrote to the secretary of the company declaring his option to take his portion of the new shares,—*Held*, that the time fixed by the resolution was final, and consequently that the plaintiff's declaration was too late. *V. Chan. Ct.* 1845, *Pearson v. London & Croydon Railw. Co.* 14 *Sim.* 541; 4 *Eng. Railw. Cas.* 62; 14 *Law. J. N. S. Ch.* 412; 9 *Jur.* 841.

58. Provisional certificates. Where a railroad company, desiring to raise a loan, issued provisional certificates stipulating that the bondholders should have the right to subscribe to the capital stock of the company to a given amount, whenever they desired to do so,—*Held*, that upon payment of all the installments of subscription to the bonds, the subscribers' right to the shares of capital

stock was absolute and could not be subsequently limited, by notice given by the company, to an election to take the stock on or before a specific date. *N. Y. Ct. of Appeals*, 1866, *Van Alen v. Illinois Central R. R. Co.* 2 *Koyes*, 673.

59. Assignee's claim. Equity will not take jurisdiction of the claim of an assignee of the optional rights of shareholders to receive new stock issued by the corporation on payment of the par value, so as to enforce the claim to such stock against the corporation, after they have sold it for default in payment. *Mass. Supreme Ct.* 1851, *Sewall v. Eastern R. R. Co.* 9 *Cush.* 5.

60. Refusal. Where the stockholder of a bank is entitled to a pre-emption of additional stock authorized to be issued, he cannot maintain an action against the bank for refusing to permit him to subscribe for the new stock, without first proving that he demanded and offered to subscribe for such stock. *Pa. Supreme Ct.* 1857, *Wilson v. Bank of Montgomery County*, 29 *Pa. St.* 537.

61. Increase does not discharge purchaser. The act of directors in increasing the amount of the corporate stock, in a manner which diminishes its market value, does not constitute a defence to an action by a holder of the old stock on a contract against one who had agreed to purchase it. Such mere accidents not affecting the inherent quality of the stocks, or essentially their actual value, cannot be said to create such a change of state as to justify the vendor in refusing to go forward with his contract. If the act was legal, the purchaser was bound to know what the directors might do, and this formed one of the contingencies of his purchase; but if the act was unlawful he might resist it when he became a stockholder in any legal way. *Vt. Supreme Ct.* 1854, *Faulkner v. Hebard*, 26 *Vt.* 452.

62. Fraudulent issue. After a corporation had issued stock to the full amount of their charter limit, their transfer agent, who was also president, fraudulently gave to one K. a certificate in the usual form, for eighty-five shares of stock, when, in fact, the latter owned no stock, none stood on the books in his name, and no certificate for such stock had been surrendered. The plaintiffs, in good faith, and relying upon the certificate as regularly issued and valid, made a loan to K. receiving from him the certificate, with

* Yet one does not, by doing all that he ought in order to entitle himself to become a proprietor in the new stock, become such proprietor, and entitled to a dividend thereon, if he is prevented from subscribing, and a stranger is admitted in his stead. *Titcomb v. Union Marine and Fire Ins. Co.* 8 *Mass.* 382.

The right to subscribe for stock considered and determined, under a very peculiar charter. *State Bank v. Bank of Charleston*, *Dudl.* 157.

Compare *Miller v. Illinois Central R. R. Co.* 24 *Barb.* 312.

an assignment of the stock supposed to be represented, and a power of attorney to transfer the same. In an action by the plaintiffs against the corporation for refusing to permit the stock to be transferred on its books, or to pay its value,—*Held*, 1. That the certificate was void in the hands of K. the first holder, because it was fraudulently issued, and he paid nothing for it. 2. That it was also void in his hands, because issued by an agent without authority, there being no surrender of a previous certificate, and no transfer to him on the books of actual stock, and this want of authority was known to him. 3. That it was void, because the stock it professed to represent had no existence, and could not exist under the charter of the company, all the powers of the corporation in the creation and issue of stock being exhausted, and hence no person, in whatever situation, could claim under it the rights of a stockholder, or damages on the ground of a refusal to admit him to such rights. 4. Even if void only on the ground of the fraud in the issue, since stock certificates do not partake of the character of negotiable instruments, an assignee, though in good faith, takes them subject to all the equities; and where the assignee made no inquiries of the corporation, so that he cannot claim that they are estopped, they are not liable for the over-issue. *N. Y. Ct. of Appeals*, 1856, *Mechanics' Bank v. N. Y. & New Haven R. R. Co.* 13 *N. Y. (8 Kern.)* 599. And see *People v. Parker Vein Coal Co.* 10 *How. Pr.* 543. But compare *Bridgeport Bank v. N. Y. & R. R. Co.* 80 *Conn.* 281; *Mandelbaum v. North Amer. Mining Co.* 4 *Mich.* 465.

63. Action to cancel fraudulent stock. Where a part of such fraudulently issued certificates was held by parties who took with knowledge of the fraud, and a part had passed into the hands of innocent purchasers, for value and without notice; and for a part of the certificates, which had been returned by the holders, new certificates, representing in part spurious and in part genuine stock, had been issued,—*Held*, that the corporation could maintain an action against all persons who claimed stock under the spurious issue, to have the certificates representing such issue declared void; and the complaint of the corporation, joining all such parties as defendants, was not multifarious. *N. Y. Ct. of Appeals*, 1858, *N. Y. & N. H. R.*

R. Co. v. Schuyler, 7 *Abb. Pr.* 41; 17 *N. Y.* 592.

64. If persons conspire to fabricate shares in addition to the limited number of which a joint stock company, according to its rules, consists, in order to sell them as good shares, they may be indicted for it, notwithstanding any imperfection in the original formation of the company. *K. B.* 1827, *Rex v. Mott*, 2 *Car. & P.* 521.

65. Note for void stock. The fact that the note in suit was given for the price of railroad stock, which was void because issued by the directors of the company in violation of its charter,—*Held*, a good defence; as against the original payee. *U. S. Cir. Ct. (Pa.)* 1858, *Sturges v. Stetson*, 3 *Phil.* 207.

66. The directors may act through their officers or agents in issuing stock. *N. Y. Superior Ct.* 1848, *Lohman v. N. Y. & Erie R. R.* 2 *Sandf.* 89.

67. Unauthorized stock. Where the charter provides that the president and directors shall cause a certificate to be given to each shareholder, signed by them and countersigned by the treasurer, certificates issued by the president alone, signed by him and countersigned by the treasurer without authority of the directors, and without consideration, are void. And since the president, in issuing such certificates, acts without the scope of his authority, the corporation are not liable for his act. *Circ. Ct. D. C.* 1829, *Holbrook v. Fauquier & Alexandria Turnpike Co.* 3 *Cranch C. Ct.* 425.

68. Fraudulent stock. Stock in a railroad company issued at less than the par value is fraudulent, and a purchaser thereof who has paid for it, and has a regular transfer of it on the books of the company, is entitled to a rescission of his contract. *U. S. Cir. Ct. (Pa.)* 1858, *Fosdick v. Sturges*, 3 *Phil.* 812. But compare *Minor v. Mechanics' Bank of Alexandria*, 1 *Pet.* 46.

69. Conditional issue. A railroad company borrowed of a bank \$5,000, for which the company gave their note, and at the same time caused to be issued to the bank fifty shares in the capital stock of the company. The bank was assessed as the owner of the shares, and the tax collected. In a suit to recover back the amount,—*Held*, that parol evidence was inadmissible to prove that the absolute title was intended to be conditional; and that the tax was legal. *Me. Supreme Ct.*

1853, *Augusta Bank v. City of Augusta*, 36 *Me.* 255.

70. **Option.** Where one of the owners of a ferry, in his lifetime, refused to take the value of his interest in the ferry in the stock of a bridge company to erect a bridge in the same place, as authorized by the act of incorporation of the bridge company, such refusal being after the requisite amount of stock had been subscribed, and the bridge was erected,—*Held*, that his heirs could not, after his death, come in as stockholders, but were concluded by the refusal of their ancestor. *Ala. Supreme Ct.* 1842, *White v. Florence Bridge Co.* 4 *Ala. N. S.* 464.

71. **Fraudulent issue.** Certificates of stock fraudulently issued by the officers of a corporation, do not create an estoppel *in pais* against the corporation in favor of a purchaser or pledgee from the holder of such certificates. An admission or representation is no estoppel in favor of a stranger to whom it is not made, and whose conduct it was not expressly designed to influence. [3 *Johns. Cas.* 101; 6 *Hill*, 534; 3 *Id.* 215; 7 *Barb.* 644.] *N. Y. Ct. of Appeals*, 1856, *Mechanics' Bank v. N. Y. & New Haven R. R. Co.* 13 *N. Y. (3 Kern.)* 599.

72. Where the defendants issued genuine and spurious stock certificates indiscriminately,—*Held*, that the like principle should be applied as in the case of a party fraudulently mingling his property with that of another so that it cannot be distinguished. *N. Y. Supreme Ct.* 1862, *Shotwell v. Mali*, 83 *Barb.* 445.

73. The identity of a given number of shares is not changed by the surrender of the certificates representing them, and taking out new ones in another name. [4 *Johns. Ch.* 490; 3 *Hill*, 593; 7 *Id.* 497; 19 *N. Y.* 170.] *N. Y. Ct. of Appeals*, 1859, *Ketchum v. Bank of Commerce*, 19 *N. Y.* 499; *Cal. Supreme Ct.* 1867, *Hawley v. Brumagin*, 33 *Cal.* 394.

74. **Scrip unnecessary.** In the absence of any provision of law or by-law, the delivery of certificates of stock to subscribers is unnecessary. The stock is issued fully and effectually by placing it in the name of the subscriber on the books. *N. Y. A. V. Chan. Ct.* 1844, *Thorpe v. Woodhull*, 1 *Sandf. Ch.* 411.

75. **Making a certificate and mailing it to a stockholder is regarded as the issuing of it.** See *Jones v. Terre Haute & Richmond R. R. Co.* 17 *How. Pr.* 529.

76. **Interest bearing scrip.** A certificate in the ordinary form, but containing a promise of the corporation to pay interest thereon until the happening of a specified event, constitutes the person to whom it is issued a stockholder, and the corporation cannot, without the assent of the holder, compel him to receive their bond, for the interest upon such certificate. *Mich. Supreme Ct.* 1860, *McLaughlin v. Detroit & C. Railway Co.* 8 *Mich.* 100.

77. An agreement to pay a fixed sum in stock, at par value, the stock being really much below par, is not within the rule that an agreement to pay in specific articles requires a tender on the part of the debtor. *N. Y. Supreme Ct.* 1851, *Moore v. Hudson River R. R. Co.* 12 *Barb.* 156.

78. An agent of a turnpike corporation, appointed to contract for the construction of a certain portion of their road, with the restriction that one-third of the payments of such contracts shall be made in shares of the road, cannot charge the corporation by contracts made without this stipulation. *Mass. Supreme Ct.* 1813, *Hayden v. Middlesex Turnp. Corp.* 10 *Mass.* 397.

79. **Agreement to take.** Where a subscriber to articles of association, prepared and signed with a view to a formation of a corporation under the general statutes of Massachusetts, failed to perform his part of the stipulation contained therein, by which he promised to take a certain number of shares on specified terms,—*Held*, that he was unable to maintain an action against the corporation, subsequent to its formation, for refusing to deliver to him the shares, upon making a tender of payment therefor, notwithstanding his name was entered in the subscribers' book, and he was requested to pay for the shares subscribed for by him, and the same were afterwards disposed of, without selling them in conformity with the provisions of a statute for the non-payment of assessments. *Mass. Supreme Ct.* 1866, *Perkins v. Union Button Hole & C. Co.* 12 *Allen*, 273.

80. Where a contractor with a railroad company has agreed with the company to receive stock of the company for his services, the fact that the company subsequently mortgaged their property to secure debts due to third persons, does not amount to a disability on their part to perform the contract, such

as to convert their obligation into an absolute liability to pay money in lieu of stock. The mortgage, it is true, might have the effect to depreciate the stock in the market, and render it less valuable to the holder; but every purchaser of, or contractor for stock, knows that he must take and hold it subject to all charges incident to the completion of the road, and the accomplishment of other legitimate objects of the corporation. *U. S. Circ. Ct. (Vt.)* 1853, *Boody v. Rutland & Burlington R. R. Co.* 3 *Blatchf.* 25; 24 *Vt.* 660.

81. Surrender. It is not unlawful for a corporation, by its directors, and under circumstances which render such a step proper, to agree with the stockholders that the latter may relinquish a portion of their stock, and have payments previously made by them upon it, applied wholly to the residue, upon condition of their paying promptly all subsequent calls.* *Ala. Supreme Ct.* 1846, *Cooper v. Frederick*, 9 *Ala. N. S.* 788.

82. Redeemable shares. A by-law of a church corporation provided that a shareholder paying a certain amount in addition to the total sum the corporation were authorized to assess, should have his scrip redeemable out of the corporation funds, whenever he should leave the town in which the meeting house of the corporation was situated, and take up his permanent residence elsewhere: *Held*, that the by-law was valid, as providing a mode of raising funds, which was one of the objects necessarily embraced in the objects of the corporation. *Mass. Supreme Ct.* 1844, *Davis v. Proprietors of Meeting house in Lowell*, 8 *Metz.* 321.

83. An agreement to purchase from a col-

* The act of incorporation of a banking company required that ten per cent. should be paid to the commissioners on each share of the capital stock at the time of subscribing. So soon as all the capital stock was taken and ten per cent. thereon paid in, trustees were to be elected and the company fully organized. Subsequently an amendment of the charter authorized the company in its discretion, to allow any stockholder to surrender his certificate of capital stock, and take a certificate of full stock equal to the amount of payment on the stock so surrendered, and the company were to hold or reissue such overplus stock. *Held*, that the company were not bound to require of the purchasers of this surrendered stock a payment of ten per cent. on each share of their purchase. The terms of the original charter have exclusive reference to the subscribers before the corporation was organized, and before it had existence; and the amendatory act gave the company and not the commissioners the right of releasing its surrendered stock. *Fla. Supreme Ct.* 1852, *Social Life Ins. & Trust Co. v. Lanier*, 5 *Fla.* 110, 151.

lege shares of its stock, to be receivable in payment of lecture tickets,—*Held*, valid. *Miss. Ct. of Errors*, 1866, *Botanico-Medical College v. Atchinson*, 41 *Miss.* 188.

84. Allowing stock to be forfeited. A resolution of a corporation, allowing the stockholders to forfeit their stock, on paying a part of calls already made, is void as against creditors. But if it be on payment of all existing calls, and is assented to by the creditor as trustee, it may be binding upon him.* *N. Y. Ct. of Errors*, 1822, *Slee v. Bloom*, 19 *Johns.* 456; reversing *S. C.* 5 *Johns. Ch.* 366.

85. Where a creditor, who was also a trustee of the corporation, openly protested, at the time, against a resolution authorizing stockholders to forfeit their stock on payment of a part of the calls which had been made thereon,—*Held*, that his accepting money raised under it, and concurring at a meeting of the trustees, when the application of the money was directed, was not such a ratification by him of the by-law or resolution as would affect his rights as creditor. *Id.*

III. ENFORCING PAYMENT.

86. The general power of a corporation to make by-laws not inconsistent with law, does not authorize it to make a by-law subjecting stock to forfeiture for non-payment of installments. They must have express authority to do this.† *N. Y. Supreme Ct.* 1837, *Matter of Long Island R. R. Co.* 19 *Wend.* 37; *S. P. Chancery*, 1859, *Exp. Barton In re National Patent Steam Fuel Co.* 5 *Jur. N. S.* 420; 28 *Law J. N. S. Ch.* 637. And see *Turnpike Co. v. Imlay*, 1 *South.* 285.

87. The board of directors of an incorporated company cannot adjudge forfeited any stock once rightly issued, for the non-compliance of the owner with a contract for the consideration of which it was issued; nor in any other way, except the mode provided by the charter. *N. J. Supreme Ct.* 1851, *Downing v. Potts*, 3 *Zabr.* 66.

* A shareholder cannot absolve himself from calls by paying the directors a sum of money for his discharge, even though the money be accepted and the shares transferred. *Exp. Bennett*, 21 *Eng. Law & Eq.* 573.

† Where an act of incorporation of an insurance company prescribed the particular manner in which the shares of members in the stock were to be attached and sold on execution,—*Held*, that such provision superseded the general provisions on the same subject contained in a previous statute. *Mass. Supreme Ct.* 1811, *Titcomb v. Union Mar. & Fire Ins. Co.* 3 *Mass.* 326.

88. The provisions of law as to the mode in which shares of a stockholder in a corporation may be sold for the non-payment of assessments, do not apply to the case of new shares offered to existing stockholders, and sold because not taken by them. *Mass. Supreme Ct.* 1851, *Sewall v. Eastern R. R. Co.* 9 *Cush.* 5.

89. Forfeiture a cumulative remedy. A power conferred by the legislature on a corporation to sell the stock of a subscriber for default of payment of an installment by him, does not exclude the common law remedy to recover the amount; but he is still liable in an action of assumpsit on his promise by the subscription. The penalty of forfeiture is cumulative; and the company may waive it, and proceed *in personam* on the promise.* *Q. B.* 1841, *London Grand Junction R. W. Co. v. Graham*, 1 *Q. B.* 271; *Birmingham, Bristol & Thames R. W. Co. v. Locke*, 1 *Q. B.* 256; *N. Y. Supreme Ct.* 1812, *Goshen Turnpike Co. v. Hurtin*, 9 *Johns.* 216; 1814, *Highland Turnpike Co. v. McKean*, 11 *Johns.* 109; 1817, *Dutchess Cotton Mnfg. Co. v. Davis*, 14 *Johns.* 238; 1835, *Spear v. Crawford*, 14 *Wend.* 20; 1839, *Troy Turnpike & R. R. Co. v. McChesney*, 21 *Wend.* 296; *N. Y. Ch.* 1846, *Sagory v. Dubois*, 8 *Sandf. Ch.* 466; *N. Y. Superior Ct.* 1829, *Harlem Canal Co. v. Seixas*, 2 *Hall*, 504; *N. Y. Ct. of Ap-*

peals, 1849, *Small v. Herkimer Mnfg. Co.* 2 *Comst.* 880; overruling, 21 *Wend.* 278; *S. C.* 2 *Hill*, 127; *N. Y. Supreme Ct.* 1854, *Troy & Rutland R. R. Co. v. Kerr*, 17 *Barb.* 581; *Troy & Boston R. R. Co. v. Tibbits*, 18 *Barb.* 297; 1856, *Ogdensburg, Rome and Clayton R. R. Co. v. Frost*, 21 *Barb.* 541; *Conn. Supreme Ct.* 1850, *Mann v. Cooke*, 20 *Conn.* 178; *Mass. Supreme Ct.* 1856, *City Hotel v. Dickinson*, 6 *Gray*, 586; *Pa. Supreme Ct.* 1803, *Delaware & Schuylkill Canal Co. v. Sansom*, 1 *Binn.* 70; *N. C. Supreme Ct.* 1825, *Tar River Navigation Co. v. Neal*, 3 *Hawks*, 520; *Ala. Supreme Ct.* 1842, *Beene v. Cahawba &c. R. R. Co.* 3 *Ala. N. S.* 660; *Ky. Ct. of Appeals*, 1843, *Gratz v. Redd*, 4 *B. Monr.* 178; *Ill. Supreme Ct.* 1856, *Peoria & Oquawka R. R. Co. v. Elting*, 17 *Ill.* 429; 1860, *Raymond v. Caton*, 24 *Id.* 123; *Ga. Supreme Ct.* 1850, *Hightower v. Thornton*, 8 *Ga.* 486.

To the same effect are, *Stokes v. Lebanon & Sparta Turnpike Co.* 6 *Humph.* 241; *Eastern Plank Road Co. v. Vaughan*, 20 *Barb.* 155; *Klein v. Alton & Sangamon R. R. Co.* 13 *Ill.* 514; *Hartford & New Haven R. R. Co. v. Kennedy*, 12 *Conn.* 499; *Instone v. Bridge Company*, 2 *Bibb*, 577; *Grays v. Turnpike Company*, 4 *Rand.* 578; *Rockville & Washington Turnpike Road v. Maxwell*, 2 *Cranch C. Ct.* 451.

90. In this respect there is nothing to distinguish the case of an assignee from that of an original stockholder. See *Mann v. Currie*, 2 *Barb.* 294.

91. The rule is the same, although the subscription promise upon pain of forfeiture, &c. The company may sue, as upon an absolute promise. *N. Y. Supreme Ct.* 1839, *Troy Turnpike & R. R. Co. v. McChesney*, 21 *Wend.* 296.

92. That the forfeiture can only be enforced on a full compliance with the provisions of the act,*—see *Eastern Plank Road Co. v. Vaughan*, 20 *Barb.* 155.

93. Option. Where the shares of a defaulting stockholder, in a railroad company, are, by the charter, made "liable to forfeiture, and the company may declare the same forfeited and vested in the company," the option to forfeit is with the company, and

* Under the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16, § 29), which authorizes the company to sue for unpaid calls, and also authorizes the company to forfeit stock on which calls are unpaid, whether they have sued or not, the remedies are not alternative, and after commencing a suit the company may declare a forfeiture and also prosecute the action until the claim is satisfied. *Exch.* 1849, *Great Northern Railw. Co. v. Kennedy*, 4 *Exch.* 417; 6 *Eng. Railw. Cas.* 5; 19 *Law J. N. S. Exch.* 11.

Otherwise where the two powers are expressed in the alternative. *Exch.* 1848, *Giles v. Hutt*, 3 *Exch.* 18; 5 *Eng. Railw. Cas.* 505.

By the private act of a company, power was given to cancel any forfeited shares where the market was not sufficient to realize a sum equal to the arrears of the calls, and to issue so many new shares, and of such nominal amount as they might think fit, provided the capital to be represented by such new shares should not in the whole exceed the capital represented by the unpaid portion of the shares which should be so canceled. *Held*, that the remedy given by this latter provision was cumulative, and that an action for calls was maintainable, notwithstanding that the shares had been forfeited and canceled; and that it was no answer to the action, to say that new shares had been issued and sold in lieu of the canceled shares, which realized a sum greater than the unpaid portion of the canceled shares; but that the original shareholders would be entitled to the benefit of payments made in respect of the new shares. *H. of Lords*, 1852, *Ingils v. Great Northern Railway Co.* 16 *Eng. L. & Eq.* 55; 16 *Jur.* 893.

* Where the statute was, that "the directors may order the treasurer to sell" they cannot delegate the power of ordering sales to a committee, and an order to the treasurer must be absolute and not in the alternative. See *York & Cumberland R. R. Co. v. Ritchie*, 40 *Me.* 425.

not with the stockholder. *S. Ct. of Appeals*, 1857, *Railroad Co. v. Rodriguez*, 10 *Rich. Law*, 278.

94. Notice. Where a by-law of a corporation provided for notice to be given of sales of shares, for non-payment of assessments, by advertisement designating the time and place thereof, and the shares to be sold,—*Held*, that any description sufficing to show clearly what shares were intended to be the subject of sale, was sufficient. *Me. Supreme Ct.* 1855, *York & Cumberland R. R. Co. v. Pratt*, 40 *Me.* 447.

What is sufficient service of notice. *Van Dieman's Land Co. v. Cockerell*, 1 *C.B.N.S.* 732.

95. Omission to sell. Where a corporation has power to sell the stock of a corporation for the payment of each call as it is made, and to hold the stockholder responsible for the deficiency, if the corporation fails to sell the stock as each successive default occurs, and waits until all the calls are made, it thereby loses its remedy by sale. *Tenn. Supreme Ct.* 1845, *Sparta v. Lebanon & Sparta Turnpike Co.* 6 *Humph.* 241. Compare *Brockenbrough v. James River & Co.* 1 *Patt. & H.* 94.

96. Under a statute authorizing the company to sell, and, in case of deficiency, to recover the deficiency by motion,—*Held*, that they might proceed by motion, although for want of bidders they had not made the sale which they advertised. *Va. Ct. of Appeals*, 1826, *Grays v. Turnpike Co.* 4 *Rand.* 578. See also *Franklin Glass Co. v. White*, 14 *Mass.* 286.

97. Forfeitures without notice. Under the English statute (7 & 8 Vict. ch. 110),—which gives directors absolute power to declare a forfeiture of shares of subscribers who do not execute the deed of association, and under which the members have ample means of becoming aware of the peril they run of their shares being forfeited by delaying to subscribe,—a forfeiture decreed by the directors without notice to the delinquent is valid. *Q. B.* 1852, *Stewart v. Anglo-California Gold Mining Co.* 14 *Eng. L. & Eq.* 51; 21 *Law J. N. S. Q. B.* 898; 17 *Jur.* 257.

98. A subscriber for stock cannot rescind his contract by forfeiting the payment made thereon; the right of forfeiture belongs exclusively to the corporation. See *Klein v. Alton & Sangamon R. R. Co.* 13 *Ill.* 514; *S. P. Turnpike Co. v. Imley*, 1 *South.* 285.

99. An action will lie to recover a subscription for stock in a corporation, although the charter declares that, upon the failure of the subscriber to pay any requisition of the directors thereon, his stock "shall be forfeited to the company, with the installments which have been paid." The charter remedy is only cumulative. *Ala. Supreme Ct.* 1843, *Selma & Tennessee R. R. Co. v. Tipton*, 5 *Ala. N. S.* 787.

100. Where the subscription simply amounted to an engagement to take a certain number of shares, without any express promise to pay therefor, and the corporation did not exercise their power of forfeiture for non-payment,—*Held*, that an action would not lie. *Mass. Supreme Ct.* 1811, *New Bedford & Bridgewater Turnpike Corp. v. Adams*, 8 *Mass.* 138.

101. Upon a subscription to the stock of a corporation, which was not made upon any condition expressed, or to be inferred from the charter or by-laws, that the subscriber should only be liable for the balance of assessments remaining due after a sale of his shares,—*Held*, that assumpsit to recover the assessments might be maintained, without previously selling the shares of the delinquent subscriber. *Me. Supreme Ct.* 1852, *Kennebec & Portland R. R. Co. v. Jarvis*, 34 *Me.* 860; *Kennebec & Portland R. R. Co. v. Palmer*, 34 *Id.* 866.

102. By-law. Where by statute a power to enforce the payment of assessments by sale of the shares exclusively existed,—*Held*, that a by-law, giving an action against a stockholder for any deficiency after the sale, was repugnant to the statute, and void. *Me. Supreme Ct.* 1850, *Jay Bridge Corporation v. Woodman*, 31 *Me.* 578.

103. A person may be liable though not regularly made a shareholder.* *Q. B.* 1850, *West Cornwall Railway Co. v. Mowatt*, 19 *Law J. N. S. Q. B.* 478. And see *West London Railw. Co. v. Bernard*, 3 *Ad. & E. N. S.* 873; 13 *Law J. N. S. Q. B.* 68.

104. The registered holder of shares in a railway company, though a mere trustee, is, in the absence of any special contract to the

* A person who was a shareholder at the time when a call was made, and notice thereof given to him, but who had, before the call became payable, transferred his shares, and delivered the transfer to the secretary,—*Held*, liable to be sued for the calls. *Q. B.* 1850, *North American Colonization Association v. Bentley*, 19 *Law J. N. S. Q. B.* 437.

contrary, liable alone to the company for calls on such shares; and the company have no remedy in equity for calls against the real or beneficial owner of such shares. *Rolls Ct.* 1851, *Newry & Co. Railway Co. v. Moss*, 4 *Eng. L. & Eq.* 84; 15 *Jur.* 374; 14 *Beav.* 64.

105. Where a person subscribed for shares in an incorporated company, agreeing "to take and fill the number of shares set against his name,"—*Held*, that *assumpsit* might be maintained against such subscriber, or proprietor, to recover an assessment on his shares; the word "fill" being deemed to amount to a promise to pay assessments.* *Me. Supreme Ct.* 1833, *Bangor Bridge Co. v. McMahon*, 10 *Me.* (1 *Fairf.*) 478.

106. Evidence. In an action by an incorporated company against a stockholder to recover the amount of certain assessments upon his shares of stock, it must be alleged and proved that notice of the time and place of payment of the assessment was given to the subscriber. *Fla. Supreme Ct.* 1861, *Alabama & Florida R. R. Co. v. Rowley*, 9 *Fla.* (1 *Galb.*) 508.

107. In the absence of any provisions in the charter or by-laws of a corporation relating to the giving of notice of calls upon stock by public advertisement, a notice published in a newspaper is not sufficient. *Id.*

108. To enable a corporation to maintain an action for a balance due on assessments after a sale of shares, it must appear that they complied with the condition of the statute, and conformed to their by-laws regulating the sale; and therefore a notice of sale, which was not published as the directors ordered, in pursuance of the by-laws, and which did not mention the place of sale, was deemed insufficient. *Mass. Supreme Ct.* 1855, *Lexington & West Cambridge R. R. Co. v. Staples*, 5 *Gray*, 520.

109. Three days' notice of the time and place of sale of shares in a railroad corporation for non-payment of assessments,—*Held*, unreasonably short, and therefore insufficient, where the proprietor was known to reside at a distance. *Id.*

For the cases on Subscriptions as a Cause

* Where an individual subscribed for certain shares in a turnpike, and promised to pay to the agent of the proprietors all assessments, &c.,—*Held*, that though the agent could maintain no action for the unpaid assessment, yet the promise would support an action by the proprietors in their corporate capacity. *Mass. Supreme Ct.* 1809, *Gillmore v. Pope*, 5 *Mass.* 491.

of action, and the defences thereto, see SUBSCRIPTIONS.

110. Where a promissory note was given by a stockholder in a banking corporation, payable to the bank, and discounted by the same to pay calls made by the bank on the subscription of stock,—*Held*, that though the first and several other calls had been paid on said stock, the note remained a valid obligation on the maker, which might be enforced, subsequent to the judgment of forfeiture against the bank, by the trustee. *Miss. Ct. of Errors*, 1850, *Lewis v. Robertson*, 13 *Smed. & M.* 558.

IV. RIGHTS OF STOCKHOLDERS.

111. The law authorizes no distinction between the rights of one stockholder and those of another. Hence a new subscriber to the untaken capital stock of a company, by that act, becomes a stockholder, having equal rights with the original members; and, if a stockholder has not paid his subscription in full, he owes for what is unpaid, but is none the less a shareholder. *Pa. Supreme Ct.* 1867, *Curry v. Scott*, 54 *Pa. St.* 270.

112. By subscribing to the capital stock of a corporation, and paying the amount of his subscription, the subscriber acquires an interest in the company and a right to a certificate, which is a sufficient consideration for his promise. *N. Y. Superior Ct.* 1829, *Harlem Canal Co. v. Seixas*, 2 *Hall*, 504.

113. Liabilities. In the case of corporations whose charters are subject to a reserved power in the legislature to repeal, modify, &c., each stockholder holds his stock subject to such liability as may attach to him in consequence of an alteration of the charter, without his application or consent. *N. Y. Ct. of Appeals*, 1862, *Bailey v. Hollister*, 26 *N. Y.* 112. But compare RAILROAD CORPORATIONS, 28.

114. When a stockholder dies, his estate succeeds him in the rights in the stock he held; and must take them subject to any liability then existing upon them; and, so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time, which the law may impose upon any holder of the stock, as such. *Id.*

115. A provision in the articles of a private association, declaring that every person dealing with them "disavows having recourse,

on any pretense whatever, to the person or separate property of any member,"—*Held*, not to prevent recovery of judgment, but to be only a ground of relief, in equity, against execution. *Davis v. Beverly*, 2 *Oranah C. Ct.* 85.

116. **Transfers.** A stockholder in a moneyed corporation has a perfect ownership over his own stock, and may sell and transfer it to whom he pleases, and from doing this the bank has no power to restrain him; and such stock entitles the owner to his proportion of the dividends, which may be from time to time declared. *Tenn. Supreme Ct.* 1836, *Brightwell v. Mallory*, 10 *Yerg.* 196; *Ohio Supreme Ct.* 1840, *State v. Franklin Bank*, 10 *Ohio*, 91.

117. **Payment of dividends out of capital** not authorized unless the power be specially given in the statute. *Ohio Supreme Ct.* 1867, *Painesville & Hudson R. R. Co. v. King*, 17 *Ohio St.* 534.

118. **An agreement to pay the plaintiff** six per cent. on the amount of insurance stock belonging to him, and all losses thereon, in consideration of plaintiff's agreeing that defendants should have all the profits arising thereon, is not void for want of consideration. *Vt. Supreme Ct.* 1839, *Phelps v. Stewart*, 12 *Vt.* 256.

119. **Extraordinary profits.** The rule that dividends of extraordinary profits are regarded as an accretion to the capital, and do not go to the legatee for life, but to the remainder man,—does not apply in the case of the regular and ordinary dividends of a land company, of funds derived entirely from the sale of its lands. *Mass. Supreme Ct.* 1868, *Reed v. Head*, 6 *Allen*, 174.

120. **A transfer made in conformity to** the usage of the officers of the corporation, though not in the manner required by the charter and by-laws, may be sufficient as against the company and enable the transferee to maintain a suit for dividends. *Conn. Supreme Ct.* 1833, *Richmond Manuf. Co. v. Prall*, 9 *Conn.* 487.

121. **A bridge corporation, in pursuance** of a bequest by a testator who was a stockholder in the company, gave to his daughter a certificate that she was a proprietor for life, and her guardian, she being *non compos mentis*, made a deed, in which the certificate was recited, conveying the shares to the plaintiff, a *bona fide* purchaser. The deed was

left with the clerk of the corporation to be recorded, but no new certificate was issued to the plaintiff. *Held*, that all the ward's interest passed by the deed, and that the plaintiff might maintain an action for money had and received against the corporation to recover the dividends; and the fact that the plaintiff had no certificate of his ownership of shares could not prejudice his claim, as it was not in his power to obtain one without the consent of the corporation. *Mass. Supreme Ct.* 1824, *Ellis v. Proprietors of Essex Merrimack Bridge Co.* 2 *Pick.* 243.

122. **Certificates of preferred stock** entitling the holder to \$6 per share semi-annually,—*Held*, under the circumstances to be an agreement with subscribers therefor to pay thereon twelve per cent. in semi-annual payments, not technically dividends of six per cent. contingent on the surplus earnings, by the year, being sufficient. *Me. Supreme Ct.* 1860, *Bates v. Androscoggin & C. R. R. Co.* 49 *Me.* 491.

V. TRANSFER.

1. General right.

123. **Mere associations.** No shares in any joint enterprise are transferable so as to introduce the assignee into the association, as a member, unless it be joint stock companies and corporations, formed in pursuance of legislative authority. And in the case of legislative incorporations, the shares are transferable only under the charter, and according to its terms.* *C. P.* 1828, *Duvergier v. Fellows*, 5 *Bing.* 248.

124. **Where, in a private association, the** trustees appointed by the agreement, and for the benefit of the stockholders, suffered shares in the stock to be transferred to a *bona fide* purchaser without notice, by a person not having authority to make the transfer,—*Held*, that the loss, in a contest between such purchaser and the stockholders, would fall

* Where several persons associated themselves together, intending to buy land and build mills to commence a city, the property to be holden by a trustee; and the nominal capital was divided into shares, and transferable certificates therefor, were issued to the parties in interest, expressed to be subject to the provisions of the articles of association,—*Held*, that they represented an equitable interest in the whole property, real and personal, which a court of equity would protect, and which could be sold, pledged, or mortgaged, like any other species of property, and that equity would recognise and protect the transferee's interest. *Wis. Supreme Ct.* 1843, *Durkee v. Stringham*, 8 *Wis.* 1.

on the latter. *Md. Chancery*, 1848, *Cohen v. Gwynn*, 4 *Md. Ch. Dec.* 357.

125. Evidence of authority. Banks and other corporations are trustees for the property and title of each owner of their stock. They have in their keeping the primary evidence of title, and are held to proper diligence and care in its preservation. They may, therefore, as a matter of right, and for their own safety, demand evidence of authority to transfer stock before permitting it to be made. This rule is especially applicable when the stock is expressed to be held on trust for persons specified.* *Pa. Supreme Ct.* 1866, *Bayard v. Farmers' & Mechanics' Bank of Philadelphia*, 52 *Pa. St.* 232

126. Letters of administration are sufficient evidence of authority to execute transfers of stock. A trustee of an insolvent debtor may also make a transfer; and so, generally, may an executor. His letters testamentary show an apparent right to dispose of the testator's stock, even if the stock may have been bequeathed specifically, when it is necessary to the payment of debts. *Ib.*

127. A banking corporation may refuse to recognize a power of attorney in the transfer of its stock if not satisfied of its entire genuineness, and may require the personal attendance of the party for the purpose of determining such matters of fact as may give rise to disputes; but where a transfer of stock is once made under a power of attorney, the corporation allowing it are bound by it. Thus, where a transfer was made of bank stock under a power executed by a lunatic, who received no benefit from the transfer,—*Held*, that the transfer should be avoided, and that the bank, being responsible for allowing the transfer to take place, was liable to pay simple interest on the dividends accrued on the stock since the transfer, from the time it knew of the lunacy. *Md. Ct. of*

* A memorandum on the transfer of stock, of an objection to the title, will not be allowed, nor will any secret trust as against the party who has open legal title, affect the bank. *Lady Mayo's case*, *Loft*, 65.

An injunction to restrain the holders of certain stock in a corporation from selling or transferring the same, or from voting thereon at the next election of directors, which was to be held within three days after the filing of the bill, was refused, in respect to restraining the voting thereon, although granted, as to the transferring of stock, on the ground, that granting it might change the result of the election, and deprive those holding the legal title to a majority of the stock, of the control of its affairs without an opportunity for a hearing. *N. J. Chancery*, 1869, *Hilles v. Parriah*, 14 *N. J. Eq.* (1 *McCart.*) 330.

Appeals, 1859, *Chew v. Bank of Baltimore*, 14 *Md.* 299.

128. Assignment in blank. The holder's writing his name and affixing his seal on a certificate of stock, and delivering it with intent to be filled up by one who should purchase the stock, is a valid transfer of the stock [1 *Anst.* 229; 4 *Johns.* 54; 6 *Cow.* 60; 8 *Id.* 118; 13 *Wend.* 587]; and a subsequent holder may write over them an assignment and power to transfer. *N. Y. Ct. of Errors*, 1839, *Commercial Bank of Buffalo v. Kortright*, 22 *Wend.* 348; affirming *S. C.* 20 *Id.* 91. To similar effect, *Bridgeport Bank v. New York & C. R. R. Co.* 30 *Conn.* 281. But compare *N. Y. & New Haven R. R. Co. v. Schuyler*, 38 *Barb.* 584.

129. The holder of a certificate of stock with an assignment thereof in blank, and a power to transfer on the books in blank, has power to fill the blanks with his own name; but if he does not do so, he cannot recover against the corporation for not making or not permitting him or his nominated attorney to make the transfer, and issue a new certificate to him. [Distinguishing 22 *Wend.* 348, *supra* 128.] *N. Y. Supreme Ct.* 1852, *Dunn v. Commercial Bank of Buffalo*, 11 *Barb.* 580.

130. Certificates of stock are not like bills and promissory notes, transferable by mere indorsement and delivery. The party claiming under transfer by indorsement in blank, must prove the contract or consideration. [8 *Johns.* 29; 11 *Id.* 121; 13 *Id.* 159; 13 *Id.* 175; 14 *Id.* 349.] *N. Y. Supreme Ct.* 1852, *Dunn v. Commercial Bank of Buffalo*, 11 *Barb.* 580.

131. The interest on a note given to a railway company for stock, and secured by mortgage, was payable annually, and with the principal payable in Wisconsin. The note, made payable to bearer was transferred with the mortgage, with the company's bond attached, by which it guaranteed to the holder payment of the interest semi-annually at New York, and payment of the principal at the same place. The guaranty also provided that the note and mortgage might be "transferred in connection therewith, but not otherwise, to any party or purchaser."—*Held*, that this guaranty did not affect the negotiable character of the note and mortgage. *Wis. Supreme Ct.* 1863, *Andrews v. Hart*, 17 *Wis.* 297.

132. Consideration. A banking corporation which has no claim on the shares of a stockholder cannot refuse to transfer them on the ground that the assignment was for an illegal consideration. *Ind. Supreme Ct.* 1859, *Helm v. Swiggett*, 12 *Ind.* 194.

133. After acquired shares. Where stock is transferred under a power of attorney attached to a certificate, which power also contains an assignment of the shares, and authority to transfer the said shares, the power does not authorize the transfer of any shares acquired after the date of the power. And a transfer by the attorney, even if he be a pledgee, without making a transfer on the books of the company, cannot pass title to subsequently acquired stock. *N. Y. Supreme Ct. Sp. T.* 1860, *N. Y. & N. Haven R. R. Co. v. Schuyler*, 38 *Barb.* 584, 564.

134. Stock received and transferred on the same day should, in equity, be considered as received before it was transferred, although the numbers of the transfers may be such as to make the transfer by the transferor appear earlier than the transfer to him; unless it is proven that such transfer was made prior to the one by which the stock was assigned to the transferee. *Id.*

135. The by-laws of a corporation, requiring a surrender of a certificate of stock before making a transfer, are not binding on third persons, so as to affect their rights, or deprive them of their property. *Id.*

136. After dissolution. Stock of an incorporated company cannot be transferred after the dissolution of the company, so as to give the transferee any greater right than the assignor had. *N. Y. Chancery*, 1844, *James v. Woodruff*, 10 *Paige*, 541.

137. Under a clause in a will directing the "property" of the testator to be sold, stock in a railroad corporation is included. See *Adams v. Jones*, 6 *Jones, Eq.* 221.

138. Under a bequest of the testator's railway shares, of which he should be possessed at his decease,—*Held*, that such railway shares specifically named in the will, as the testator had at its date, passed, although subsequently converted into consolidated stock of the same company, by a resolution of the company; but that other consolidated stock of the same company, owned by testator at his decease, did not pass, the same having been purchased after the execution of the will. *V. Chan. Ct.* 1852, *Oakes v.*

Oakes, 9 *Hare*, 666. Compare *Trinder v. Trinder*, 1 *Law Rep. Eq. Cas.* 695; *Millard v. Bailey*, 1 *Id.* 378; 85 *Law J. N. S.* 312; 13 *Law Times*, *N. S.* 751.

139. An unconditional bequest of the dividends of stock, is a bequest of the stocks themselves. [7 *Cranch*, 178; 3 *Wheat* 563; 4 *Kent's Com.* 54.] *Ohio Supreme Ct.* 1854, *Collier v. Collier*, 3 *Ohio St.* 869.

140. Nature and effect of a gift of stock in view of death. *Staniland v. Willott*, 3 *Macn. & G.* 664; 12 *Eng. L. & Eq.* 42.

141. A purchaser of stock, upon its transfer to him, is protected in the enjoyment of his purchase, although there was no right to make the transfer. *Pa. Supreme Ct.* 1866, *Bayard v. Farmers' & Mechanics' Bank of Philadelphia*, 52 *Pa. St.* 232. Compare *Sabin v. Bank of Woodstock*, 21 *Vt.* 353.

2. Necessary formalities.

142. Agency. One bank may act as the agent of another bank in the transfer of its stock; and a bank whose officers and agents have assumed such agency, will be liable for their faithful discharge of the duties of the agency. See *Bank of Kentucky v. Schuylkill Bank*, 1 *Pars. Sel. Cas.* 236.

143. Title. A transfer on the books of a corporation for value, to a *bona fide* holder, passes to him the shares so transferred, although at the time the transferor had a certificate in his name outstanding for the same, which he did not surrender at the time of the transfer; and the fact that the owner has pledged the certificate to a third party as security for money borrowed, without notice to the company thereof, does not affect such transfer, or the title of the transferee, to the stock so transferred. *N. Y. Supreme Ct. Sp. T.* 1860, *N. Y. & N. Haven R. R. Co. v. Schuyler*, 38 *Barb.* 584, 564.

144. Transfer by power effectual against creditors. M. delivered to the complainants certificates of stock in a corporation, accompanied by an irrevocable power of attorney for their transfer, as collateral security for his notes and renewals of them. The corporate charter declared the stock to be personal property and "transferable on the books," and that "books of transfer of stock should be kept, and should be evidence of the ownership of said stock in all elections," &c. by the stockholders. *Held*, that this transfer to complainants was effectual as

against the attachment levied upon the stock thereafterward by a creditor of M.; the delivery of the certificate, with the power of immediate transfer on the books, being as effectual with respect to the provisions of the charter, as a formal assignment accompanying the certificate. *N. J. Chancery*, 1860, *Broadway Bank v. McElrath*, 2 *Beasl.* 24; *N. J. Ct. of Errors*, 1864, *Hunterdon County Bank v. Nassau Bank*, 17 *N. J. Eq.* (2 *C. E. Green*,) 496.

145. **Disregarding formalities.** Where the deed of settlement of a joint stock company required the directors to use certain formalities in the transfer of shares, which for ten years they had in no instance observed,—*Held*, that after such long-continued and universal violations of their deed, the company could not set them up to the prejudice of third parties. *H. of Lords*, 1854, *Bargate v. Shortridge*, 31 *Eng. L. & Eq.* 44; 5 *II. of L. Cas.* 297.

146. A transfer of stock made according to the usage of the company, is valid as against the company, notwithstanding there is a by-law requiring the consent of the board, which, by the practice of the company was never observed. *Pa. Supreme Ct.* 1849, *Chambersburg Ins. Co. v. Smith*, 11 *Pa. St.* 120. And see *Chouteau Spring Co. v. Harris*, 20 *Mo.* 382; *Bargate v. Shortridge*, 5 *H. of L. Cas.* 297; 31 *Eng. L. & Eq.* 44. To very similar effect are, *Gilbert v. Manchester Iron Manufacturing Co.* 11 *Wend.* 627; *Quiner v. Marblehead Social Ins. Co.* 10 *Mass.* 476; *Sargent v. Essex Marine Railway*, 9 *Pick.* 204.

147. That a seal is not necessary upon an assignment of shares in a corporation,—see *Atkinson v. Atkinson*, 8 *Allen*, 15.

148. Where the shares in a railway company were, by express provisions in the charter, transferable only by deed executed by both the parties to the transfer,—*Held*, that the execution of a deed by the seller of the shares, with a blank left for the name of the transferee, was not a compliance with the statute. *Exch.* 1840, *Hebblewhite v. McMoline*, 6 *Mees. & W.* 200; 2 *Eng. Railw. Cas.* 51; 4 *Jur.* 769.

149. **Official title.** The resignation of an officer and appointment of his successor, does not of itself operate to transfer the title to stocks held by him as such officer, and standing in his individual name with the addition of his office. An assignment is nec-

essary. *N. Y. Supreme Ct.* 1838, *Matter of Mohawk & Hudson R. R. Co.* 19 *Wend.* 185.

150. **Bankruptcy.** When title passes to assignee in bankruptcy, and what is acceptance by him,*—see *South Staffordshire Railw. Co. v. Burnside*, 5 *Exch.* 129; 6 *Eng. Railw. Cas.* 611; 20 *Law J. N. S. Exch.* 120.

151. **Condition precedent.** Under a statute requiring all calls made upon shares to be paid before any transfer of the shares shall be deemed valid, the company are not obliged to regard any transfer, made after the resolution of the directors, making the assessment. And the assessment need not specify the time of payment, but that may be determined, by a subsequent act of the board. See *Great North of England Railway Co. v. Biddulph*, 7 *Mees. & W.* 243; 2 *Eng. Railw. Cas.* 401; *Newry & Enniskillen Railw. Co. v. Edmonds*, 5 *Eng. Railw. Cas.* 275; 2 *Exch.* 118, 122; *Ambergate & Eastern Junction Railw. Co. v. Mitchell*, 6 *Eng. Railw. Cas.* 285; 4 *Exch.* 540; *Regina v. Londonderry & Coleraine Railway Co.* 13 *Q. B.* 998. Compare *Exp. Tooke, In re The Londonderry & Coleraine Railway Co.* 6 *Eng. Railw. Cas.* 1; *North American Colonial Association of Ireland v. Bentley*, 15 *Jur.* 187; 19 *Law J. N. S. Q. B.* 427.

152. Although the charter provide that no transfer of stock shall be valid till the whole capital has been paid in, a *bona fide* sale by a debtor to his creditor, in satisfaction of his debt, may be sufficient to transfer the equitable interest, so far as to justify the company in issuing certificates to the assignee, and to entitle him, when the full amount of the shares should be paid in, to have the transfers entered in the company books, and to a certificate of his shares.† *Mass. Supreme Ct.* 1813, *Quiner v. Marblehead Social Ins. Co.* 10 *Mass.* 476.

153. Where the charter, or the general law, requires all calls upon the stock of an

* Notice to the company is necessary to perfect the title of a mortgagee in case of bankruptcy or insolvency, although where all parties are partners, notice will sometimes be implied. *Waltman, Exp.* 2 *Mont. & A.* 364; *Duncan v. Chamberlayne*, 11 *Sim.* 123; *Eitay v. Bridges*, 2 *You. & Coll.* 486.

† A refusal of a bank to redeem paper in specie,—*Held* "a failure" within a provision of the charter, that transfers of stock, made within six months previous to failure, should be void; but that an act to relieve the banks from the liabilities incurred by them by their suspension of specie payments, and the resumption of specie payments in pursuance thereof, cured that failure, so as to restore the rights of the parties to such transfers. *Lumpkin v. Jones*, 1 *Kelly*, 27.

incorporated company to be paid to the company before transfer of shares, the company are not bound to accept a transfer otherwise made. *Q. B.* 1851, *Regina v. Wing*, 38 *Eng. L. & Eq.* 80.

154. **Transfer on the books dispensed with.** The provisions usual in charters, that no transfer of the stock shall be effectual until entered in the books of the corporation, is a regulation designed for the security of the corporation itself, and of third persons taking transfers without notice of any prior equitable transfer. It relates to the transfer of the legal title, and not of any equitable interest subordinate to that title. As between vendor and vendee, a transfer not in conformity to such provisions, passes the equitable title, and divests the vendor of his interest. [2 *Cow.* 777, 778; 11 *Wend.* 628; 22 *Id.* 362; 10 *Mass.* 476; 8 *Pick.* 90.] *U. S. Supreme Ct.* 1841, *Black v. Zacharie*, 3 *How.* 483. To similar effect, *Farmers' Bank of Maryland v. Iglehart*, 6 *Gill*, 50.

155. A clause in an act of incorporation, providing that stock of the company shall only be transferred on its books, is for the security of the corporation, and does not prevent the title from passing as between vendor and vendee; therefore, a member of a corporation who has sold and transferred his stock, although not in the manner prescribed by the charter and by-laws, is a competent witness for the company. *Ala. Supreme Ct.* 1846, *Duke v. Cahawba Navigation Co.* 10 *Ala. N. S.* 82.

156. **Equitable title.** The ground on which stock sold, but not legally transferred, is subject to attachment by the creditors of the vendor, is the same on which personal chattels sold, but retained in the possession of the vendor, are liable to attachment; and the same circumstances that would excuse failure to take possession in one case, will excuse failure to perfect the transfer in the other. Even if the transfer conveys only an equitable title, it is good in equity against an attachment if made in good faith, and the parties have done what they could to perfect the title. *Conn. Supreme Ct.* 1862, *Colt v. Ives*, 31 *Conn.* 25. See also, *Sargent v. Essex M. Railway Co.* 9 *Pick.* 202; *S. P. Sargent v. Franklin Ins. Co.* 8 *Pick.* 90.

157. **Transfer on books not dispensed with.** Shares in a bank, whose charter provides that they shall "be transferable only at

its banking house and on its books," cannot be effectually transferred as against a creditor of the vendor, who attaches them without notice of any transfer, by a delivery of the certificates thereof, together with an assignment and blank power of attorney from the vendor to the vendee, even if notice of such transfer be given to the bank before the attachment. *Mass. Supreme Ct.* 1855, *Fisher v. Essex Bank*, 5 *Gray*, 373.

158. Where one borrowed money, and deposited certificates of railway shares, with blank assignments upon them, as security, and the blanks were not filled up, till the shareholder became bankrupt,—*Held*, that although the charter provided that a purchaser of stock should have no share in the undertaking till his transfer was registered on the books, the pledgee had a lien upon the shares, for money advanced by him, or paid on calls upon the shares. *Exp. Dobson*, 2 *Mont. D. & D.* 685. Compare *Regina v. General Cemetery Co.* 6 *Ell. & B.* 415; 36 *Eng. L. & Eq.* 126.

159. Where the charter of a turnpike company provided that shares of the stock should be transferable only on the books of the company, in such manner as they, by their by-laws, should direct, and a by-law provided that the directors should prescribe the form of transfer to be registered by the clerk in the company's books, and that no transfer should be valid, unless so made and registered,—*Held*, that a deed of transfer in the prescribed form conveyed no title until actually registered. *Conn. Supreme Ct.* 1821, *Northrop v. Newtown & Bridgeport Turnpike Co.* 3 *Conn.* 544.

160. The registry, in such case, is itself the originating act in the change of title; and an entry by the clerk, on the deed, "received for record," is not equivalent to a registry. *Id.*; *S. P. Marlborough Manf. Co. v. Smith*, 2 *Conn.* 579. And see 5 *Id.* 246.

161. But a written assignment in the form prescribed, and seasonably registered at length by the clerk on the books of the company, is a transfer on the books within the meaning of the charter, and conveys the legal title. *Conn. Supreme Ct.* 1823, *Northrop v. Carter*, 5 *Conn.* 246.

162. Where a by-law provided that no transfer should be of any avail until received for record by the clerk, who should enter thereon the time he received it, which should

bear date accordingly,—*Held*, that a sale or pledge, accompanied by a letter of attorney to make the transfer, conveyed no title, until the transfer was received for record by the clerk. *Conn. Supreme Ct.* 1837, *Oxford Turnpike v. Bunnell*, 6 *Conn.* 552.

163. Under the *Mass. Rev. Stat.* ch. 89, sec. 552, which provides that shares of railroad stock may be transferred in writing, but such conveyance shall not be valid against any other persons than the grantors and their representatives unless recorded,—the title of a grantee whose conveyance is not recorded, is defeated by the sale of the stock on execution against his grantor. *Mass. Supreme Ct.* 1862, *Rock v. Nichols*, 8 *Allen*, 342.

164. Where, by the regulation of the company, actual transfers of stock can only be made on the books and on the surrender of the certificate, such a transfer is necessary in order to divest the legal title of the owner, or his assignee in insolvency. A verbal promise of the owner to one indebted jointly with him that he would transfer the stock to their creditor, in consideration of which such co-debtor transferred securities of his for the same purpose, does not give the latter any lien as against the former's creditors. So where the owner, after having given a written assignment, with power to transfer, as security for a debt, received the certificates and assignments back again, in order to obtain a stock dividend from the company, on a promise to return the same number of shares to the creditor, which he never did, such creditor acquired no lien as against attaching creditors. *Conn. Supreme Ct.* 1860, *Shipman v. Aetna Ins. Co.* 29 *Conn.* 245.

165. A sale in good faith of the shares in the stock of a manufacturing corporation, accompanied by an assignment and delivery of the certificate, but made without notice to the corporation, is invalid in Massachusetts as against a subsequent attachment and sale on execution, by a creditor of the assignor. *Mass. Supreme Ct.* 1853, *Blanchard v. Dedham Gas Light Co.* 12 *Gray*, 213.

166. In Maine, no transfer of the shares of the capital stock of a bank is valid, so as to secure them from attachment, until it is entered on the books of the corporation, "showing the names of the parties, the number of shares, and the date of transfer," in accordance with the provisions of section 11,

ch. 46 of the Revised Statutes.* *Me. Supreme Ct.* 1860, *Skowhegan Bank v. Cutler*, 49 *Me.* 815.

167. An assignment of shares of stock, in a corporation formed under the *Cal. Act* of 1853, by a mere delivery of the certificate of stock without a transfer on the books of the corporation, as provided by the statute, is invalid as against a subsequent purchaser of the stock at sale on execution against the assignor, without notice of the assignment. *Cal. Supreme Ct.* 1862, *Naglee v. Pacific Wharf Co.* 20 *Cal.* 529.

168. In New Hampshire, a transfer of railroad stock is not complete until an entry of such transfer is made upon the stock record, or it be sent to the office for that purpose; and the omission thus to perfect the delivery will be *prima facie*, and, if unexplained, conclusive evidence of a secret trust, and render the transfer fraudulent and void as to creditors. *N. H. Supreme Ct.* 1861, *Pinkerton v. Manchester & C. R. R.* 42 *N. H.* 424.

169. How made. An entry on the books that a transfer is made, attested by the secretary, and with the power affixed,—*Held*, a substantial compliance with a by-law, requiring transfers of stock to be made on the books and attested by the secretary. *Pa. Supreme Ct.* 1849, *Chambersburg Ins. Co. v. Smith*, 11 *Pa. St.* 120.

3. Effect of Transfer.

170. An assignee of a stockholder in a dissolved corporation, takes no greater interest or right than had the assignor. *N. Y. Chancery*, 1844, *James v. Woodruff*, 10 *Paige*, 541; *N. Y. Superior Ct.* 1857, *McCready v. Rumsey*, 21 *How. Pr.* 271. Compare *Callanan v. Edwards*, 32 *N. Y.* 483.

171. Transfer of subscription. Where an original subscriber to the stock of an incorporated company, bound to pay the installments upon his subscription, from time to time, as they were called in by the company, transfers his stock to another, with his assent, the transferee is substituted to the rights and obligations of the original subscriber, and becomes bound to pay up installments called for after the transfer to him. And the payment of installments, by such

* The statute of Maine, (*R. S.* of 1841, c. 76, § 12) providing for the transfer of certificates of stock upon the books of the corporation, construed. See *Skowhegan Bank v. Cutler*, 52 *Me.* 509.

transferee, is evidence of his assent to the transfer. *Md. Ct. of Appeals*, 1847, *Hall v. United States Ins. Co.* 5 *Gill*, 484. To similar effect, *N. Y. Supreme Ct. Sp. T.* 1848, *Mann v. Currie*, 2 *Barb.* 294.

172. Under a Pa. statute, incorporating the "West Philadelphia Canal Company," A. one of the subscribers, transferred his shares to B. who, after installments had been called for, but before they were payable, transferred to C. on the books of the company. C. agreed to the transfer before it was made, but never gave personal notice of acceptance nor called for the certificates. *Held*, that B. was not liable for installments due after the date of his transfer. *Pa. Supreme Ct.* 1838, *West Philadelphia Canal Co. v. Innes*, 3 *Whart.* 198.

173. Liability for calls. If a subscriber to stock of a corporation transfer it without the assent of the corporation, for the purpose of escaping liability on his subscription, the transfer will be no defence to him in an action for the amount due on his subscription. *Pa. Supreme Ct.* 1857, *Everhart v. West Chester & Philadelphia R. R. Co.* 28 *Pa. St.* 339.

174. One who sells shares of the capital stock of a corporation, which has not yet issued certificates, and agrees to give the purchaser a certificate as soon as he obtains it, is not liable for an assessment laid thereafter, and before the certificates are issued.* *Mass. Supreme Ct.* 1865, *Brigham v. Mead*, 10 *Allen*, 245.

175. Where property encumbered with a mortgage to secure the subscription of a shareholder to the capital stock of a corporation, was sold with the shares of stock, for a fixed price, and without guaranty against the mortgage,—*Held*, that the purchaser was liable to the original stockholder, and he, when called on for payment of the subscription, might call in warranty his vendee, although there had never been any transfer of the stock on the books of the company. *La. Supreme Ct.* 1859, *Clinton & Co. R. R. Co. v. Eason*, 14 *La. Ann.* 816.

*The purchaser of scrip certificates in a proposed railway company which had not obtained any act of Parliament,—*Held*, after the act had passed, and in the absence of any special contract, not bound to take a transfer of the corresponding shares from his vendor, or to indemnify him from the amount of calls subsequently made. *Jackson v. Cocker*, 4 *Beav.* 29; 2 *Eng. Railw. Cas.* 368; 10 *Law J. N. S. Ch.* 286. Compare *Wynne v. Price*, 8 *De Geo & S.* 310; 18 *Jur.* 295; *Humble v. Langston*, 2 *Eng. Railw. Cas.* 583; 7 *Moss & W.* 517.

176. Until the deed of transfer upon the sale of railway shares has been registered by the transferee, (whose duty it is to procure such deed to be registered,) the transferor cannot, after he has been compelled to pay the amount of such calls, recover the same from the transferee, upon the common count for money paid to his use. *Q. B.* 1849, *Sayles v. Blane*, 6 *Eng. Railw. Cas.* 79; 14 *Jur.* 87; 19 *Law J. N. S. Q. B.* 19. Compare *Taylor v. Blane*, 14 *Q. B.* 205.

177. As to liability of purchaser to receiver of corporation,—see *Litchfield Bank v. Peck*, 20 *Conn.* 384. Compare *Id.* 137.

178. Failure of consideration. A proprietor of shares in a public company is liable to a person to whom he has sold them, in assumpsit for money had and received, on failure of consideration upon the dissolution of the company. *C. P.* 1826, *Watkins v. Huntley*, 2 *Car. & P.* 410, n.

179. Upon a sale of corporate stock, both parties believed it was fully paid up; but in consequence of a subsequent resolution of the directors, the buyer was compelled to make a payment upon it. *Held*, that there being neither fraud nor warranty in the sale, he could not recover from the seller. *N. Y. Supreme Ct.* 1816, *Cunningham v. Spier*, 13 *Johns.* 392.

180. A covenant, by the vendee of bank stock, to indemnify his vendor for all liabilities he may have incurred as stockholder, applies only to lawful claims, not to the cost of defending a groundless suit, nor to the vendor's expense and trouble in getting reversal of a judgment on which his property had been taken, he having been appointed receiver of the bank, and having wrongfully consented to judgment against it.* *Ma. Supreme Ct.* 1854, *Merrill v. Shaw*, 38 *Ma.* 267.

181. Construction and effect of a stipulation by corporators, on a sale of stock, that the corporation shall not set up claims against the buyer, in respect of past transactions. *Jackson v. Grant*, 18 *N. J.* (3 *Green.*) 145.

182. Dividends. That an assignment of shares of stock in a corporation passes the

* That, when a stockholder sells shares in a manufacturing corporation, and covenants that they are free from all encumbrances, the covenant is at once broken, if the shares of the stockholders are liable for the debts of the corporation; and if, at the time of the sale, the assets of the corporation are not equal to its liabilities,—see *Clark v. Perry*, 30 *Ma.* 143.

profits on such shares not yet ascertained and declared,—see *Kane v. Bloodgood*, 7 *Johns. Ch.* 90.

183. Notice to a purchaser, before maturity, of a note and mortgage given in payment of a subscription to railroad stock, that they were given for such consideration, is notice of a lawful consideration and does not impair his rights as a *bona fide* holder. *Wis. Supreme Ct.* 1863, *Andrews v. Hart*, 17 *Wis.* 297.

184. The agent of a seller of stock who did not at once transfer it, but promised the buyer that he would be accountable for such dividends as he or his agent should receive before transfer,—*Held*, to be thereafter the agent of the latter to receive such dividends. *Cropper v. Adams*, 8 *Pick.* 40.

185. The parties to a controversy agreed that certain stock should be delivered by one to B. for the other, in satisfaction of his demand, and this was done. *Held*, that B. was to be regarded as the agent of the claimant, and his receipt of the stock was a receipt by the claimant, and constituted a good satisfaction. *N. Y. Supreme Ct.* 1819, *Anderson v. Highland Turnpike Co.* 16 *Johns.* 86.

186. Credit on the books. A subscriber for stock in a corporation, not fully paid, on making a sale of property to the corporation, was credited on its books for a part of the price, and the residue was credited to another person, who held as collateral security some stock also partly unpaid. *Held*, that the relation between the former and the company was that of debtor and creditor, and did not entitle her to maintain an action against the company and such pledgee, to have the credit transferred from his account to hers. *N. Y. Supreme Ct.* 1863, *Craig v. Hyde*, 24 *How. Pr.* 318.

187. Where a trustee of stock or annuities assumes to transfer the stock, it is a breach of trust, and the *cestui que trust* will be entitled to an election, either to have the individual stock restored to him, which stood in the name of the trustee, or to have the proceeds arising from its sale. *Chancery*, 1740, *Harrison v. Harrison*, 2 *Atk.* 121.

VI. CORPORATE DUTY.

188. Fraudulent issue. A corporation is bound to exercise, in respect to permitting issue and transfer of its stock, such ordinary

care and skill as affords to dealers a safe and reliable mode of acquiring title to its shares; and this obligation exists not only towards existing shareholders, but towards the public generally, and all who enter upon dealings in their stock. If their transfer agent is guilty of frauds in the issue of stock, which by ordinary care and diligence might have been detected, the corporation is liable to a party injured, for his damages. Such a case does not present the question, which of two innocent parties must suffer; the question is between an innocent and a culpable party.* *N. Y. Ct. of Appeals*, 1865, *New York & N. H. R. R. Co. v. Schuyler*, 34 *N. Y.* 80.

189. The general principles governing the transfer of stock, the rights of dealers in it, and the liability of the corporation for acts of their transfer agent,—explained. *Id.*

190. Transfer on forged power. A corporation innocently permitted a transfer upon its books of plaintiff's stock, upon a forged power of attorney, canceling the certificates, and issuing new ones. *Held*, that it was bound to transfer an equal quantity of its stock to the plaintiff, or pay its value.† *N. Y. Ct. of Appeals*, 1852, *Pollock v. National Bank* 7 *N. Y.* (3 *Seld.*) 274.

191. A stockholder may recover of a bank the dividends on his stock, although, at the time the dividends are payable, he knows that the stock has been placed, under a forged power of attorney, to the name of another person, and omits to inform the bank of the circumstance, and does not demand payment of the dividends till after the escape of the offender. Property in stock is not transferred from the owner by being placed under a forged power of attorney to the name of another person on the books of the corporation.‡ *C. P.* 1824, *Davis v. Bank of*

* Where false scrip had been issued, beyond the amount and number of shares allowed by the charter, and already registered,—*Held*, the company could not, upon that ground, refuse to register the shares of those who had purchased the genuine scrip. *Daly v. Thompson*, 10 *Mees. & W.* 300.

† Where a company have registered a transfer of stock which is alleged to be a forgery, and an action is brought against it by the original shareholder, and another is threatened by the alleged transferee, the court will not grant an interpleader. See *Dalton v. Midland Railway Co.* 13 *C. B.* 458; 39 *Eng. L. & Eq.* 452.

‡ A party whose stock has been sold under a forged power may recover the value as money had and received from the purchaser. *Marsh v. Keating*, 1 *Bligh. N. C.* 198; 1 *Scott*, 5.

§ This case was reversed, in error, on the ground that the declaration omitted to show that the money had been actually issued by government to the bank to pay the div-

England, 2 *Bing.* 393; 3 *Law J.* 4; 9 *Moore*, 747; *Taylor v. Midland Railw. Co.* 6 *Jur. N. S.* 595; 29 *L. J. N. S. Ch.* 731; 8 *W. R.* 401.

192. Alteration. Where the owner of a certificate of shares in a corporation sold a portion of them, and executed and delivered an assignment thereof, by partially filling up a blank form, printed for that purpose upon the back of the certificate, being guilty of no want of care in the mode of filling up the same, and the assignment was afterwards altered so as to purport to assign the whole of the shares, and the corporation negligently and carelessly assigned and transferred and issued new certificates to others for the whole of the shares,—*Held*, that the corporation was liable to make good to the owner the amount wrongfully transferred. *Mass. Supreme Ct.* 1862, *Sewall v. Boston Water Power Co.* 4 *Allen*, 277. Compare *Swan v. North British &c. Co.* 7 *Hurlst. & N.* 603.

193. Where the negligence of a stockholder misled a bank to believe that a transfer of stock which was in fact fraudulent, had been made with the assent of the stockholder, and on the faith of that they paid dividends to the transferee,—*Held*, that the executors of such stockholder could not recover the dividends from the bank.* *Q. B.* 1839, *Coles v. Bank of England*, 10 *Ad. & Ell.* 437; 4 *Jur.* 266; 2 *Per. & D.* 521.

194. That a corporation is bound to transfer a stock to an assignee duly authorized, unless they hold some claim against it, or are restrained by injunction of a competent court,—see *Purchase v. N. Y. Exchange Bank*, 3 *Robertson* 164. But compare *Mechanics' Banking Association v. Mariposa Co.* *Id.* 395.

195. If a railroad company has no interest or lien on stock, when a transfer is made, then it is good between the parties, and the company cannot rightfully object to the demanded transfer. *Cal. Supreme Ct.* 1858, *People v. Crockett*, 9 *Cal.* 112.

196. The by-laws of an insurance company provided that the certificates of stock

should be transferable only at the office of the company, by the holder personally, or his attorney, and that transfers should be authenticated by the president, and attested by the secretary, and that it should be the duty of the president to attend at the office during business hours. A deed of assignment was made of some shares to two persons, who were copartners, with power to them to transfer the same on the books of the company; and one of the partners called at the office during business hours, and, the president being absent, exhibited to the secretary the assignment and power, and demanded that the shares should be transferred on the books of the company, and certificates issued to himself and his partner; but the secretary declined, saying it was the business of the president. *Held*, that the company were bound by these proceedings to make the transfer, and issue the new certificates, and that they could not refuse to do so on the ground that they held notes given by the assignors for premiums of insurance, one of which was then due. *Mass. Supreme Ct.* 1829, *Sargent v. Franklin Ins. Co.* 8 *Pick.* 90.

197. A by-law of a company, the shares of the stock of which are personal and assignable property, requiring transfers to be made only at its office personally, or by attorney with consent of the president thereof, is contrary to the general laws of Massachusetts respecting the transfer of the right of personal property. *Id.*

198. Trust funds. The mere fact that a bank permits stock which stood in the name of a testator, to be transferred by the executor, furnishes no ground of complaint against the bank, although it is made to appear that the executor was, by the act of transfer, converting the money to his own use; for a party dealing with an executor, is not bound to inquire into his object, nor is the party dealing with an executor at all liable for the executor's misapplication of the money, unless he have reasonable ground for believing that the latter intended to misapply the money. *Md. Ct. of Appeals*, 1852, *Albert v. Savings Bank*, 2 *Md.* 159. Compare 1 *Md. Ch. Decis.* 407.

199. A bank which permits a transfer of its own stock by an executor as such, on its books, is chargeable with notice of the will under which he acts, and the contents thereof; and an omission to examine such

Idends in question, at the time of the alleged breach of duty. *Bank of England v. Davis*, 4 *Law J. N. S. K. B.* 145; 5 *Barn. & Cres.* 185; 15 *Dowl. & R.* 823.

* But where shares were fraudulently transferred, and the owner treated the transaction as being valid, as against the transferee, but filed a bill against the company for damages,—*Held*, that he could not recover. *Duncan v. Lintley*, 2 *Mac. & G.* 30.

will and the specific bequests of the stock standing on its books in the name of the testator, amounts to negligence, for which it will be held liable, on a conversion by the executor to his own use of the stock of the *cestui que trust*. *U. S. Circ. Ct. (Md.)* 1848, *Lowry v. Commercial & Farmers' Bank*, 6 *West. Law J.* 121.

200. As towards the corporation, an executrix appointed in another State, has the legal power to convert the shares belonging to the estate into money, without the aid of the Probate Court of the State, if she can do it without legal process; the bank is not bound to see to the application of the proceeds, nor to decide whether the case required the sale.* *Mass. Supreme Ct.* 1847, *Hutchins v. State Bank*, 12 *Metc.* 421.

201. Liability for refusal to transfer. The charter of a corporation provided that no transfer of its stock should be valid, until registered in a book to be kept by the corporation, and the certificates of stock were in terms only transferable on the books "by the said stockholder or his attorney, on surrender of the certificate." *Held*, that when the required evidence was produced, the corporation was bound to permit the transfer, and was liable in damages to the full value of the stock for refusing. *N. Y. Ct. of Errors*, 1839, *Commercial Bank of Buffalo v. Kortright*, 22 *Wend.* 348; affirming *S. C.* 20 *Id.* 91.

202. A mandamus to compel a corporation to transfer stock on its books will not lie. There is a remedy by action. [20 *Wend.* 91; 23 *Id.* 348.] *N. Y. Supreme Ct.* 1843, *Exp. Firemen's Ins. Co.* 6 *Hill*, 248; 1813, *Shipley v. Mechanics' Bank*, 10 *Johns.* 484; 1854, *People v. Parker Vein Coal Co.* 10 *How. Pr.* 548; 1 *Abb. Pr.* 128. See also, *Rex v. London Assurance Co.* 5 *Barn. & Ald.* 899; *Rex v. Worcester Canal Co.* 1 *M. & R.* 529; *Regina v. Liverpool, Manchester &c. Railw. Co.* 11 *Eng. L. & Eq.* 408; *Sargent v. Franklin Insurance Co.* 8 *Pick.* 90.

* Stock standing in the name of the ward on the books of an incorporation, was transferred by his guardian; the certificates of the stock were canceled by the corporation, and new ones issued in their stead to the transferee. *Held*, that this was a "sale or removal" by the guardian within the meaning of the act of Maryland of 1843, c. 304, and, having been made without an order of the orphans' court as required by the act, it was void, and did not affect the rights of the ward; and that the act of the corporation in cancelling the certificates was such a conversion as to make a demand and refusal unnecessary before suit. *City of Baltimore v. Norman*, 4 *Md.* 352.

203. A mandamus should not be granted to compel the officers of a corporation of which spurious stock has been issued, to permit transfers of stock pending litigation as to the validity of the certificates outstanding. But in case of insolvency of the corporation, a temporary injunction may be allowed. *N. Y. Supreme Ct. Sp. T.* 1854, *People v. Vein Coal Co.* 10 *How. Pr.* 186.

204. Action. An assignee of shares in a banking corporation, who is entitled to receive a certificate therefor, may maintain assumpsit against the bank for a wrongful refusal to issue to him such certificate. *N. H. Supreme Ct.* 1864, *Hill v. Pine River Bank*, 45 *N. H.* 800; *S. P. Ind. Supreme Ct.* 1859, *Helm v. Swiggett*, 12 *Ind.* 194.

205. In an action to compel the transfer of stock, it is sufficient if the defendants transfer the requisite number of shares without reference to the identity of those claimed by the plaintiff. *Cal. Supreme Ct.* 1867, *Hardenbergh v. Bacon*, 38 *Cal.* 356; *S. P.* *Noyes v. Spaulding*, 27 *Vt.* 420.

VII. LIEN OF THE CORPORATION.

206. There is no lien at common law, upon stock for debts in favor of the corporation issuing the stock. When such a lien exists, it is by statutory authority, either expressed in the act of incorporation, or by by-laws made by authority of the act.* [Ang. & Ames on Corp. § 335.] *Pa. Supreme Ct.* 1866, *Steamship Dock Co. v. Heron*, 52 *Pa. St.* 280. To similar effect, *Mass. Supreme Ct.* 1851, *Mass. Iron Co. v. Hooper*, 7 *Cush.* 183.

207. A corporation has no implied lien upon the stock of a shareholder, which has been transferred by him as security for any demand against him; and the company is bound, notwithstanding they have such demand, to enter on their books the transfer of such stock, in pursuance of the assignment of the same, and is liable in damages to the assignee for a refusal so to do.† *N. C. Su-*

* A stockholder, whose estate was insolvent, died indebted to the corporation; and after his death the company passed a resolution prohibiting the transfer of stock by any one indebted to the company till the debt was paid or secured. The stock was subsequently sold, the purchaser having no knowledge of the stockholder's indebtedness, or of the resolution of the company. *Held*, that the company was bound to permit a transfer of the stock. *Pa. Supreme Ct.* 1866, *Steamship Dock Co. v. Heron*, 52 *Pa. St.* 280.

† A payment which the assignee of stock makes to satisfy

preme Ct. 1831, *Heart v. State Bank*, 2 *Dev. Eq.* 111.

208. Usage. If a stockholder borrow money of a bank, with full knowledge of a usage not to permit a transfer of the stock of one indebted to the bank, he is bound by such usage; and neither he nor a general assignee, who has not paid value, can sustain an action against the bank for refusing to permit a transfer. *Pa. Supreme Ct.* 1822, *Morgan v. Bank of North America*, 8 *Serg. & R.* 73.

209. Form of certificate. Where the certificate of stock, issued to the holder by the company, stated that the stock was transferable, "subject nevertheless to his indebtedness and liability at the bank, according to the charter and by-laws of said bank,"—*Held*, that these words might be construed as sustaining a lien, although no lien was expressly provided for by the charter or by-laws; and that the corporation, having relied on the stock as security for an indebtedness of the holder, were entitled to insist upon the lien against the holder of the stock and against his assignee in trust for creditors. *Conn. Supreme Ct.* 1857, *Vansands v. Middlesex County Bank*, 26 *Conn.* 144. Compare *Fitzhugh v. Bank of Shepherdsville*, 3 *B. Monr.* 126.

210. Power to make by-laws. The provision of a charter declaring the stock of the corporation personal property, and authorizing the board of directors to make rules and regulations concerning its transfer, subject to the general law of the State, authorizes the board to adopt a rule prohibiting the transfer of stock until all the debts due by the owner of the stock to the corporation shall have been paid, although such rule be inconsistent with the general law of the State governing the transfer of personal property.* *Mo. Supreme Ct.* 1845, *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 *Mo.* 149; *S. P. Cun-*

ningham v. Alabama Life Ins. & Trust Co. 4 *Ala. N. S.* 652.

211. A transfer contrary to such rule and according to the general law governing the transfer of personal property is good against the parties, although not against the corporation. *Mo. Supreme Ct.* 1845, *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 *Mo.* 149.

212. A by-law of a bank, giving to the institution a lien upon the shares of a stockholder for debts due from him to the bank, is a reasonable and valid by-law; and under it, a bank may defend against a suit brought by a stockholder for a refusal to permit him to transfer his stock on its books, without first paying the debts he owes to it. *Del. Superior Ct.* 1832, *McDowell v. Bank of Wilmington*, 1 *Harring.* 27; *Ga. Supreme Ct.* 1846, *Tuttle v. Walton*, 1 *Ga.* 43; *Mo. Supreme Ct.* 1845, *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 *Mo.* 149. See also *Child v. Hudson's Bay Co.* 2 *P. Wms.* 207.

213. Contrivance to gain lien. The purchase, by a corporation, of a bill of exchange, the act being in excess of their corporate powers, and for the purpose of subjecting the stock of a party to the bill, not assenting to such transfer, to a lien for its payment, is an abuse of its corporate rights, and will not authorize the company to withhold its assent to an assignment of the stock previously made to a third person, though unknown to the company at the time they received the bill. *Ohio Supreme Ct.* 1861, *White's Bank v. Toledo Ins. Co.* 12 *Ohio St.* 601.

214. Effect of provision. Where, by the charter of a corporation, or its by-laws thereby authorized, its stock is transferable only on its books, and the charter declares that a stockholder who is indebted to the company, shall have no right to sell or transfer his stock until he pays or secures the debt to the satisfaction of the company,—the assignee of stock, without a transfer on the corporate books, takes it subject to the equity of the company. *N. Y. Chancery*, 1832, *Stebbins v. Phoenix Fire Ins. Co.* 3 *Paige*, 350; *U. S. Supreme Ct.* 1817, *Union Bank v. Laird*, 2 *Wheat.* 390. Compare *McCready v. Rumsey*, 6 *Duer*, 574.

215. Where the charter of a bank provided that no part of her capital stock should be sold or transferred, except in certain cases, until the whole amount had been paid in,—*Held*, that a contract for the transfer of

a debt due to the company from the assignor, and which they require him to make as a condition of permitting a transfer on the books, is not to be deemed a voluntary payment; but one made, in some measure, under compulsion, and he can recover it back. *N. Y. Supreme Ct.* 1802, *Bates v. N. Y. Ins. Co.* 3 *Johns. Cas.* 288.

* A statute forbidding banks to make loans or discounts on pledge of their own stock, may be considered as intending a case where the stock is directly and specifically pledged as security for the particular debt, and not where a mere general lien exists, especially where the discount is made in favor of a third party who has no interest in the stock subjected to the lien. *Vansands v. Middlesex County Bank*, 26 *Conn.* 144.

shares, not falling within the exceptions made, and to be carried into execution when but fifty per cent. should be paid in, was illegal and void. *Mo. Supreme Ct.* 1839, *Merrill v. Call*, 15 *Mo.* (8 *Shepl.*) 428.

216. An assignee of a certificate cannot thereby acquire any rights against the corporation superior to those possessed by the assignor. He is to be deemed an assignee of a thing in action not negotiable, and as succeeding merely to the rights and equities of the assignor. *N. Y. Ct. of Appeals*, 1856, *Mechanics' Bank v. N. Y. & New Haven R. R. Co.* 13 *N. Y.* (8 *Kern.*) 599; *N. Y. Superior Ct.* 1857, *McCready v. Rumsey*, 6 *Duer*, 574.

217. Hence, if the corporation have, under their charter and by-laws, a lien against the stock for a debt of the holder, one who takes an outside transfer of the certificate, is not entitled to require the corporation to transfer the stock, except on terms of his satisfying the lien. *N. Y. Superior Ct.* 1857, *McCready v. Rumsey*, 6 *Duer*, 574.

218. What debts are secured. A clause of a statute or act of incorporation, which provides that "no stockholder, indebted to a bank, shall be authorized to make a transfer, or receive a dividend, until such debt shall have been discharged," or secured, includes notes discounted by the bank for the stockholder, as well as debts due for an original subscription for stock. *Pa. Supreme Ct.* 1824, *Rogers v. Huntington Bank*, 12 *Serg. & R.* 77; 1822, *Morgan v. Bank of North America*, 8 *Id.* 78.

219. Partnership debts. The articles of association of a bank provided that no shareholder should be permitted to transfer his shares, or receive a dividend thereon, who should owe the bank a debt then due, unless by consent, &c.; and authority was given whenever such a debt should be past due, to sell the stock, and apply the proceeds to pay the debt. *Held*, that these provisions created a lien upon the stock in favor of the bank for the debts of the stockholder, and that the debts of a partnership, of which the stockholder was a member, were his debts within the rule. *N. Y. Supreme Ct.* 1857, *Arnold v. Suffolk Bank*, 27 *Barb.* 424.

220. The word "indebted," in such a statute applies to notes which have not become due and payable. The restraint on the transfer of stock would fail of the intended

benefit, if a stockholder had an unrestrained right to transfer at any time before his note fell due. *Pa. Supreme Ct.* 1826, *Grant v. Mechanics' Bank of Philadelphia*, 15 *Serg. & R.* 140; *S. P. Sewall v. Lancaster Bank*, 17 *Serg. & R.* 285. And see *Cunningham v. Alabama Life Ins. &c. Co.* 4 *Ala. N. S.* 652.

221. It applies to debts to become due, as well as to those due, and to those in which the stockholder is surety or indorser as well as those in which he is the principal debtor. *Mo. Supreme Ct.* 1845, *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 *Mo.* 149.

222. It applies to the liability to pay for the amount of stock subscribed, although the installments have not been collected before the time of transfer. *Pa. Supreme Ct.* 1857, *Pittsburgh &c. R. R. Co. v. Clarke*, 29 *Pa. St.* 146; 9 *Am. Railw. Times*, 51.

223. Debts due. A provision in the articles of a banking association that "no shares shall be transferable, unless the shareholder shall previously discharge all debts due by him to the association," includes not only debts which have matured and are already payable, but also liabilities not yet matured. *N. Y. Ct. of Appeals*, 1862, *Leggett v. Bank of Sing Sing*, 24 *N. Y.* 283.

224. The lien which a bank has on stock for all debts actually due and payable to the corporation, attaches to the stock of a depositor who has overdrawn his account by checks, but not for notes or bills on which he may be a party, as maker or endorser, not due at the time a transfer of such stock is demanded. *Md. Ct. of Appeals*, 1859, *Reese v. Bank of Commerce*, 14 *Md.* 271.

225. If the corporation claims more than is due, the stockholder must tender what he admits to be due, to put the bank in the wrong for refusing to transfer. *Circ. Ct. D. C.* 1828, *Peirson v. Bank of Washington*, 8 *Cranch C. Ct.* 363.

226. Debts accruing after demand. Where an assignee demands a transfer of stock in a corporation which holds a lien on the stock for all debts actually due and payable to the corporation, but refuses to pay the debts due the bank by the stockholder, and afterwards makes another demand when other debts have become due, he is not entitled to a transfer without offering to pay all the debts then due. *Md. Ct. of Appeals*, 1859, *Reese v. Bank of Commerce*, 14 *Md.* 271.

227. Surety. If a corporation which is

permitted by its charter to retain, at its option, the dividends, and prohibit the transfer of the stock belonging to stockholders who may be indebted to it, does not actually fix its lien upon the stock of such a stockholder by refusing to permit its transfer, and no requisition is made upon the company by the surety, to refuse to permit its transfer for his protection, the company may allow the transfer to be made, without losing any right against the surety. *Ala. Supreme Ct. 1858, Perrine v. Fireman's Ins. Co. of Mobile, 22 Ala. N. S. 575.*

228. Equitable title of assignee. By the provisions of the Ohio "act to incorporate the State Bank of Ohio, and other banking companies" (48 O. L. 24), a bank holds a lien on the shares of its stockholders for the amount of his indebtedness, which cannot be defeated by a transfer made without the consent of a majority of the directors, nor will such consent authorize a transfer if the debt is overdue and unpaid. *Held*, that although an assignment on the books of the bank may be necessary to pass a legal title to stock, yet an equitable title may be otherwise conveyed; that the bank is bound to respect such equity from the time it receives notice of it; that debts contracted by the assignor to the bank, after the receipt of such notice, are not as against the assignee, liens on the stock; that notice of such assignment to the cashier is notice to the bank; and that, where a person holds a full and equitable title to stock, of which the bank has notice, he is also entitled in equity to the dividends thereafter accruing upon it. *Ohio Supreme Ct. 1853, Conant v. Seneca County Bank, 1 Ohio St. 298; S. P. Nesmith v. Washington County Bank, 6 Pick. 324.*

229. Relation back. Where a banking association had not, before it obtained its charter, a lien on the stock of its stockholders,—*Held*, that the lien given by the charter could not overreach a prior assignment of stock so as to preclude its transfer. *Circ. Ct. D. C. 1819, Neale v. Janney, 2 Cranch C. Ct. 188.*

230. Interposition of court of equity. Where the charter of a bank made its stock transferable only upon the books of the bank, and after satisfaction of any claims actually due and held by it against the stockholders,—*Held*, that a court of equity would not compel the bank to allow a transfer of the stock

of a stockholder who died insolvent, and against whose estate the bank had a claim upon a note, which had not matured at the time of his death, so as to give the United States a priority in the distribution of his assets. An individual asserting such a claim in equity against the bank in virtue of an act of bankruptcy, an execution, or assignment, between the date and protest of the note, would be compelled to do equity before he could enforce his legal right, and there is no reason why the United States should be exempt from this fundamental rule. *U. S. Supreme Ct. 1886, Brent v. Bank of Washington, 10 Pet. 596.*

231. The charter of a bank provided that the stock of each shareholder should at all times be pledged and liable for the payment of any debt (other than an original instrument) due, or owing, from said stockholder to the bank, and might be sold, or so many shares thereof as should be necessary, at public auction, for such debt, on default of payment thereof. *Held*, that such lien being intended solely as a protection to the bank for debts due to it, equity would not compel the bank to enforce it in favor of the sureties on such debts, on the ground that it was intended for the benefit of the sureties; although, upon general principles, it might interpose at the suit of the sureties, to prevent an abuse by the directors of the power conferred upon them by the clause giving the lien. *R. I. Supreme Ct. 1840, Cross v. Phoenix Bank, 1 R. I. 39.*

232. Borrowed stock. Where the articles of a bank forbade stockholders to transfer stock while their notes were unpaid, a stockholder loaned and transferred his stock to a third person to enable the latter to obtain a discount. *Held*, that the bank had a lien as against the owner of the stock, for the borrower's debt. *Circ. Ct. D. C. 1813, Burford v. Crandell, 2 Cranch C. Ct. 86.*

233. No lien against unregistered holder. A bank has no lien for an assignee's debts on stock of which the certificate has been assigned with a power to transfer, but which has not been transferred; and, therefore, if such an assignee sell to a second assignee the bank cannot set up such a lien as a ground for refusing to transfer from the original assignor to the second assignee.* *Ind.*

* The owner of forty shares of bank stock, bequeathed them to his four sons, and during the minority of

Supreme Ct. 1859, *Helm v. Swiggett*, 12 *Ind.* 194. To the contrary, *N. Y. Ct. of Appeals*, 1862, *Leggett v. Bank of Sing Sing*, 24 *N. Y.* 288.

234. Fictitious holder. Stock standing in the name of a fictitious person,—*Held*, liable for the debt of the true owner. *Stebbins v. Phoenix Fire Ins. Co.* 3 *Paige*, 350.

235. Where the owner of stock transferred it among his friends, in order to increase his influence at an election, and one of them held several shares for a long time, permitting the former, however, to receive the dividends and treat the stock as his own property,—*Held*, that the transferee was thereafter bound to inquire of the bank as to the state of the title before purchasing and claiming a beneficial interest in the stock; and in order to sustain his claim that he had recently become a purchaser, in consideration of the payment of pre-existing debts, he should have given notice to the bank of his having become the beneficial owner, and his title could be deemed to have accrued only from that time. *Sabine v. Bank of Woodstock*, 21 *Vt.* 353.

236. A bank may hold the whole of its debtor's stock, under such a lien, till the debt is paid, though the debt be less than the value of the stock; it is not obliged to appropriate part and transfer part. *Pa. Supreme Ct.* 1826, *Sewall v. Lancaster Bank*, 17 *Serg. & R.* 285.

237. Lien on dividends. A lien upon shares gives, as an incident, a lien upon dividends, and a right to receive, and retain them. *Exch.* 1848, *Hague v. Dandeson*, 2 *Exch.* 741.

238. It does not by implication give a lien upon dividends accruing after the death of the shareholder. *Circ. Ct. D. C.* 1824, *Brent v. Bank of Washington*, 2 *Cranch C. Ct.* 517.

239. The lien inures to third persons. The Pennsylvania act of April 16, 1850,—which prohibits the transfer of stock, or the receipt of dividends thereon, by any stockholder, who may at the time be indebted to the bank, though intended mainly for the

security of the bank, operates also incidentally in favor of the endorsers of such debtors. The right of a bank to prevent such transfer or payment becomes absolute as soon as any such debt becomes due and payable, and the legal title to the stock remains in the bank for its own security until payment, and for the benefit of the sureties of a debtor, if there be any, afterwards. *Pa. Supreme Ct.* 1863, *Klopp v. Lebanon Bank*, 46 *Pa. St.* 88.

239 a. The sureties of such indebted stockholder are, in equity entitled to be subrogated to the security thus held by the bank, which equitable right attaches the instant the lien of the bank commences, and is consummated by payment of the debt for which they were surety. *Id.*; *S. P. Kuhns v. Westmoreland Bank*, 2 *Watts*, 186. Compare *Cross v. Phoenix Bank*, 1 *Ang. & A.* 89.

240. Walver of the lien. The act of a bank which claims a lien upon the stock of one whose unpaid acceptance they hold, in taking security from an endorser, does not affect their lien. The bank has a right to take security from one of the parties to a bill or note discounted by it, and also to hold the shares of another party as security for the same. *U. S. Supreme Ct.* 1817, *Union Bank v. Laird*, 2 *Wheat.* 390.

241. It is no objection to the recovery of unpaid installments, from a person to whom stock in a corporation has been transferred with his assent, that the charter of the company declares, that no stockholder indebted to the company shall be permitted to transfer his stock until his debt be paid or secured. This provision is a privilege which the president and directors may waive or assert at their pleasure. *Md. Ct. of Appeals*, 1847, *Hall v. United States Ins. Co.* 5 *Gill*, 484.

242. The charter of a bank provided that its shares of stock should be transferable on the books of the corporation only, according to such rules as should be established by the president and directors; but all debts actually due and payable to the corporation, by a stockholder requesting a transfer were required to be satisfied before such transfer could be made, unless the president and directors should direct to the contrary. *Held*, that this lien on the stock was not waived by the form of a certificate for stock declaring the stockholder entitled to — shares of stock transferable only at the bank, personally or by attorney, on surrender of the cer-

one, the bank, with notice of the will, permitted the transfer of thirty shares, by the consent of all the legatees, to a stranger. *Held*, that under the Pennsylvania statute the bank could not refuse to permit a transfer of the ten remaining shares, on the ground of a debt being due by two of the sons, who were of full age when the transfer of the thirty shares was permitted. *Presbyterian Congregation v. Carlisle Bank*, 5 *Pa. St.* 345.

tificate; and that an assignee of the stockholder took his equitable assignment, subject to the rights of the bank, against the stockholder, under its charter, of which he was bound to take notice. [6 Gill, 50; 2 Wheat. 393; 10 Pet. 616]. *Md. Ct. of Appeals*, 1859, *Reese v. Bank of Commerce*, 14 *Md.* 271.

243. Where A., the owner of shares in a bank, transferred them to B., and the bank thereupon issued and delivered to B. a new certificate for the shares in terms "transferable after the holder pays all his liabilities to said bank,"—*Held*, that the right of the bank, if any such it had, to refuse to allow a transfer until A.'s indebtedness to the bank should be discharged, was thereby waived. *N. H. Supreme Ct.* 1864, *Hill v. Pine River Bank*, 45 *N. H.* 300.

244. The taking of collateral security by the bank from a debtor who was also a stockholder,—*Held*, not to discharge the lien of the bank. *U. S. Circ. Ct. (O.)* 1845, *McLean v. Lafayette Bank*, 3 *McLean*, 587.

245. Consent of directors. Where the charter in effect declares that a stockholder who is indebted to the company shall not transfer his stock without the consent of the board of directors, the proper evidence of their assent is a recorded resolution adopted when the board was in session. When the transfer was made by a director, it further ought to appear that the assent was carried without his vote. In ordinary business transactions between a corporation and strangers, the authority of agents and the existence of contracts, may be implied from acquiescence and other circumstances; but where the act of incorporation grants a power, the mode prescribed by the statute for its exercise, must be strictly pursued. [5 Barb. 649; 2 Cranch, 127.] *Pa. Supreme Ct.* 1857, *Pittsburgh & C. R. R. Co. v. Clarke*, 29 *Pa. St.* 146; 9 *Am. Railw. Times*, 51.

246. Sale. Under the statute of Pennsylvania the purchaser of bank stock, taken in execution and sold, takes it subject to the lien of any debt due by the holder of the stock to the bank; and a subsequent sale of the stock for the debt creating such lien divests the title of the first purchaser.* *Pa.*

*A note drawn by C. to the order of A. and B., and jointly indorsed by them, having been discounted at a bank where A. held stock, was protested for non-payment, and judgment confessed by A. and C. to the bank for the amount; after-

Supreme Ct. 1861, *West Branch Bank v. Armstrong*, 40 *Pa. St.* 278.

247. When a statute prescribes the terms on which shares in the stock of an incorporated company may be sold for the payment of assessments, and the shareholder be held to pay the balance if the shares are not sold for a sum sufficient to pay the assessment, those terms are conditions precedent, and, unless they are strictly complied with, the sale is illegal, and the shareholder not chargeable. *Mass. Supreme Ct.* 1846, *Portland & C. R. R. Co. v. Graham*, 11 *Metc.* 1.

248. The lien of a corporation upon the stock of a debtor to it is good against a purchaser of the stock at a sheriff's sale, with notice of the lien, as to all liability of the stockholder to the corporation prior in time to the lien acquired by the purchaser under the judgment; and such a purchaser is not entitled to a transfer of the stock so purchased, without first discharging the lien created by the by-law. *Ga. Supreme Ct.* 1846, *Tuttle v. Walton*, 1 *Ga.* 43.

VIII. CONTRACTS FOR SALE OF STOCK.

249. Distinction between a sale, an executory contract and a pledge; and that an executory contract is barred by lapse of time. See *Moss' Appeal*, 44 *Pa. St.* 23.

250. Writing necessary. A contract for the sale of shares in a manufacturing corporation, is a contract for the sale of goods, wares and merchandise, within the Statute of Frauds. *Mass. Supreme Ct.* 1838, *Tisdale v. Harris*, 20 *Pick.* 9. To the contrary are the following English cases: *Humble v. Mitchell*, 11 *Ad. & E.* 205; 2 *Eng. Railw. Cas.*

wards D. obtained a judgment against A., upon which he issued execution, levied upon and bought the stock at the sale. The bank then obtained judgment against A. and B., on their joint indorsements, and issued executions on both of their judgments, upon which A.'s stock was again levied on, when B., one of the indorsers, paid the debt to the bank, took an assignment of the judgments to his use, and on the execution against A. and C., purchased A.'s stock. The bank refusing to transfer the stock to B., he brought suit, when D. interpleaded, claiming it under the sheriff's sale to him. *Held*, that the payment of the debt by B., with the assignments of the judgments, did not extinguish the lien of the bank on the stock which attached upon the protest of the note; that, by virtue of the assignments, B. acquired all the rights of the bank, and became entitled to all its remedies; and that under the second sale he took a good title to the stock, notwithstanding the previous sale to D. *Pa. Supreme Ct.* 1861, *West Branch Bank v. Armstrong*, 40 *Pa. St.* 278.

70; *Duncuft v. Albrecht*, 12 *Sim.* 189; *Hargreaves v. Parsons*, 18 *Mees. & W.* 561; *Exp. Lancaster Canal Co.* 1 *Deac. & C.* 800.

251. An agreement by a corporation to sell shares of its own stock for less than par, is not void, where it does not appear how the company acquired the stock. *N. Y. Supreme Ct.* 1867, *Otter v. Brevoort Petroleum Co.* 50 *Barb.* 247.

252. Consideration. Past services, rendered by the plaintiff in promoting a railway, and anticipated future services, which, under the contract, he was under no obligation to render,—*Held*, not a good consideration for an agreement to assign to him, shares in the corporation when created. *C. P.* 1860, *Gorgier v. Morris*, 7 *C. B. N. S.* 588. Consult also OFFICERS and PRESIDENT.

253. Certain lands were conveyed to trustees, to be held for the benefit of an association. Articles of agreement were entered into by the trustees and stockholders, and the property of the company was divided into shares, and made transferable in a mode pointed out. In an action of assumpsit on a memorandum executed by the defendant, acknowledging that the amount of a specified number of shares in the association was due to the plaintiff,—*Held*, that the transfer of shares was a good consideration for the written promise to pay money therefor, although the project of the association subsequently failed, and the shares purchased proved to be worthless. *Ms. Supreme Ct.* 1841, *Gore v. Mason*, 18 *Me.* 84.

254. W. gave his promissory note to a manufacturing corporation, in consideration of the written agreement of R., who signed as agent of the corporation, but without authority, to procure the obligation of the treasurer, for certificates of two shares of their capital stock. R. obtained the treasurer's obligation to deliver such certificates on payment of the note, and requested W. to call at his house and receive it. *Held*, that there was a sufficient consideration for the note, the promises being mutual and independent; that no tender of the treasurer's obligation was necessary, the possession of R. being the possession of W.; and that the condition of payment of the note, therein inserted, was proper, and not inconsistent with R's engagement. *Ms. Supreme Ct.* 1831, *Saco Manuf. Co. v. Whitney*, 7 *Me.* (7 *Greenl.*) 256.

255. Calls. Under a statute prohibiting a transfer of shares on which any calls are unpaid, it is no impediment to a seller's readiness to convey shares, that he has not paid an intervening call, which was ultimately to be paid by the purchaser, for the seller may pay the call at the moment of executing the transfer. *Exch.* 1847, *Shaw v. Rowley*, 5 *Eng. Railw. Cas.* 47.

256. Fraud. A. induced B. to purchase from him some stock in a corporation, by representing that he was about to sell to the corporation certain land, at the price of \$16,000. He sold the land, in fact, for \$85,000, and received that price from the corporation. *Held*, that this was a fraud upon B., which entitled him to rescind his purchase. *N. Y. Superior Ct.* 1859, *Seaman v. Low*, 4 *Bosw.* 387.

257. A transferee of stock is not chargeable with negligence, though the language of the stock certificate is such as to put him on inquiry, if, upon making inquiry of the assignor who knows the truth, he is deceived by the latter. *N. Y. Ct. of Appeals*, 1866, *Johnson v. Hathorn*, 2 *Keyes*, 477.

258. Persons dealing in the market for the debentures of a joint stock company, are bound to use reasonable precaution in seeing to the authenticity of the documents they are purchasing. *Chancery*, 1858, *Official Managers of the Athenæum Ass. Soc. v. Pooley*, 31 *Law Times*, 70.

259. Execution. A contract for the sale of stock becomes executed, by a delivery to the purchaser, of certificates of the shares, with a power of attorney to transfer them on the books of the corporation; such delivery is analogous to the delivery of chattels, and renders the transfer complete. *Pa. Supreme Ct.* 1811, *United States v. Vaughan*, 3 *Binn.* 394. See also *Howe v. Starkweather*, 17 *Mass.* 240; *Noyes v. Spaulding*, 29 *Vt.* 420. But compare cases *supra*, 128-169.

260. Where the charter of a corporation or the deed of settlement required the assent of the directors to complete the title of a purchaser,—*Held*, that it was the duty of the seller to procure this assent.* *Q. B.* 1845,

* Where a person was entitled to shares, on his performing certain acts for the company, and they acted as if full performance had been made, and such person conveyed certain of his shares to a third person,—*Held*, that it was not competent for the latter to set up the condition to avoid his own contract of purchase. *Bradley v. Chase*, 22 *Mc.* 511.

Wilkinson v. Lloyd, 7 Q. B. 27; 14 Law J. N. S. Q. B. 165; 9 Jur. 328; Bosanquet v. Shortridge, 4 Exch. 699.

261. Plaintiffs covenanted to subscribe for stock in a certain corporation, pay ten per cent. on it, and then assign and transfer it to defendant, "by a proper instrument of conveyance." They made the subscription and paid the ten per cent. The plaintiffs having applied to the directors for leave to transfer this stock to the defendant, which which was refused, because the by-laws prohibited any transfer, unless thirty per cent. was paid, tendered to the defendant an instrument, whereby they assigned and transferred to him the stock, and constituted him their attorney to transfer it on their books. *Held*, that whether the instrument of transfer would vest the legal title in the defendant or not, it was a sufficient performance of the covenant. [11 Wend. 627; 22 Id. 348; 2 Cow. 770; 8 Id. 398; 8 Pick. 90; Ang. & A. on Corp. 445.] *N. Y. Ct. of Appeals*, 1856, Orr v. Bigelow, 14 N. Y. (4 Kern.) 556.

262. An agreement to transfer stock to a certain amount, is not satisfied by a transfer of half paid stock to that nominal amount, when the certificate for the same is accepted on the fraudulently induced supposition that it represents full paid stock. *N. Y. Ct. of Appeals*, 1866, Johnson v. Hathorn, 2 Keyes, 477.

263. Tender. On a sale of stock in a corporation, a tender of the certificates of stock to the purchaser, with a power of attorney to transfer the same, and demand and refusal of payment, without an actual transfer of the stock into the name of the purchaser, are enough to entitle the seller to recover, where the purchaser, at the time of the tender, makes no objection for want of a transfer, but rejects the stock altogether, and refuses payment on any terms. *N. Y. Supreme Ct.* 1857, Munn v. Barnum, 24 Barb. 283.

264. Intermediate sale. An agreement to sell a certain number of shares of stock at a future day, the seller having that number at the time of making the agreement, is not rescinded by his selling them to another before the day, if the contract is not for the sale of those particular shares. If, in case of a demand, he procures the requisite stock to transfer, it is enough. [1 Ld. Raym. 440.] *N. Y. Supreme Ct.* 1827, Frost v. Clarkson, 7 Cow. 25.

265. Abandonment. Where A. sold B. shares in a projected joint stock company, and the undertaking was abandoned before any thing was done pursuant to the project, —*Held*, that B. could recover from A. the money paid for the shares. *C. P.* 1826, Kempson v. Saunders, 2 Car. & P. 366; 4 Bing. 5; 13 Moore, 44.

266. Rules of stock exchange. In an action for the non-acceptance of railway shares, which were sold at L. through brokers, and were to be delivered in a reasonable time, a rule of the L. stock exchange, acted upon by the brokers there, and seen by the defendant, "that the seller of shares was in all cases entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he was acquainted with the name of his transferee," —*Held*, admissible on an issue whether the plaintiff within a reasonable time was ready and willing and offered to transfer the shares; although it did not appear that either of the parties, or their brokers, was a member of the L. stock exchange.* *Exch.* 1841, Stewart v. Canty, 8 Mees. & W. 160; 2 Eng. Railw. Cas. 616.

267. A power of attorney to transfer stock, is valid, though executed in blank, if the transaction is founded on a valuable consideration. A delivery, by an owner of stock in an association, of such a power, with the certificates, is evidence of an implied authority to fill up the power with the name of the attorney to make a transfer. *Pa. Supreme Ct.* 1865, German Building &c. Association v. Sendmeyer, 50 Pa. St. 67. Compare cases *supra*, 125-128.

* For the rules applicable to the purchase and sale of stocks through brokers and auctioneers, — see Bowby v. Bell, 10 Jur. 669; Mortimer v. McCallan, 6 Mees. & W. 59; 4 Jur. 173; Fletcher v. Marshall, 10 Jur. 523; Franklin v. Lamond, 4 C. B. 687; Pollock v. Stables, 19 Jur. 1043; 17 Law J. N. S. 352; 5 Eng. Railw. Cas. 363; Ingham v. Cockerill, 8 Hurl. & Nor. 979; Mitchell v. Newhall, 15 Mees. & W. 306; 4 Eng. Railw. Cas. 300; 15 Law J. N. S. 392; 10 Jur. 318; Lamert v. Heath, 15 Mees. & W. 496; 4 Eng. Railw. Cas. 362.

As to the construction and effect of the stock jobbing acts, prohibiting contracts for future sale of stocks of which the seller has not possession, — see Hewitt v. Price, 5 Scott N. R. 229; 4 Mann. & G. 355; 8 Eng. Railw. Cas. 176; Grimwood v. Blane, 20 Eng. L. & Eq. 290; 11 C. B. 568; Hibblewhite v. McMorine, 5 Mees. & W. 462; Hannuic v. Goldner, 11 Id. 849; Mortimer v. McCallan, 7 Id. 30; 4 Jur. 638; Barrett v. Mead, 10 Allen, 367; James v. Woodruff, 10 Paige, 541; Thompson v. Alger, 12 Metc. 438; Washburn v. Franklin, 35 Barb. 599; 13 Abb. Pr. 140; Noyes v. Spaulding, 27 Vt. 429.

IX. MEASURE OF DAMAGES.

268. Agreement to take stock. On the breach of a contract by which defendants agreed to take certain stock in a corporation, which plaintiffs should for that purpose subscribe for, and pay an installment upon, the damages are not limited to the difference between the price agreed and the actual value. Since plaintiffs act not as vendors, but rather as agents of defendants, under such a contract, defendants must respond in damages which shall be a complete indemnity to plaintiffs on their subscription. *N. Y. Ct. of Appeals*, 1856, *Orr v. Bigelow*, 14 *N. Y. (4 Kern.)* 556.

269. Where contractors of a railroad agreed to receive in payment of their demands one-fourth of the amount in stock of the company, and the company refused to deliver the stock on request,—*Held*, that the damages, which the contractors sustained by the non-delivery, were the market value of the stock at the time it should have been delivered, and that the company were only liable for such amount. *Ohio Supreme Ct.* 1855, *Cleveland & Pittsburgh R. R. Co. v. Kelley*, 5 *Ohio St.* 180.

270. — to deliver stock not fully paid up. The measure of damages upon the breach of a contract by a corporation to deliver shares of its stock to a subscriber, which are subject to unpaid calls or assessments made by the corporation, is, as in the case of a sale of goods not paid for, the difference between the market value at the time of the demand, and the amount of the installments unpaid, and interest thereon. Plaintiff is also entitled to interest on such difference from the day of the demand to the time of the verdict. [3 *Hill*, 593; 3 *Mass.* 364; 12 *N. Y.* 41]. *N. Y. Superior Ct.* 1861, *Van Allen v. Illinois Central R. R. Co.* 7 *Bow.* 515. Compare *Van Dieman's Land Co. v. Cockerell*, 1 *C. B. N. S.* 782.

271. Breach of contract to purchase. The damages which a party is entitled to recover, upon a breach of a contract for the purchase of shares of stock, is the difference between the contract price, and the market price at the time for delivery.* *C. P.* 1841,

Barned v. Hamilton, 2 *Eng. Railw. Cas.* 624.

272. In an action for the non-delivery of shares on a given day, pursuant to contract, the measure of damages is the difference between the contract price, and the market price on the day when the contract was broken.* *Exch.* 1846, *Shaw v. Holland*, 15 *Moss. & W.* 136.

273. In an action for neglect in delivering stock according to an order specifying no time of delivery, the measure of damages is the value of the stock when demanded. *Mass. Supreme Ct.* 1857, *Eastern R. R. Co. v. Benedict*, 10 *Gray*, 212.

274. Mistaken sale. In an action on a contract for the sale of specific stock which, without the knowledge of the vendor, had already been sold to another by his agent, the plaintiff can only recover nominal damages. *Pa. Supreme Ct.* 1865, *Wilson v. Whitaker*, 49 *Pa. St.* 114.

275. Deficiency. Where shares are not accepted, and are resold by the vendor within a reasonable time, the measure of damages is the difference between their price at the time of the contract and at the time of the resale. *Exch.* 1841, *Stewart v. Canty*, 8 *Moss. & W.* 160; 2 *Eng. Railw. Cas.* 616.

276. Conversion of stock. The measure of damages for not returning borrowed stocks at the time agreed, is the price of the stock in the market at the time when it should have been returned.† *A. V. Chan. Ct.* 1845, *Day v. Perkins*, 2 *Sandf. Ch.* 359.

277. Stock brokers, who receive a number of shares of bank stock as collateral security for the payment of a note held by them, although they do not keep them distinct, but blend them with other shares of the same stock held by them, yet if they have, at all times subject to their absolute control, a sufficient number of such shares to replace those assigned, upon the payment of the note, are not liable to account for the highest price of such shares while the note was running, but may treat any like number of such shares, so held by them, as the shares transferred to them.

Held, that the measure of damages was the contract price. *Mass. Supreme Ct.* 1847, *Thompson v. Alger*, 12 *Metc.* 428.

* As to the rule applied in a peculiar case where the breach was in respect to the quality of the stock,—see *Dyer v. Rich*, 1 *Metc.* 192.

† For the English rule of damages on a bond to replace stock,—compare *Harrison v. Harrison*, 1 *Car. & P.* 418; *Shepherd v. Johnson*, 2 *East*, 211; *McArthur v. Seaforth*, 2 *Town.* 257; *Downs v. Back*, 1 *Stark.* 818.

* A. made a contract with T. for the purchase of railroad shares, and afterwards paid T. a part of the price. T. subsequently caused the shares to be transferred to A. but he refused to take them, and T. brought an action against him.

N. Y. Chancery, 1820, *Nourse v. Prime*, 4 *Johns. Ch.* 490; 1823, *Same v. Same*, 7 *Id.* 69.

278. In detinue for the detention of certain railway scrip re-delivered to the plaintiff after action brought and before verdict,—*Held*, that the jury might, as a measure of damages, take into consideration the difference between the value of the scrip shares at the time of the demand and refusal, and their value at the time of such re-delivery, and that in such case the jury might find the facts specially and confine themselves to an assessment of damages for the detention. *Exch. Cham.* 1847, *Williams v. Archer*, 5 *C. B.* 318; 5 *Eng. Railw. Cas.* 289; 17 *Law J. N. S. C. P.* 82.

279. Refusal to permit transfer. In an action against a corporation to recover damages for a refusal to permit a transfer of stock, the measure of damages is the actual value of the stock at the time of the refusal to transfer. *Pa. Supreme Ct.* 1865, *German Building &c. Association v. Sendmeyer*, 50 *Pa. St.* 67.

The measure of damages is such actual value, with interest. *Mass. Supreme Ct.* 1829, *Sargent v. Franklin Ins. Co.* 8 *Pick.* 90; 1880, *Hussey v. Manuf. & Mech. Bank*, 10 *Id.* 415.

280. In an action against a building society, for unjustly refusing to permit a transfer of certain shares of stock held by the plaintiff, the latter is entitled to recover the amount paid on the stock, as dues, with interest thereon from the time of the several payments. *Pa. Supreme Ct.* 1860, *North American Building Association v. Sutton*, 85 *Pa. St.* 463.

281. A corporation may be liable to a transferee of stock for his damages sustained through a fall of his stock during their unreasonable delay in perfecting the transfer. *Sutton v. Bank of England*, 1 *Carr. & P.* 193; 1 *Ryland & M.* 52.

282. Refusal to take subscription. A stockholder in a bank that is authorized to commence business with one amount of stock, and to increase the amount afterwards, is entitled to subscribe for and hold the additional stock, in proportion to his original shares; and the bank is liable to him, if its officers, or the corporation, refuse to allow him thus to subscribe therefor; and the measure of damages will be the excess of the market value above the par value of the number of shares to which he was entitled, with

interest on such excess. *Mass. Supreme Ct.* 1807, *Gray v. Portland Bank*, 8 *Mass.* 364.

283. Specific delivery. A court of law cannot render a judgment that the defendant shall deliver to the plaintiff so many shares of stock. Upon a contract to deliver stock in payment of a debt or otherwise, a court can only award damages for the failure to deliver it, the measure of which is the value of the stock at the time it ought to have been delivered. *Va. Ct. of Appeals*, 1867, *Orange & Alexandria R. R. Co. v. Fulvey*, 17 *Gratt.* 366.

X. PLEDGES AND MORTGAGES.

284. How made. Shares of stock in an incorporated company may be pledged by a written transfer thereof; and the transaction may be a pledge, instead of a mortgage, notwithstanding the legal title passes to the pledgee.* *N. Y. Ct. of Appeals*, 1849, *Wilson v. Little*, 2 *N. Y. (2 Comst.)* 443; *S. P. A. V. Chan. Ct.* 1844, *Vaupell v. Woodward*, 2 *Sandf. Ch.* 143. Compare *Huntington v. Mather*, 2 *Barb.* 538; 6 *N. Y. Leg. Obs.* 206; *Hasbrouck v. Vandervoort*, 4 *Sandf.* 74; *Ede v. Johnson*, 15 *Cal.* 53.

285. Shares of stock cannot be pledged,

* A. and B. were directors in a company, in which no shareholder could act as a director without holding ten shares. Being intimate friends, the latter advanced to the former several sums. At the time of the last loan, A. delivered to B. an order upon the secretary of the company to transfer A.'s ten shares into B.'s name. B. did not then make use of the order, and A. continued to act as director until his death several years after, insolvent, when a suit was instituted for the administration of his assets. B. then served the order of transfer on the secretary, and presented his petition in the suit, claiming an equitable lien on A.'s ten shares for the amount of his advances, with interest. *Held*, that these circumstances were not sufficient to show an intention to create a lien on the shares, and consequently B.'s claim was rejected. *Exch.* 1887, *Cumming v. Prescott*, 9 *Yos. & C. Exch.* 488.

A subscriber for 90 bank shares, of \$100 each, paid \$2,750 towards an installment of 80 per cent. and drew a draft in favor of the bank for the balance, and transferred to the bank all his right, &c., in his shares, (excepting and reserving the sum he had paid in money,) as collateral security for payment of the draft. The draft was not paid, nor did the bank pass to the subscriber's credit any stock, nor give him any certificate of shares. *Held*, that the subscriber was once an owner of the shares, and that the effect of the reservation in his conveyance to the bank was, that an amount equal to 84 shares, of the par value of \$89 a share, remained his property, and was liable to be sold on an execution against him. *Mass. Supreme Ct.* 1880, *Hussey v. Manufacturers' & Mechanics' Bank*, 10 *Pick.* 415.

The application, by the bank, of the \$2,750 to an account of the subscriber which was independent of the shares,—*Held*, unauthorized, and not to affect his title to the shares. *Id.*

unless they are evidenced by certificates, which must be transferred and delivered to the pledgee. *La. Supreme Ct.* 1867, *Lallande v. Ingram*, 19 *La. Ann.* 364.

286. An agreement whereby the maker of notes delivers certificates of stock as collateral security for the payment of the notes, stipulating that if the notes are not paid at maturity the securities shall be under the control of the holder, who is authorized to dispose of them and to apply the proceeds to the credit of the maker,—is a pledge of the stocks and not a mortgage. *N. Y. Com. Pl. Sp. T.* 1857, *Lewis v. Graham*, 4 *Abb. Pr.* 106.

287. A transfer of his shares by a member of an association, as collateral and additional security to a bond and mortgage executed by him to the society as security for a loan, is in the nature of a pledge rather than of a chattel mortgage, the shares remain the property of the shareholder for every purpose except that of defeating the lien of the association, the holder exercising every other control over them. The principle is applied wherever a stockholder pledges his stock to the corporation of which he is a member. He retains his rights of membership. *N. J. Chancery*, 1862, *Mechanics' Building & Loan Association v. Conover*, 14 *N. J. Eq.* (1 *McC.*) 219.

288. Pledge to officer. Where an indorser of promissory notes held by a bank, as security for such liability, transferred twenty shares of its stock, on the books of the bank, to the cashier, and it appeared that assignments and transfers of the stock to the bank, or in pledge to it, or as security for debts and liabilities to it, were invariably, by the usage of the bank, made in the same manner as the transfer in question,—*Held*, that such transfer vested the legal title to the shares so transferred, not in the cashier in his own right, but in the bank. *Conn. Supreme Ct.* 1845, *Stamford Bank v. Ferris*, 17 *Conn.* 259.

289. The liability of a person as the indorser of a promissory note, to the holder, is a sufficient consideration to support a transfer of bank shares, by the former, as security to the latter for such liability. *Id.*

290. Sale. A sale of pledged stock cannot be made at the board of brokers in New York city unless there was a stipulation to that effect, for the reason that by the regulations of the board the sales are not public.

N. Y. Superior Ct. *Wood v. Hamilton*, cited in *Castello v. City Bank*, (1842) 1 *N. Y. Leg. Obs.* 25; *Supreme Ct.* 1851, *Rankin v. McCullough*, 12 *Barb.* 103. Compare *Dykers v. Allen*, 7 *Hill*, 497; *Brown v. Ward*, 3 *Duer*, 660.

291. Where the stock or bonds of a corporation are pledged, they may, upon default, be sold for the debt. But such sale must be at public auction, and can only be made upon demand of payment, and notice to the pledgor of the time and place of sale.* *N. Y. Superior Ct. Sp. T.* 1854, *Brown v. Ward*, 3 *Duer*, 660.

292. A member of a saving fund society who has assigned his shares of stock in the association to a third party as collateral security for a debt, cannot, when sued upon his mortgage to the association, claim a credit for the value of such shares of stock. *Pa. Supreme Ct.* 1860, *Schober v. Accommodation & Co. Association*, 35 *Pa. St.* 223.

293. Purchases. Where the owner of stock delivers the certificate to his pledgee, with a power to transfer it, the fact that his name is in the certificate is not notice of his rights, as against third persons who take it for value from the pledgee. *N. Y. Supreme Ct.* 1862, *Felt v. Heye*, 23 *How. Pr.* 359.

294. But where a person purchased stock of a corporation at a sheriff's sale, knowing that the certificates of such stock had been previously hypothecated,—*Held*, that he was chargeable with notice of the fact, and took the stock subject to the claim of the pledgee. *Cal. Supreme Ct.* 1856, *Weston v. Bear River & Co. Mining Co.* 6 *Cal.* 425.

295. Stock was hypothecated by the owner, and afterwards assigned to trustees for the benefit of creditors, neither the

* Defendant deposited stock with a banking association in the city of New York, as collateral security to his note, giving the association, by the terms of the note, power to sell in case of non-payment of the note, without stating any restriction as to manner of sale. *Held*, that a sale at the board of brokers, on a two days' notice to defendant, he not objecting, was binding upon him. *N. Y. Supreme Ct.* 1842, *Willoughby v. Comstock*, 3 *Hill*, 389.

The pledgee of stock, under a general hypothecation, without any specification of time of redemption, or power or mode of selling, after having repeatedly called on the pledgor to redeem, and apprised him of intention to sell, and having offered the stock without success at the board of brokers, sold it at private sale without notice to the pledgor of the time and place. *Held*, that the sale was unauthorized, and the fact that the pledgor was avowedly unable to redeem did not affect his right. *N. Y. Supreme Ct.* 1842, *Willoughby v. Comstock*, 3 *Hill*, 389; *A. V. Chan. Ct.* 1842, *Castello v. City Bank*, 1 *N. Y. Leg. Obs.* 25.

pledgee nor the assignee taking a transfer upon the books of the company, or causing themselves to be registered as stockholders. *Held*, that the title still remained in the original holder; and that he could not sue his fellow-stockholders to enforce a personal liability for a debt claimed to be due him from the corporation. *N. Y. Supreme Ct. 1864, Richardson v. Abendroth, 43 Barb. 162.*

296. *Redeeming.* That a bill in equity may be maintained to redeem shares in the capital stock of a corporation transferred by an instrument absolute in its terms, upon parol proof that the transfer was in reality made only as collateral security for a debt. *Mass. Supreme Ct. 1865, Newton v. Fay, 10 Allen, 505.*

297. *Foreclosure.* Where the articles of a mining association empowered any partner to sell or dispose of his shares, but gave a right of pre-emption to the other partners, the court on a bill filed by the mortgagee of certain shares, made the usual foreclosure decree against one of the partners, but in the event of his being absolutely foreclosed gave leave to any of the other partners to redeem the mortgaged shares on payment of the mortgage debt. *Rolls Ct. 1866, Redmayne v. Forster, 2 Law Rep. Eq. Cas. 467; 35 Law J. N. S. Ch. 847.*

298. Where a corporation agreed to pay a creditor in shares of stock or in the bonds of the company, at his election, the company to retain the same as security for certain liabilities on his account, and gave him a certificate of such stock with an agreement indorsed, to exchange it for bonds when issued, if he desired, and the certificate was then returned to them, as their indemnity; and the treasurer entered the shares in the books of the company as his property, and they were in consequence sold upon attachment against him. *Held*, that the company were bound, notwithstanding, to issue the bonds if demanded. 1. They are not exonerated by the act of the treasurer in entering the shares as the property of the pledgor instead of as that of the company the pledgees, as was his duty to have done. 2. Without reference to the pledge, the shares, by the special agreement, ceased to exist in the creditor as shares, and he became only the holder of a special contract which was not liable to attachment. *N. H. Superior Ct. 1856, Jones v. Portsmouth &c. R. R. Co. 32 N. H. 544.*

STOCKHOLDERS.

[This title embraces matters strictly pertaining to membership in a corporation having a stock capital. Rules common to membership in all corporations are under MEMBERS, and titles connected with that; while those which apply to particular corporations are under their titles. The SUBSCRIPTION, which constitutes one a stockholder, and the title to stock, as well as the INDIVIDUAL LIABILITY of the holder, to creditors, &c., are more fully discussed under those titles.]

I. CAPACITY AND LIABILITIES.

II. ACTIONS BY AND AGAINST.

I. CAPACITIES AND LIABILITIES.

1. *Who are stockholders.* One who subscribes for stock is a stockholder, within a provision of the charter making stockholders individually liable for the debts, though he has paid nothing on his subscription, and received no certificate of stock. As long as the relations subsisting between subscribers and the corporation are such that the corporation can compel them to pay for their stock, the policy of the act requires that they should be considered stockholders. *N. Y. Supreme Ct. 1835, Spear v. Crawford, 14 Wend. 20.*

Such an one, too, is entitled to vote at elections. *N. J. Supreme Ct. 1851, Downing v. Potts, 3 Zab. 66.*

2. One who has merely given a premium note to a mutual insurance company, is not a stockholder within the N. Y. 2 Rev. Stat. 464, § 40; nor does the fact that the trustees have declared a dividend, out of which he may be entitled to a compensation upon his premium note, render him a creditor within that section. *N. Y. V. Chan. Ct. 1847, Hill v. Nautilus Ins. Co. 4 Sandf. Ch. 577.*

3. One who never accepts, but refuses to accept stock in a corporation, is not a stockholder, even though the secretary enters his name in the books as such. The books, though presumptive evidence, may be impeached. *Cal. Supreme Ct. 1867, Mudgett v. Horrell, 33 Cal. 25.*

4. A stockholder's connection with the corporation, dissolved by forfeiture of stock. *Macauley v. Robinson, 18 La. Ann. 619.*

5. When a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it takes the character

which belongs to its associates, and to the business which is to be transacted. As a member of a corporation,—*a. g.* a State bank—a government never exercises its sovereignty. It acts merely as a corporation, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. *U. S. Supreme Ct.* 1824, *Bank of United States v. Planters' Bank*, 9 *Wheat.* 904; 1837, *Briscoe v. Commonwealth of Kentucky*, 11 *Pet.* 257; 1854, *Louisville &c. R. R. Co. v. Letson*, 2 *How.* 497; 1851, *Pennsylvania v. Wheeling &c. Bridge Co.* 13 *How.* 518, 560.

6. The fact that a State is the sole owner of the stock of a banking corporation, does not affect the rights of creditors to be paid out of the bank's property; and to follow the fund in equity for this purpose. [9 *Wheat.* 904; 8 *Pet.* 481; 11 *Id.* 824; 13 *How.* 12]. *U. S. Supreme Ct.* 1853, *Curran v. Arkansas*, 15 *How.* 804.

7. Although a State cannot be sued, yet, if it becomes interested as a stockholder in a corporation, such interest will not protect the corporation against a suit and all its incidents. *Ohio Supreme Ct.* 1841, *Seymour v. Milford & Chillicothe Turnp. Co.* 10 *Ohio*, 476.

8. A debt due to a bank, whose stock is wholly owned by the State, is not a debt due to the State in such a sense as to give it priority of lien over other judgments in the distribution of a decedent's estate. *Ga. Supreme Ct.* 1852, *Central Bank of Georgia v. Little*, 11 *Ga.* 346. Compare *Robinson v. Bank of Darien*, 18 *Id.* 65.

9. Hence, such a debt is not subject to attachment in the hands of the disbursing officers of the State, under a statute requiring such officers to retain moneys due to persons indebted to the State, until such debts are liquidated, as from the salary of a public officer. *Tenn. Supreme Ct.* 1855, *Bank of Tennessee v. Debrell*, 8 *Sneed*, 879.

10. Reducing stock. Where the capital stock of a plank-road company has been reduced, by forfeitures of stock made by the company, for the non-payment of calls, the signature or consent of stockholders, holding or representing two-thirds of the capital as thus reduced, are sufficient as a compliance with the requisition of the statute, which authorizes the abandonment of portions of the road on the consent of two-thirds

of the capital. *N. Y. Supreme Ct. Sp. T.* 1857, *People v. Fishkill & Beekman Plank-road Co.* 27 *Barb.* 445.

11. The proprietor of shares in a mining company, for convenience of having the deed signed in order to complete the title to his shares, had them entered in the name of his son, who signed the deed accordingly. *Held*, that the legal interest was not in him, but in the son, as against the assignees in bankruptcy of the former. *K. B.* 1880, *Dawson v. Rishworth*, 1 *Barn. & Ad.* 574.

12. Rule of decision. In a suit arising under a charter of a foreign corporation, the decisions of the courts of the State in which such corporation was created, are the best evidence of the rights and duties of stockholders under it. *Pa. Supreme Ct.* 1867, *Merimac Mining Co. v. Levy*, 54 *Pa. St.* 227.

13. Right to purchase at sheriff's sale. A stockholder has a perfect right to become a purchaser of the corporate property at sheriff's sale, for his own benefit; and in the absence of fraud, he is not accountable to the other stockholders, even where the property is bought below its value. Stockholders are not tenants in common nor partners. *N. Y. Chancery*, 1844, *Mickles v. Rochester City Bank*, 11 *Paige*, 118.

14. — to convey to corporation. A stockholder in a bank may sell or convey property, by mortgage, to the bank, in payment of a debt he owes the bank. *Ala. Supreme Ct.* 1848, *Governor v. Baker*, 14 *Ala. N. S.* 652.

15. Rights as against majority. It is a matter of contract that the corporation shall administer the funds and exercise the functions according to the provisions, and in accomplishment of the purposes prescribed by the charter. The stockholder has distinct individual rights as against the corporation, growing out of that relation, which he cannot be compelled to yield or forego without his assent. In this respect he is not subject to the will or vote of the majority. It is only as to matters within the prescribed limits of corporate power and capacity that he, as a stockholder, becomes, on common principles, subject to the vote of the majority. Standing upon those rights and in the exercise thereof, he may, at his pleasure, and effectually, assent to or dissent from measures adopted by corporate vote in the usual mode. *Vt. Supreme Ct.* 1861, *Vermont & Canada*

R. R. Co. v. Vermont Central R. R. Co. 84 *Vt.* 1, 50.

16. But this privilege is personal to himself alone (unless by privity of contract with the stockholder, another person obtains it). It does not extend to an ordinary holder of a bond issued by the corporation, whose interest arises upon a contract directly with the corporation, evidenced by the bond and such mortgage as may have been given to secure it. *Id.*

17. Corporate powers. When the statute declares that the powers of the corporation shall be exercised by a board of the trustees, the stockholders have no power to authorize a sale of the corporate property. *Cal. Supreme Ct.* 1867, *Gashwiler v. Willis*, 83 *Cal.* 11. See also, POWERS.

18. Creditors. Stockholders in an insolvent bank who have paid the amount for which they are individually liable, while other stockholders have failed to do so, do not thereby become entitled to share with creditors of the bank in a *pro rata* division of assets, until after all the creditors have been paid. *N. Y. Ct. of Appeals*, 1865, *Hollister v. Hollister Bank*, 2 *Keyes*, 245.

19. Where a corporation is dissolved by the act of the legislature allowing all the property of the company to be sold to a new company, a stockholder cannot be compelled to take payment for the shares in the old company in shares of the new; nor have a majority of the members a right to transfer all the corporate property to the other corporation and take payment in the shares of the new, thus divesting the interests of the dissenting stockholder, without first giving him security for his interest. *Pa. Supreme Ct.* 1858, *Lauman v. Lebanon Valley R. R. Co.* 30 *Pa. St.* 42.

20. Stockholder a competent witness. In a suit against a business corporation, the stockholders are competent witnesses for the corporation; and their interest in the event of the suit merely affects their credibility and not their competency. *Ind. Supreme Ct.* 1854, *Newcastle & Richmond R. R. Co. v. Brumback*, 5 *Ind.* 548; 1855, *New Albany & Salem R. R. Co. v. Gillespy*, 7 *Id.* 245; *Unthank v. Henry County Turnp. Co.* 6 *Id.* 125; *Mo. Supreme Ct.* 1859, *Bredow v. Mutual Savings Institution*, 28 *Mo.* 181.

21. Where the members of a corporation are made personally liable for the corporate

debts in certain events, the liability is too uncertain and contingent to render a member, who has assigned his stock, incompetent as a witness for the corporation, unless it is shown that all the facts exist which the statute requires to render his liability fixed and certain. *N. H. Superior Ct.* 1855, *Manchester Bank v. White*, 10 *Fost.* 456. To similar effect, 1856, *White Mountains Railroad v. Eastman*, 84 *N. H.* 124; *Pa. Supreme Ct.* 1855, *Meighen v. The Bank*, 25 *Pa. St.* 288.

22. On the trial of an indictment against the defendant for destroying a vessel at sea, with intent to injure an insurance company, who had underwritten thereon, the president of the company, although a stockholder, was admitted a witness to prove the handwriting of the defendant to the manifest of the cargo; because the conviction of the defendant would not be evidence, in a suit on a policy, against the company, and the witness would not therefore be interested. *U. S. Circ. Ct. (Pa.)* 1806, *United States v. Johns*, 1 *Wash. C. Ct.* 368; 4 *Dall.* 412. See also, *Commonwealth v. Farley*, *Thach.* 654.

23. A promissory note was made by a firm, payable to A, B, and C, and a corporation, joint owners of a vessel. The promisees assigned the note to A, towards his share of the earnings of the vessel. The corporation assigned all its property, under the insolvent law, for the benefit of all its creditors, one of which creditors was a bank. A suit against the firm was brought on the note, in the name of all the promisees, for the benefit of A. *Held*, that a stockholder in the bank, which was a creditor of the corporation, was a competent witness for the plaintiffs. *Mass. Supreme Ct.* 1848, *Hathaway v. Crocker*, 7 *Metc.* 262.

24. Contra. A stockholder is not a competent witness on behalf of the corporation.* *Me. Supreme Ct.* 1837, *Watson v. Lisbon Bridge*, 14 *Me.* 201; *Vt. Supreme Ct.* 1847, *Porter v. Bank of Rutland*, 19 *Vt.* 410; *Ala. Supreme Ct.* 1855, *Montgomery & Wetumpka Plank Road Co. v. Webb*, 27 *Ala. N. S.* 618; *N. C. Supreme Ct.* 1856, *Stevenson v. Simmons*, 4 *Jones, Law*, 12; *Pa. Supreme Ct.* 1857, *Philadelphia & West Chester R. R. Co. v. Hickman*, 28 *Pa. St.* 318; *Pa. Supreme Ct.* 1796, *Bank of North America v. Wycoff*, 4

* That a stockholder of a private corporation can not attest the execution of a deed to the corporation,—see *Winsted Sav. Bank v. Spencer*, 26 *Conn.* 195.

Dall. 151; *La. Supreme Ct.* 1819, *Lynch v. Postlethwait*, 7 *Mart.* 69; *Pa. Supreme Ct.* 1853, *Hill v. Frazier*, 22 *Pa. St.* 320. See also, *Wolf v. St. Louis Independent Water Co.* 15 *Cal.* 319.

25. Under the code. In an action by a corporation, a stockholder in it is a competent witness, under the N. Y. code of procedure. He is not a party to the action, nor a person for whose immediate benefit the action is prosecuted, within the meaning of section 399. *N. Y. Ct. of Appeals*, 1852, *Montgomery County Bank v. Marsh*, 7 *N. Y.* (3 *Seld.*) 481; *S. P.* [citing 2 *How. U. S.* 497, 554; 6 *Ad. & E. N. S.* 937; 8 *Mann. Gr. & S.* 299], *N. Y. Superior Ct. Sp. T.* 1850, *Washington Bank of Westerly v. Palmer*, 2 *Sandf.* 686; 8 *N. Y. Leg. Obs.* 92; *N. Y. & Erie R. R. Co. v. Cook*, *Id.* 732.

26. To the same effect, *Mo. Supreme Ct.* 1858, *Barclay v. Globe Mut. Ins. Co.* 26 *Mo.* 490.

27. Under a statute respecting the formation of corporations, providing for the continuation of the liability of stockholders for debts contracted while they were such,—*Held*, that a person, who was a member of a corporation, when the liabilities were incurred on which the action was brought, but who had sold his shares before the commencement thereof, was incompetent as a witness from interest, in an action against the corporation. *Cal. Supreme Ct.* 1856, *McAnley v. York Mining Co.* 6 *Cal.* 80. And see *Mokelumne Hill & Co. v. Woodbury*, 14 *Cal.* 266.

28. Removal of disqualification, by sale. A bona fide sale and transfer to a bank, by a stockholder, of stock owned by him in the bank, will divest him of all interest arising from his having been the owner of such stock, so as to render him a competent witness for the bank, notwithstanding the charter of the bank may contain clauses prohibiting the corporation from dealing or trading, directly or indirectly, in buying or selling any goods, wares, or merchandise, or commodities whatsoever. *Vt. Supreme Ct.* 1846, *Farmers' & Mechanics' Bank v. Champlain Trans. Co.* 18 *Vt.* 131; *S. P. N. H. Superior Ct.* 1855, *Manchester Bank v. White*, 10 *Foster*, 456.

29. A person who has been a member of an incorporated company, but has sold out before suit brought, is a competent witness for the company. *Cal. Supreme Ct.* 1858,

Tuolumne County Water Co. v. Columbia & Co. Water Co. 10 *Cal.* 193.

30. A stockholder, who sells his stock after suit brought, is a competent witness in such suit. *Tenn. Supreme Ct.* 1843, *Union Bank v. Owen*, 4 *Humph.* 338; *Ill. Supreme Ct.* 1844, *Mutual Fire Ins. Co. v. Marseilles Manuf. Co.* 1 *Gilm.* 236; *Pa. Supreme Ct.* 1855, *Meighen v. The Bank*, 25 *Pa. St.* 288.

31. A stockholder (also secretary in this case) who transfers his stock after the commencement of a suit, is a competent witness for the corporation, though it was indebted at the time of the transfer, and continued so indebted to the time of the suit. *Ala. Supreme Ct.* 1857, *Smith v. Tallassee Branch of Central Plank Road Co.* 30 *Ala. N. S.* 650.

32. A stockholder of a company is made a competent witness, in an action by the company for installments, if, at the trial, he transfers his shares by an instrument in writing, although the regulations of the company require that, before the transfer is complete, it should be entered on the books of the company. *N. J. Supreme Ct.* 1852, *Delaware & Atlantic R. R. Co. v. Irick*, 3 *Zabr.* 321.

33. A corporator who has assigned his stock is not rendered incompetent by any liability for costs of an action brought by the corporation; for that liability accrues by the rendition of the judgment. *N. H. Superior Ct.* 1855, *Manchester Bank v. White*, 10 *Foster*, 456.

34. A stockholder's competency for the corporation is restored by an absolute transfer of his stock, although he made it for the purpose, and expects to re-acquire it for the same price. *N. Y. Ct. of Errors*, 1837, *Stall v. Catskill Bank*, 18 *Wend.* 466; *N. Y. Supreme Ct.* 1829, *Utica Ins. Co. v. Cadwell*, 3 *Id.* 296.

35. Where an individual is shown to have been a stockholder in a bridge built by a corporation, which bridge went to decay, and a new one was built, it is not sufficient evidence that the interest of the stockholder has ceased, that he has been called upon for no payment towards the new bridge, and supposes his stock to have been sold. Such a fact must be clearly shown, before he can be a witness in a suit in which the corporation is a party. *N. H. Superior Ct.* 1840, *Ameriscoggin Bridge v. Bragg*, 11 *N. H.* 102.

36. — by other counterbalancing interest.

A stockholder,—*Held*, a competent witness for the plaintiffs, his corporate interest, which might have been advanced by his testimony, being overbalanced by the private and individual interest which he had in the matter in controversy. *Conn. Supreme Ct.* 1841, *Church v. Sterling*, 16 *Conn.* 388.

37. A stockholder in a corporation, who is, as such, liable individually for its debts, is a competent witness for the plaintiff, in a suit against the corporation; his interest being against the plaintiff, and not being a party to the suit by virtue of his being such stockholder. *Mich. Supreme Ct.* 1843, *Hasey v. White Pigeon Beet Sugar Co.* 1 *Doug.* 198.

38. Refusal to testify. A stockholder in a banking corporation may legally refuse to testify in an action brought by the bank in its corporate name. *Ms. Supreme Ct.* 1842, *Bank of Oldtown v. Houlton*, 21 *Ms.* 501.

39. The interest of the witness as a stockholder may be proved by his statements on the *voir dire* alone. *Ib.*

40. Particular facts. A stockholder in a company may be a witness, in an action of ejectment by the company, to prove service of a notice on the defendant's agent, and the admission of such person that he was agent, and that notice was served on him. *Pa. Supreme Ct.* 1842, *Union Canal Co. v. Loyd*, 4 *Watts & S.* 394.

41. A stockholder, who has paid up his stock in full, is a competent witness in an action by the assignees of a mutual insurance company upon a note given for premiums and losses, to prove an acceptance by the company of a supplementary charter. *Pa. Supreme Ct.* 1862, *Fell v. McHenry*, 42 *Pa. St.* 41.

42. Testimony as to books. It is a general rule of evidence, that in a suit by a corporation, one who is a stockholder and interested in the event of the suit, is not a competent witness in behalf of the institution; but it does not follow that he is competent for no purpose—as where he is called upon to prove himself to be or to have been the depository of the muniments of the corporation. An interested corporator, however, is not a competent witness to prove that a book continued to be one of the muniments of his corporation, after he had ceased to be the depository thereof, and when he stood only in the relation of a stockholder in the corporation, any more than any other stockholder. But

admitting the existence as to depositaries, of the exception to the general rule of evidence, his having ceased to be the depository at the time he was called as a witness does not disqualify him from proving the book produced to have been a muniment of the corporation, while he was the depository; the nature of his interest as a stockholder not being changed, while he continued in that position. *Md. Ct. of Appeals*, 1827, *Union Bank of Maryland v. Ridgely*, 1 *Harr. & G.* 324, 408.

43. Conversations with individual stockholders, not agents or officers, are not evidence against the corporation. *Ohio Supreme Ct.* 1832, *Hogg v. Zanesville Manuf. Co. Wright*, 139.

44. Commissioner. A report of commissioners appointed to assess the value of land taken by a railroad, and the damages sustained by the land owner, will not be set aside, at the instance of the company, on the ground that a majority of the commissioners were stockholders. *Wis. Supreme Ct.* 1863, *Strang v. Beloit & Madison R. R. Co.* 16 *Wis.* 685. Compare *Corrigal v. London & Blackwell Railw. Co.* 3 *Eng. Railw. Cas.* 411.

45. Juror. A stockholder in a railroad company is disqualified to sit as juror in a cause wherein the company in which he owns stock is pecuniarily interested to any amount; and a verdict on a hearing before commissioners, awarding damages to a land owner for land taken by a railroad will be set aside, if the fact of the jurors owning stock is known after verdict. *N. H. Superior Ct.* 1850, *Page v. Contoocook Valley R. R. Co.* 1 *Fost.* 438.

46. Liability for debts of corporation. Where defendant had held stock as security for a debt, and the debt having been paid, had returned the certificate, with a power to transfer, before the debt now sued on was incurred, but the transfer had not been made on the books, he was held liable for the debt. [2 *Hill*, 265]. *N. Y. Supreme Ct.* 1844, *Adlerly v. Storm*, 6 *Hill*, 624; 1849, *Worrall v. Judson*, 5 *Barb.* 210.

47. Under the Maryland act of 1852, ch. 338, § 9,—which provides that stockholders shall be individually liable to the creditors of the company in which they are stockholders, to an amount equal to the stock held by them respectively, for all debts and contracts made, until the whole amount of stock shall be paid in,—such stockholder is liable in his

individual capacity for the liabilities of the company contracted while he was a member thereof, without reference to the amount which he may have paid in on his stock. *Md. Ct. of Appeals*, 1866, *Matthews v. Albert*, 24 *Md.* 527.

48. Executors of a deceased shareholder are properly chargeable with liability to the creditors of a bank, as the holders of shares of stock which appear on the corporate books to have been held by their testator, and subsequently by his executors. Having the legal title to the stock, they are liable under the N. Y. statute; and the pecuniary liability which would have rested upon the testator, if he were living, may be enforced against his estate, and primarily against his personal property, the legal title of which is in the executors. *N. Y. Supreme Ct.* 1868, *Diven v. Duncan*, 41 *Barb.* 520.

49. One who had subscribed for stock in a manufacturing corporation, under a verbal agreement that one-half of it should belong to, and be paid for, by another person,—*Held*, liable as a stockholder to the full amount; but entitled to recover half of his payment from his co-owner. *N. Y. Ct. of Appeals*, 1864, *Stover v. Flack*, 30 *N. Y.* 64.

50. The Massachusetts statute of 1862, (ch. 218, § 8),—which provides that no stockholder or officer of a manufacturing corporation shall be held liable for its debts unless a judgment is recovered against it, and the corporation shall neglect, for the space of thirty days after demand on execution, to pay the amount due, or the execution shall be returned unsatisfied,—*Held*, to apply to manufacturing corporations organized under general laws as well as to those holding special charters. *Mass. Supreme Ct.* 1864, *Peele v. Phillips*, 8 *Allen*, 86.

51. The stockholders of express companies in Virginia, are liable to the amount of their stock for the payment of taxes, assessed in compliance with the laws of the State, on the gross earnings of the corporation. *Va. Ct. of Appeals*, 1868, *Anderson v. Commonwealth*, 18 *Gratt.* 295.

Consult also, INDIVIDUAL LIABILITY.

52. — for subscriptions. Stockholders who have paid for their stock, have a right to insist that the receiver shall collect the unpaid capital, so as to equalize the burden of the loss. *N. Y. Chancery*, 1841, *Nathan v. Whitlock*, 9 *Paige*, 152.

53. The person to be proceeded against by the receiver, for the balance due on the stock of a dissolved corporation (2 *Rev. Stat.* 469, § 69), is the person in whose name the stock stands on the books of the corporation, as absolute owner, though he has, in fact, transferred it. He cannot set up that he holds it as trustee for one to whom he has assigned it. [2 *Cow.* 770; 22 *Wend.* 348; 6 *Hill*, 628; 2 *Wheat.* 391; 2 *Conn.* 579.] *N. Y. Supreme Ct. Sp. T.* 1848, *Mann v. Currie*, 2 *Barb.* 294.

Consult also, SUBSCRIPTION and STOCK.

54. Stockholders' guaranty. Where stockholders sign an absolute guaranty for the payment of all the corporate debts, to such creditors as forbear to sue, for a specified time, a creditor who does forbear to sue for that time may maintain an action against them for the same. *Ga. Supreme Ct.* 1867, *Calhoun v. Manufacturers' Bank of Macon*, 36 *Ga.* 410.

II. ACTIONS BY AND AGAINST.

55. Courts of United States. A stockholder residing in another State than that in which the corporation and persons conducting its affairs have their domicile, may file a bill in a court of the United States for proper relief against a breach of trust, or duty, by the directors or officers of the corporation. *U. S. Supreme Ct.* 1855, *Dodge v. Woolsey*, 18 *How.* 331; *S. P. Bacon v. Robertson*, *Id.* 480.

56. A stockholder may sue his corporation upon a contract made by him with the corporation. *U. S. Circ. Ct. (Ind.)* 1849, *Oulbertson v. Wabash Navigation Co.* 4 *McLean*, 544. Compare *Bedford v. Brutton*, 1 *Scott*, 245; 1 *Bing. N. C.* 399; *Lucas v. Beach*, 1 *Scott*, *N. R.* 350; 1 *Mann. & G.* 417; 4 *Jur.* 631; *Money Penny v. Hartland*, 1 *Car. & P.* 352; 2 *Id.* 378.

57. A stockholder in a corporation is no party to a suit against it, although his individual property has been attached in the suit, and a copy of the writ left with him; and he may impeach the judgment recovered therein, when introduced against him. *Me. Supreme Ct.* 1846, *Whitman v. Cox*, 26 *Me.* 335.

58. The creditors of an incorporated company may enforce their claims by suit at law against the corporation, although they

are stockholders therein. *Pa. Supreme Ct.* 1864, *Brinham v. Wellersburg Coal Co.* 47 *Pa. St.* 48.

59. The service of a writ in favor of a corporation is good, notwithstanding it was made by an officer who is a stockholder. *Mass. Supreme Ct.* 1826, *Merchants' Bank v. Cook*, 4 *Pick.* 405.

60. Actions between members. Inasmuch as the effect of a charter making stockholders severally liable, individually, to any person, for debts of the company, is to place them upon the same footing as though they had not been incorporated, and make them liable as partners [2 *Wend.* 327; 2 *Hill*, 265], one stockholder under such a charter cannot recover, against another, a debt due from the company. *N. Y. Supreme Ct.* 1842, *Bailey v. Bancker*, 3 *Hill*, 188.

61. A stockholder whose scrip has been stolen may maintain, against the corporation and a person who holds the stolen scrip, an action to establish his right to it. *N. Y. Superior Ct. Sp. T.* 1858, *Wells v. Smith*, 7 *Abb. Pr.* 261.

62. When an individual stockholder has money of the corporation in his hands, accruing from a sale of corporate property, another shareholder cannot recover his proportion of it in an action for money had and received. Otherwise, if the corporation assent to the sale and a distribution among the shareholders. *Ma. Supreme Ct.* 1839, *Hodsdon v. Copeland*, 16 *Me.* 314.

63. Against officers. A suit at law cannot be maintained by an individual stockholder against the directors of a corporation for mismanaging its affairs, for the purpose of defrauding the corporation. *Conn. Supreme Ct.* 1857, *Allen v. Curtis*, 26 *Conn.* 456.

64. For the damage sustained by a stockholder from illegal and fraudulent acts of directors and officers of a company, an action may be sustained by the stockholder against the officers and directors. *N. Y. Supreme Ct. Sp. T.* 1854, *Crook v. Jewett*, 12 *How. Pr.* 19.

65. Power of chancery. Independent of the provisions of the Revised Statutes, the Court of Chancery had jurisdiction, in favor of the corporators, to call the directors of a corporation to account, and compel them to make satisfaction for any loss arising from a fraudulent breach of trust, or willful neglect of known duty. [2 *Johns. Ch.* 389.] *N. Y.*

Chancery, 1832, *Robinson v. Smith*, 3 *Paige*, 222. And see *Bayless v. Orne*, 1 *Freem.* 161.

66. The directors of a manufacturing corporation, as the best means of continuing the business, contemplated a sale of all the corporate property to a new corporation, the shares of the latter to be taken in payment, and to be distributed among the old stockholders. A trustee holding stock in the old corporation, brought a bill in equity to obtain the instructions of the court relative to the administration of his trust, and to restrain the corporation from making the sale. No fraud or breach of trust was alleged in the bill. *Held*, that the bill could not be maintained. A court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief. Their rights and duties are regulated by the common law, which, in most cases, furnishes ample remedies for any excess or abuse of corporate powers and privileges. It is only where there is no plain and adequate remedy at law, and a case is presented which entitles a party to equitable relief, under some general head of chancery jurisdiction, that a bill in equity can be maintained against a corporation; and this rule is applicable to stockholders as well as to other persons. *Mass. Supreme Ct.* 1856, *Treadwell v. Salisbury Manuf. Co.* 7 *Gray*, 393. See also, *Brown v. Monmouthshire Railway & Canal Co.* 13 *Beav.* 32; 15 *Jur.* 475; 20 *Law J. N. S. Ch.* 497.

67. The members of a corporation, as stockholders, have rights and interests in the affairs and management of the concerns of the corporation; but these are derivative, and are limited and regulated by law. They have no right by any direct suit, legal or equitable, to call the directors or other officers of the corporation to account for mismanagement; nor, if all the stockholders were to unite in an equitable suit, could they have any better ground to recover. The directors and other officers and agents are amenable only to the corporation; and to give every individual stockholder a right of action would lead to a multiplicity of suits. *Mass. Supreme Ct.* 1851, *Abbott v. Merriam*, 8 *Cush.* 588.

68. Although a stockholder of a corpo-

ration may, under many circumstances, interfere for the protection of the company, yet, something more or less than is allowable by the terms of the charter must have been done by its directors or managers to authorize such an interference. Fraudulent collusion between the company and any of its creditors, by which its other creditors or stockholders may be wronged or defrauded, would authorize an appeal to equity. But where a debt authorized by the company is created by and with the consent of the stockholders and directors, and judgment confessed therefor, a consenting stockholder is not entitled to an injunction against an execution issued thereon. *Pa. Supreme Ct.* 1865, *Gravenstine's Appeal*, 49 *Pa. St.* 310.

69. If the directors of a company refuse to comply with the vote of a majority of the shareholders, a court of equity will compel them to do so, by injunction. *Chancery*, 1847, *Exeter & Crediton Railway Co. v. Bulter*, 5 *Eng. Railw. Cas.* 211.

70. Breach of trust. A shareholder in an incorporated company may file a bill on behalf of himself and all the other shareholders, to restrain the directors from committing a breach of trust; *e. g.* by making a contract of guaranty on behalf of the corporation, which they were not empowered by the charter to make; or committing other clear excesses of chartered powers. *Rolls Ct.* 1846, *Coleman v. Eastern Counties Railway Co.* 10 *Beav.* 1; 16 *Law J. N. S. Ch.* 73; 11 *Jur* 74; 4 *Eng. Railw. Cas.* 518; 8 *P. Ala. Supreme Ct.* 1858, *Bliss v. Anderson*, 31 *Ala. N. S.* 612.

71. A stockholder in a bank cannot maintain an action against its directors for their negligence in so conducting its affairs that its whole capital is wasted and lost, and the shares therein rendered worthless; nor for the malfeasance of its directors in delegating the whole control of its affairs to the president and cashier, who waste and lose the whole capital. *Mass. Supreme Ct.* 1847, *Smith v. Hurd*, 12 *Metc.* 371.

72. The directors of a trading corporation may be restrained by an injunction, to which the corporation and all the stockholders are made parties, upon the application of a party interested, from mismanaging the business of the corporation, or wasting its funds; and it is no objection to the bill that the corporation itself could have

maintained an action at law against the directors, nor that the plaintiffs had a legal remedy by suit against the corporation. *Conn. Supreme Ct.* 1856, *Sears v. Hotchkiss*, 25 *Conn.* 171.

73. A stockholder in a corporation may bring an action against trustees thereof who have audited and directed payment of a bill to one of their own number, at a meeting at which such one, being present, was necessary to make up the quorum. A trustee is disqualified from acting where the board are dealing with himself, and in such case, without another member present, the trustees acting had no authority to transact business. *N. Y. Ct. of Appeals*, 1867, *Butts v. Wood*, 37 *N. Y.* 317.

74. Transfer of property. An individual stockholder of a corporation has no right to object to a transfer of all its property to another corporation, under the authority of an act of assembly, and cannot, by injunction, restrain such a transfer or sale. *Pa. Supreme Ct.* 1858, *Lauman v. Lebanon Valley R. R. Co.* 30 *Pa. St.* 42.

75. If a corporation, induced by the fraudulent misrepresentations of a part of its stockholders, makes a conveyance of its property, and the grantee, in pursuance of a previous arrangement, conveys the property to the stockholders who committed the fraud, the innocent stockholders cannot, in equity, compel a reconveyance of that portion of the property represented by their stock of the corporation. *Cal. Supreme Ct.* 1865, *Gorham v. Gilson*, 28 *Cal.* 479.

76. A number of shares of the stock of a turnpike company being about to be sold, the officers of the company appointed an agent to buy them "for the use of the company;" but, when purchased, they caused a portion of them to be transferred to themselves. A stockholder instituted a suit against them to recover the damages sustained by him through the breach of the agreement to buy for the company. *Held*, that he could recover. *Pa. Supreme Ct.* 1851, *Kimmel v. Stoner*, 18 *Pa. St.* 155.

77. Fraud. A stockholder in an incorporated bank, may sustain a bill in equity against the corporation, the directors, and other stockholders, on allegation of fraudulent practices, depreciating the value of the stock, suspending banking operations, refusing cash payments, and withholding

dividends; and in such bill he may join individual stockholders with the corporation, may pray for an account of stock and funds, and for restoration of whatever has been fraudulently withdrawn from the common stock. *Ohio Supreme Ct.* 1831, *Taylor v. Miami Exporting Co.* 5 *Ohio (Ham.)* 165.

78. A bill may be brought by the present directors of a joint stock company, on behalf of themselves and all the other members of the company, against the former directors of the company, for the purpose of being relieved against a fraud, in which all the former directors are alleged to have been involved. *V. Chan. Ct.* 1842, *Benson v. Heathorn*, 1 *You. & C. Ch.* 326. See *Taylor v. Salmon*, 4 *Mylne & C.* 142.

79. Accounting. A single stockholder, having an unsettled account with his company, or any other matters of dispute, has no right to bring the corporation into court to settle all their accounts. *N. J. Ct. of Errors*, 1856, *Yard v. Pacific Mut. Ins. Co.* 2 *Stockt.* 480. Compare *Hager v. Thompson*, 1 *Black*, 80.

80. Where four of the trustees of a corporation, owning the majority of the stock, negligently managed the affairs of the company, disregarding the by-laws, and neglecting to keep proper accounts,—*Held*, that a bill would lie in the name of a single stockholder, against the corporation and trustees, and that the plaintiff was entitled to an account, and to hold the trustees to make good any loss occasioned by their malfeasance. *Cal. Supreme Ct.* 1860, *Neall v. Hill*, 16 *Cal.* 145.

81. A minority of the stockholders of a corporation may maintain a bill in equity in behalf of themselves and the other stockholders, for conspiracy and fraud, whereby their interests have been sacrificed, against the corporation and its officers and others who participate therein; but by unreasonable delay in bringing their bill, they will forfeit their title to equitable relief. *Mass. Supreme Ct.* 1863, *Peabody v. Flint*, 6 *Allen*, 52.

82. Change of business. The minority of the shareholders, in a joint stock corporation, may maintain a suit, to restrain the directors of the company, or the majority of the shareholders, from entering into a stipulation, whereby the business of the company is changed, and directed into channels and enterprises, wholly diverse from those origi-

nally contemplated and entered upon, and from which their emoluments had been derived. *N. J. Chancery*, 1853, *Kean v. Johnston*, 1 *Stockt.* 401; 1854, *Gifford v. New Jersey R. R. Co.* 2 *Id.* 171.

83. Where a railway company forms a new project in conflict with the interests of other railways, who, by leave of the legislature, own shares in the company applying for an extension of their line, or an enlargement of their powers, equity will not restrain them absolutely from procuring the contemplated grant, but only from using their funds for that purpose; and will also prohibit one company from keeping its proceedings secret, as to another company, owning part of their stock, and will generally enjoin the act of a majority of a joint stock company, where the voice of the minority is not properly heard at the meeting, or is agreed to be disregarded, by previous concert. *V. Chan. Ct.* 1852, *Great Western Railway v. Rushout*, 10 *Eng. L. & Eq.* 72; 16 *Jur.* 288.

84. In general, the directors and the majority of the company may be restrained from employing money, subscribed for one purpose, for another, however advantageous;—but, although this is the law as to joint stock companies, unincorporated and unconnected with public duties or interests, it has not been applied to corporate companies for a public undertaking, involving public interests and public duties under the sanction of Parliament. In such cases the court of chancery has permitted the use of the corporate seal, and the moneys of the company, to obtain the sanction of Parliament to purposes materially altering the interests of the shareholders according to the contract *inter se*. *V. Chan. Ct.* 1852, *Ffooks v. London & Southwestern Railway Co.* 19 *Eng. L. & Eq.* 7; 17 *Jur.* 365.

85. A stockholder in a corporation, the charter of which is by statute subject to alteration, amendment, or repeal, at the pleasure of the legislature, cannot maintain a bill in equity to restrain the corporation from engaging in a new enterprise in addition to that contemplated by the charter, but of the same kind, if it is sanctioned by an express legislative grant, and by a vote of the majority of the stockholders. *Mass. Supreme Ct.* 1862, *Durfee v. Old Colony & Fall River R. R. Co.* 5 *Allen*, 230.

86. Misapplication of funds. A stockholder in a corporation has a remedy in chancery against the directors, to prevent them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of their capital, or of the profits which might lessen the value of the shares, if the acts intended to be done amount in law to a breach of trust or disregard of duty; though it would be otherwise of a mere error of judgment. Therefore, where the directors of a bank refused to take the proper measures to resist the collection of a tax which they themselves believed to have been imposed upon them in violation of their charter,—*Held*, that this refusal amounted to a breach of duty, and any stockholder might file a bill in chancery for an injunction. *U. S. Supreme Ct.* 1855, *Dodge v. Woolsey*, 18 *How.* 831; *S. P. U. S. Cir. Ct. (O.)* 1853, *Foot v. Linck*, 5 *McLean*, 616. Compare *Bacon v. Robertson*, 18 *How.* 480.

87. A minority of the stockholders in a corporation have a remedy in chancery against the directors and against the corporation, and against all others, whether individuals or corporations, assisting or confederating with them, to prevent such corporation and the directors thereof from making any misapplication of their capital or profits which may result in lessening the dividends of stockholders, or the value of their shares, if the acts intended to be done create what in law is denominated a breach of trust or duty.* *N. H. Supreme Ct.* 1860, *March v. Eastern R. R. Co.* 40 *N. H.* 548.

88. Such stockholders have a remedy against individuals, in whatever capacity they may profess to act, and against corporations, both the one, of which they are members, and all others acting in concert with it, to effect and accomplish a common purpose

* The directors of a savings bank, who had borrowed all the assets of the bank and given their notes therefor, and for a certain bonus in addition, agreed with a stockholder, whose interest they desired to extinguish, to take one of the notes in exchange for the stock. After the agreement but before the delivery of the note, the directors voted to deduct the bonus from, and indorse it upon, their several notes. No such indorsement was made upon the note in question, which, it appears, was transferred by its owner without knowledge of the arrangement. *Held*, that the agreement of the directors was fraudulent and void, as an attempt to make a fraudulent disposition of a part of the assets of the bank. *Conn. Supreme Ct.* 1865, *Alford v. Miller*, 83 *Conn.* 548.

and object, when the object thus to be accomplished is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. [18 *How. (U. S.)* 841.] *Id.*

89. A bill by a shareholder in a fire insurance company, on behalf of himself, &c., against the directors, to restrain them from paying various sums of small amount in respect of losses caused by explosion of gunpowder, which was a risk excepted from the policies, was dismissed with costs; there being evidence to show that such payments were not unusual in other offices, and that such acts of petty liberality conduced to the benefit of the company and the extension of their business. *V. Chan. Ct.* 1864, *Taunton v. Royal Ins. Co.* 2 *Hem. & Mil.* 135; 10 *Jur. N. S.* 291; 33 *Law J. N. S. Ch.* 406; 10 *Law Times, N. S.* 156; 12 *Week. Rep.* 549.

90. Where a corporation is about to exceed its powers by applying its property to objects without the scope of its charter authority, a minority of its stockholders, who dissent from such use of the corporate funds, may obtain equitable relief. *Conn. Supreme Ct.* 1866, *Pratt v. Pratt*, 38 *Conn.* 446.

91. But an injunction will not be granted to a stockholder against the use of funds for purposes not materially different from those designed by the charter, although such expenditure may be injurious to such stockholder in another character, or the interest of other persons, or of the public may be injuriously affected thereby. *Va. Ct. of Appeals*, 1855, *Baltimore & Ohio R. R. Co. v. City of Wheeling*, 18 *Gratt.* 40.

92. Abandoned enterprise. A. obtained a charter for the construction of a turnpike which he forfeited after doing some work under it. The legislature then chartered another company to construct the same road, providing that A.'s previous work should be paid for in stock of the company. A. consequently received \$1,500 in stock, being the valuation of the work done by him. Bogus subscriptions were made, and of the corporation thus illegally organized, A. was chosen a director. The enterprise failed, and the charter was again forfeited by lapse of time. A. now filed a bill in equity to compel the other stockholders to make good to him the amount and value of his work converted into stock. *Held*, that he could not recover.

Tenn. Supreme Ct. 1858, *Hopkins v. Whitesides*, 1 *Head*, 81.

93. **Unauthorized purchase.** Where a corporation, without being expressly authorized by their charter, took stock as a corporator in another corporation,—*Held*, upon a bill by a stockholder praying a decree of dissolution of the connection between the two corporations by a sale of said stock, that there was no power in the court to grant the relief sought. A mere trading corporation are not the trustees of the stockholders, so far as the corporate property is concerned. A corporation may become a trustee like an individual, and, as such, would be subject to the ordinary jurisdiction of a court of equity, in relation to the trust property. But the relation of corporation and stockholders does not imply a trust in the corporation, sufficient to give equity jurisdiction of the corporate body, at the suit of a stockholder, for a violation of the charter. *R. I. Supreme Ct.* 1850, *Hodges v. New England Screw Co.* 1 *R. I.* 812; 1858, *Hodges v. New England Screw Co.* 3 *Id.* 9.

94. **Questionable contract.** Where the directors of a company had entered into a contract, the legality of which was doubtful, to expend money in laying down rails, they were restrained, at the suit of some of the shareholders, from laying down the rails till the validity of the contract had been decided upon at law. *V. Chan. Ct.* 1851, *Beman v. Rufford*, 6 *Eng. L. & Eq.* 106; 15 *Jur.* 914; 1 *Sim. N. S.* 550.

95. **Arbitration.** Where two railway companies entered into an agreement, under their common seals, on various matters, some of which were *ultra vires*, and disputes which had arisen thereunder had been agreed to be referred to arbitration,—*Held*, on a bill by shareholders, that an injunction would lie to restrain proceedings before the arbitrator. *V. Chan. Ct.* 1863, *Maunsell v. Midland Great Western &c. Railway Co.* 1 *Hem. & Mil.* 180; 9 *Jur. N. S.* 660; 8 *Law Times, N. S.* 826; 11 *Week. Rep.* 768; *S. P. N. H. Supreme Ct.* 1862, *March v. Eastern R. Co.* 48 *N. H.* 515.

96. **Forfeiture of stock.** An action lies against a joint stock company who, wrongfully, and without lawful excuse, declare the plaintiff's shares forfeited and sell them, thereby depriving him of the rights of a shareholder. So also, where the purchaser of

shares in a joint stock company delivers his deed of transfer to the company, and requests them to register the transfer, and issue new certificates, which they neglect to do, and thereafter make calls against the former owner, and forfeit the stock in consequence of his non-payment, an action lies against them. *Q. B.* 1852, *Catchpole v. Ambergate Railw. Co.* 1 *Ell. & Bl.* 111; 16 *Eng. L. & Eq.* 168; 22 *Law J. N. S. Q. B.* 35; 17 *Jur.* 345; 7 *Eng. Railw. Cas.* 22. Compare *Wilkinson v. Anglo California Gold Co.* 13 *Eng. L. & Eq.* 444.

97. **Calls on stock.** In an amalgamated railway company there were three classes of shareholders. A shareholder of one class filed a bill on behalf of himself and all others of the class, stating that an unfair and unnecessary call had been corruptly made on that class, which some had paid, but that the plaintiff had refused to pay it; and praying that an account might be taken to ascertain the propriety and necessity of the call, and for an injunction,—*Held*, that this was an attempt to induce the court to interfere in the internal management of the affairs of a continuing company; and a general demurrer to the bill was allowed; and, that the shareholders of the same class as the plaintiff who had paid the call, and the other two classes of shareholders, ought to be represented. *Rolls Ct.* 1849, *Bailey v. Birkenhead &c. Railw. Co.* 12 *Beav.* 433; 14 *Jur.* 119; 19 *Law J. N. S. Ch.* 377.

98. **Application of funds raised by new stock.** A court of equity will not entertain a bill to compel a railway company to apply funds, raised by the issue of new stock, according to the resolution by which the new stock was created, by the directors of the company.* *Chancery*, 1848, *Yetta v. Norfolk*

* A railway company having power under separate acts of Parliament to make and purchase certain branch railways in connection with their main line, were for those purposes respectively authorized to raise the requisite capital by the creation of new stock. Having issued scrip certificates accordingly, but being about to apply the money subscribed in respect thereof to the prosecution of works on their original line, a holder of such scrip filed his bill on behalf of himself and all other the proprietors of such scrip, against the company and its directors, praying an injunction to restrain the company and the directors from employing any money which had been subscribed in respect of the new stock towards the completion of the original line, or otherwise than in the completion of the works for which the money was subscribed. *Held*, 1. That upon the construction of the acts of Parliament creating the new stock, the capital raised by the scrip was not to be considered as identical

Railway Co. 5 *Eng. Railw. Cas.* 487; 3 *De Ges. & S.* 293; 13 *Jur.* 249.

99. Suits respecting dividends. A stockholder in a moneyed corporation can only claim the intervention of the court to protect the corporate property from the acts of the corporate officers, in cases where it is threatened with waste or misapplication, not to prevent a proper dividend. *N. Y. Supreme Ct. Sp. T.* 1857, *Carpenter v. N. Y. & New Haven R. R. Co.* 5 *Abb. Pr.* 277. Compare *Brown v. Monmouthshire Railway & Canal Co.* 13 *Beav.* 38; 15 *Jur.* 475; 20 *Law J. N. S. Ch.* 497.

100. Unless the resolution declaring the dividend, otherwise directs the officers, they must pay the dividend to the persons holding stock on the books of the company at the date when the dividend is declared. *N. Y. Supreme Ct.* 1859, *Jones v. Terre Haute & Richmond R. R. Co.* 17 *How. Pr.* 529.

101. Where the stockholders of a corporation passed a vote instructing the directors to adjust an interest dividend, which had been expected by the subscribers to the capital stock, by issuing certificates therefor, payable at a future time named, with a condition that, if there should not then be money enough in the treasury to pay the whole amount, the holders of the certificates should receive as much *pro rata* as the treasurer should be able to pay, and that he should give public notice as soon as he should be able to pay the balance, and the directors accordingly issued such certificates, —*Held*, that a holder of such certificate, if under any circumstances he might maintain an action upon it, could only do so by proof that the company was able to pay the full amount of interest covered by the vote, either at the specified time, or at the commencement of the action; and that it was immaterial whether certificates had been issued for the full amount or not. *Mass. Supreme Ct.* 1863, *Barnard v. Vermont & Massachusetts R. R. Co.* 7 *Allen*, 512.

tional with or part of the original capital of the company, and that the holders of the scrip had a clear equity to keep the company in the application of the money raised to those purposes for which it was advanced. 2. That the plaintiff, as owner of such scrip, had a right in that character to file his bill, clear of any objection to which such bill might have been open, had he merely been a member of the company. 3. That a holder of scrip by purchase was invested with all the rights of the original subscriber. *Chancery*, 1860, *Bagshaw v. Eastern Union Railway Co.* 2 *Mac. & G.* 539; 2 *Hall & T.* 201; 14 *Jur.* 491; 19 *Law J. N. S. Ch.* 410.

102. If a corporation has voted to pay to its stockholders an interest dividend at some future time, when it should be able, and issued certificates therefor accordingly, the determination of the question, whether at any particular time it is able to pay it, does not rest in the final decision of the directors, but in that of the court, who, in judging of it, will pay regard not only to the existing liabilities and funds of the corporation, but also to those contingencies to which it is exposed which may require unusual outlays. *Id.*

103. A corporation and its directors are trustees, and, as such, may be called into a court of chancery either for an account, or to restrain them from mismanagement of the corporate property, or for the purpose of compelling the corporation and its directors, to declare dividends from its surplus earnings, where such dividends are needlessly and improperly withheld. *Conn. Supreme Ct.* 1866, *Pratt v. Pratt*, 33 *Conn.* 446.

104. An owner of shares in an incorporated company may maintain an action of *assumpsit* against the corporation, for a refusal of its directors, to apportion an equitable share of its dividends upon his stock. *N. J. Supreme Ct.* 1865, *Jackson v. Newark Plankroad Co.* 31 *N. J. Law*, (2 *Vroom*), 277.

105. Where a certificate of shares of the guaranteed stock of a corporation contained the following provision: "Said stock is entitled to dividends at the rate of ten per cent. per annum, payable semi-annually in New York, on the first days of June and December in each year, out of the net earnings of the company, and is also entitled to share *pro rata* with the other stock of the company in any excess of earnings over ten per cent. per annum; and the payment of dividends as aforesaid is hereby guaranteed," —*Held*, that the holder of such certificate could not maintain an action at law against the corporation for a failure to declare and pay dividends as therein mentioned, since he could only be regarded as a member of the company, on a footing with other stockholders, and not an ordinary creditor. *Mass. Supreme Ct.* 1866, *Williston v. Michigan Southern &c. R. R. Co.* 13 *Allen*, 400.

106. Authorized acts. Where a railroad charter gave the company the right to construct lateral routes, —*Held*, that a shareholder could not restrain the company from

the exercise of such powers as were conferred by the charter, and in the manner therein specified, on the ground that it would diminish his dividends, or impair the resources of the company. Where the charter fixes no limit of time for the exercise of such powers, the court will not ordinarily prescribe one. But such grants must be express, and will not be implied. *Ill. Supreme Ct.* 1853, *Newhall v. Galena & Chicago R. R. Co.* 14 *Ill.* 273. Compare *Lord v. Copper-miners' Co.* 12 *Jur.* 1,059; 18 *Law J. N. S.* 65; 2 *Phil. Ch.* 740.

107. Where two railroad corporations are united by lease, they may, as between themselves, vary the terms of their contract with each other, and may consent to a different appropriation of the funds, profits, or dividends, from that provided for in the original contract; but stockholders in either road who have not thus assented, may, in equity, hold both corporations to perform their original contract, and apply their funds and profits in the way originally provided for, so far as relates to themselves. *N. H. Supreme Ct.* 1862, *March v. Eastern R. R. Co.* 43 *N. H.* 515.

108. Acquiescence. If a stockholder intends to treat an act of the corporation as illegal, and to hold the directors personally answerable, he must tell them so. He cannot stand by and see it done, objecting to it on other grounds, and then hold them responsible for reasons, not alleged in opposition, at the time.* *R. I. Supreme Ct.* 1853, *Hodges v. New England Screw Co.* 3 *R. I.* 9; *S. P. Chancery*, 1851, *Graham v. Birkenhead & C. Junction Railway Co.* 6 *Eng. L. & Eq.* 182; 20 *Law J. N. S.* Ch. 445.

109. An information in the nature of a *quo warranto*, under a statute authorizing that writ to issue to exclude a corporation from exercising its franchise, will not lie

against a railroad company, in behalf of a stockholder, merely because they issued stock below par value; and began to construct their road, before the requisite amount of stock was subscribed, it not appearing that the petitioner's private right was thereby put at hazard. *Mass. Supreme Ct.* 1852, *Hastings v. Amherst & C. Railw. Co.* 9 *Cush.* 596.

110. Parties in equitable suits—plaintiffs. Beyond the limits of the act of incorporation, the will of the majority cannot make an act valid; and the powers of a court of equity may be put in motion, at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. *Chancery*, 1843, *Foss v. Harbottle*, 3 *Hare*, 461. See also, *Preston v. Grand Collier Dock Co.* 11 *Sim.* 327; *Salmon v. Randall*, 3 *Mylne & C.* 444; *Gifford v. New Jersey R. R. Co.* 2 *Stockt.* 171.

111. Instigation of rival company. The circumstance that a plaintiff is suing at the instigation of another rival company is not, of itself, sufficient to prevent him from obtaining a special injunction. *Rolls Ct.* 1844, *Coleman v. Eastern Counties Railw. Co.* 10 *Beav.* 1; 11 *Jur.* 74; 16 *Law J. N. S.* Ch. 73.

112. But when the fact is established, that, under the pretence of serving the interest of one company, the shareholders in a rival company, by purchasing shares for the purpose of litigation, can make the court the instrument of defeating or injuring the company, into which they so intrude themselves, in order to raise questions and disputes on matters as to which all the other members of the company may be agreed, in such case it is not the province of the court to interfere. In questions on the law of contracts, where there is a discretionary jurisdiction, circumstances affecting the condition of the contracting parties, and the origin and situation of their rights in relation to the subject matter of the contract deserve consideration. *V. Chan. Ct.* 1852, *Ffooks v. London & Southwestern Railw. Co.* 19 *Eng. L. & Eq.* 7; 17 *Jur.* 365.

113. A suit by an individual shareholder of an incorporated company, complaining of an injury to the corporation, cannot be maintained in equity, if it appears that the plaintiff has the means of procuring a suit to be instituted in the name of the corporation it

* Two shareholders in an incorporated railway company, suing on behalf of themselves and all others, sought to restrain the company from applying their funds in completing a branch railway, for the construction of which their parliamentary powers had expired. *Held*, that an injunction would not lie, an interlocutory application therefor being refused, on the grounds that one of the plaintiffs named had acquiesced in the acts complained of; that the injunction would cause considerable inconvenience; that as all the land had been purchased, it was not clear that it was illegal to complete the line; and that the suit was not properly framed, being on behalf of all the shareholders, which would include those who had sanctioned the acts sought to be restrained. *V. Chan. Ct.* 1852, *Ffooks v. London & Southwestern Railway Co.* 19 *Eng. L. & Eq.* 7; 17 *Jur.* 365.

self; and this rule applies equally, whether the subject be an act which is merely voidable at the discretion of the majority of shareholders, or an act absolutely illegal and incapable of being confirmed by a majority. *Chancery*, 1847, *Mozley v. Alston*, 1 *Phill. Ch.* 790; 11 *Jur.* 315; 16 *Law J. N. S. Ch.* 217; 4 *Eng. Railw. Cas.* 686; S. P. 1843, *Foss v. Harbottle*, 2 *Hare*, 461.

114. Where two railroad companies, in their agreement for consolidation, inserted an article to provide for the completion and running of the route of one of the companies, and the directors of the consolidated company failed to comply with such provisions,—*Held*, that, if the duty thus created was owing to all the stockholders, one of the stockholders could not sustain an action against the directors to enforce a compliance therewith; and, that, if the duty was owing to a class of stockholders, having in respect to the matter an interest or right distinct from another class, any proceeding to obtain relief, for a refusal or neglect on the part of the directors to discharge the duty, must bring before the court not only the directors of the company, but the two classes of stockholders. *Ohio Supreme Ct.* 1862, *Port Clinton R. R. Co. v. Cleveland & Toledo R. R. Co.* 13 *Ohio St.* 544.

115. That a single dissenting stockholder may restrain the company from executing a contract which exceeds its powers,—see *Zabriskie v. Cleveland &c. R. R. Co.* 28 *How.* 381.

116. In Vermont, actions against directors for violation of law, or unfaithful discharge of official duties, may be brought by a single stockholder. See *Buell v. Warner*, 33 *Vt.* 570.

117. A stockholder in one of several railroad companies consolidated into one corporation under the Pennsylvania act of March 24, 1865, (Pamph. L. 49), authorizing the consolidation of railroad companies, who neglects to convert his stock into the stock of the new incorporation as provided by section 8, has no footing for a stockholder's bill against the consolidated company. *Pa. Supreme Ct.* 1866, *Philadelphia & Erie R. R. Co. v. Catawissa R. R. Co.* 53 *Pa. St.* 20.

118. Each shareholder has a distinct interest in dividends declared on stock, which cannot be represented, by other shareholders, suing on behalf of themselves and the

rest of the shareholders. *Chancery*, 1850, *Carlisle v. Southeastern Railway Co.* 6 *Eng. Railw. Cas.* 670.

119. Representation of other plaintiffs. In an action by the minority of stockholders of a railroad, which had been leased by the directors to another company, to compel a settlement of rents which were left unsettled, and were misappropriated by collusion of the directors,—*Held*, that in order to prevent a multiplicity of suits, and that justice might be done between all parties interested, such stockholders should set forth in their bill, that it was brought not only for themselves but for all others similarly interested, who might choose to become plaintiffs in the proceeding. *N. H. Supreme Ct.* 1860, *March v. Eastern R. R. Co.* 40 *N. H.* 548; S. P. *N. Y. Supreme Ct. Sp. T.* 1855, *Wells v. Jewett*, 11 *How. Pr.* 242. See also, *Putnam v. Sweet*, 1 *Chandl. (Wis.)* 286; *Robinson v. Smith*, 3 *Paige*, 222; *Cunningham v. Pell*, 5 *Id.* 607.

120. One stockholder of a manufacturing corporation cannot alone maintain a bill in equity to compel the execution of a trust by persons who have taken a conveyance of the company property in trust to pay its debts. The others should be made parties, or represented. *Mass. Supreme Ct.* 1858, *Heath v. Ellis*, 12 *Cush.* 601. But compare *Croskey v. Bank of Wales*, 4 *Giff.* 314.

121. When corporation must be plaintiff. The primary party to sue for a breach of trust committed by directors, is the corporation; but, if the corporation refuse to sue or is under the control of the guilty directors, the stockholders may sue in their individual names. *R. I. Supreme Ct.* 1850, *Hodges v. New England Screw Co.* 1 *R. I.* 312; *N. J. Ct. of Errors*, 1853, *Brown v. Vandyke*, 4 *Halst. Ch.* 795; *Me. Supreme Ct.* 1844, *Hershey v. Veazie*, 24 *Ms.* 9. See also, *Allen v. Curtis*, 26 *Conn.* 456.

122. A stockholder in a corporation has no right to sue in the corporate name to recover his individual rights, without the assent of a legal majority of the corporation; nor to carry on such a suit by *certiorari*. *N. J. Supreme Ct.* 1859, *Silk Manuf. Co. v. Campbell*, 3 *Dutch.* 539.

123. Who should be defendants. Where there is an agreement between two railway companies, which is beyond the powers of both, and against the policy of their acts of Parliament, a shareholder in one of the com-

panies may file a bill, on behalf of himself and all the other shareholders therein, against his own company and the other company, for an injunction to restrain the execution of the agreement, and, without making any of the directors of the former company, or the shareholders therein, who promoted the agreement, defendants. *V. Chan. Ct.* 1852, *Winch v. Birkenhead, Lancashire &c. Railway Co.* 13 *Eng. L. & Eq.* 506; 16 *Jur.* 1085.

124. All the fraudulent directors are not necessary parties to a bill, filed to obtain satisfaction for a fraudulent breach of trust. This is an exception to the general rule, that, in a proceeding in equity against trustees, all must be made parties. *N. Y. Chancery*, 1884, *Protection Ins. Co. v. Dummer*. Cited and followed, 1886, in *Cunningham v. Pell*, 5 *Paige*, 607; *N. Y. Superior Ct.* 1850, *Mayne v. Griswold*, 8 *Sandf.* 463; 9 *N. Y. Leg. Obs.* 25.

125. The corporation is a necessary party to a bill against its officers or agents for a waste or misapplication of the corporate property. The corporation should be the complainant, unless the defendants have control, or the directors, by collusion, refuse to prosecute. *N. Y. Chancery*, 1882, *Robinson v. Smith*, 8 *Paige*, 222; 1886, *Cunningham v. Pell*, 5 *Id.* 607. Followed, *V. Chan. Ct.* 1887, *Ferris v. Strong*, 8 *Edw.* 127.

126. If an individual stockholder has suffered damage, in a contract with the corporation, through the fraudulent and illegal acts of the directors, done by color of their office, his only remedy is against the corporation. He can maintain no action against the directors, who are themselves liable to the corporation. *Ms. Supreme Ct.* 1855, *Smith v. Poor*, 40 *Me.* 415.

127. Intervention of stockholders of corporation defendant. In an action against a corporation, judgment in which would be presumptive evidence against the stockholders in actions against them on their individual liability, the stockholders are interested to assist the defence; and, if the attorneys of the corporation decline further defending on the ground of non-payment of their fees, the corporation having become insolvent, the stockholders may intervene; and, at their instance, the court will, in a proper case, relieve the corporation from a default, and allow them to carry on the litigation. *N. Y. Superior Ct.* 1858, *Peck v. N. Y. & Liverpool*

U. S. M. Steamship Co. 3 *Bow.* 622. See 5 *Id.* 226.

128. Defences. A corporation, by its directors, assigned one of its stock notes to certain of its directors, as security for advances, who afterwards brought suit upon it in the name of the corporation for their own benefit. The corporation was, at the time, and had ever since remained, insolvent. The defendant, at the time of the assignment and of the bringing of the suit, was a stockholder. *Held*, that he could not avail himself, by way of defence to the suit, of the fact that the note had been so assigned, even if such assignment would be regarded as a fraud upon the corporation. *Conn. Supreme Ct.* 1859, *Protection Ins. Co. v. Ward*, 28 *Conn.* 409.

129. A defect in the proceedings to organize a corporation, is no defence to a stockholder sued to enforce his individual liability, who has participated in its acts of user as a corporation *de facto*, and appeared as a shareholder upon its books, when the debt for which he is sued, was contracted. [5 *Bing.* 521; 7 *Id.* 110; 9 *Barn. & Cr.* 356.] *N. Y. Ct. of Appeals*, 1859, *Eaton v. Aspinwall*, 19 *N. Y.* 119. To the same effect, *N. Y. Supreme Ct.* 1857, *Abbott v. Aspinwall*, 26 *Barb.* 202.

130. Neither a stockholder who has acted as a director, nor a party incurring a debt to a company, can set up as a defence an irregularity which might show that the corporation never existed, or that it had incurred a forfeiture. [4 *Den.* 392; 1 *Kern.* 108; 1 *Hall*, 191; 3 *Sandf.* 170.] Upon the same principle, one who has openly avowed himself a stockholder of the company, has registered himself upon its books, and, as a stockholder, has taken part in its management, cannot be allowed, as against third persons, to prove that the corporation was never lawfully created. *N. Y. Superior Ct.* 1856, *Eaton v. Aspinwall*, 6 *Duer*, 176; 3 *Abb. Pr.* 417; 13 *How. Pr.* 184; *N. Y. Supreme Ct.* 1857, *Mead v. Keeler*, 24 *Barb.* 20.

131. Set off. In an action by a bank upon a promissory note, the defendant may set off, against the claim of the bank, any money belonging to him in the bank, or any dividends or profits declared to be due to him as a stockholder; but he cannot be allowed for the value of his stock. Nor is money illegally drawn from the bank to be considered as in the vaults for the benefit of its stock-

holders and creditors. *Md. Ct. of Appeals*, 1823, *Whittington v. Farmers' Bank*, 5 *Har. & J.* 489.

132. Though a defendant may avail himself of any fraud, &c. practised on him as an individual, yet he cannot, as a stockholder, claim an allowance, in an action by a bank against him as indorser of a note, for any mismanagement of the officers of the bank. *Md. Ct. of Appeals*, 1823, *Whittington v. Farmers' Bank*, 5 *Har. & J.* 489.

133. He cannot give evidence that there was not a sufficient number of the directors of the bank present, at the time of making a certain order, competent to transact business of that description; and that funds had been withdrawn from the bank under that order, when the charter required a greater number of directors, whereby he, as a stockholder, had been deprived of a dividend on his stock. *Id.*

134. A stockholder of an insolvent corporation, who has been compelled to pay debts of the corporation subsequently to the commencement of proceedings in insolvency, cannot avail himself of the amount so paid by him, in defence of an action by the assignee of the corporation against him to recover a debt due to the corporation from him. *Mass. Supreme Ct.* 1861, *Howe v. Snow*, 3 *Allen*, 111.

135. In an action by the assignee of an insolvent corporation to recover a debt, the defendant is not entitled to set off a claim due from the corporation to the firm of which he is a member. *Id.*

SUBSCRIPTIONS.

[This title embraces the subject of the contract between a subscriber to the stock or fund of a proposed corporation and the corporation, or his co-subscribers; including the obligation of members to contribute to the corporate capital, so far as it rests upon their original undertaking to become members. It includes the subscriptions preliminary to the organization of a corporation, the necessity of part payment to render such subscription obligatory, the validity of conditional subscriptions and the effect of fraud and misrepresentations. The subscription considered as a cause of action is also treated here, and in connection with it the title Stock should be referred to.]

- I. THE CONTRACT GENERALLY.
- II. CONDITIONS.
- III. FRAUD.
- IV. ALLOTMENT OF STOCK.
- V. NECESSARY PAYMENTS.
- VI. PRELIMINARY SUBSCRIPTIONS.

VII. MUNICIPAL SUBSCRIPTIONS.

VIII. DISCHARGE OF SUBSCRIBERS.

IX. ACTIONS.

I. THE CONTRACT GENERALLY.

1. There is a distinction between a voluntary subscription for a building fund for the benefit of a library and a subscription for stock; and parol evidence is not admissible to show that a mere subscription to such a fund, although expressed to be for a certain number of shares, was intended to be a subscription for stock in such corporation. *N. J. Supreme Ct.* 1861, *Elizabeth Library Association v. Crane*, 5 *Dutch* 302.

2. Where a subscription paper for establishing an academy makes the money payable to persons named as trustees, and also provides that the subscribers shall organize when the necessary fund has been subscribed, if on due notice they organize in the form of a corporation, the corporation may sue for and recover the sums subscribed. *Pa. Supreme Ct.* 1860, *Edenboro Academy v. Robinson*, 37 *Pa. St.* 210.

Otherwise where the subscription indicated no design to organize formally, as a corporation or otherwise. *Me. Supreme Ct.* 1863, *Machias Hotel Co. v. Coyle*, 35 *Me.* 405.

3. A paper stating that "we, the subscribers, bind and obligate ourselves to subscribe," — *Held*, under the circumstances a subscription and not a mere promise to subscribe. *North Missouri R. R. Co. v. Miller*, 31 *Mo.* 19.

Consult also cases *infra*, 154, &c.

4. Writing necessary. A contract of subscription must be in writing, and cannot be established by parol evidence. [29 *Pa. St.* 146.] *Pa. Supreme Ct.* 1858, *Pittsburgh & Steubenville Railroad Co. v. Gazzam*, 33 *Pa. St.* 840.

5. The Commissioner's book of subscriptions to the stock of an incorporated company, is presumptive evidence that the subscriptions were genuine, or made by persons authorized. *Circ. Ct. D. C.* 1824, *Rockville & Washington Turnpike Co. v. Van Ness*, 2 *Cranch C. Ct.* 449.

6. Book not necessary. Though the statute require books to be opened, the use of subscription papers, instead of a book, does not make the subscription void. *N. Y. Supreme Ct.* 1849, *Hamilton & Deansville Plank-road Co. v. Rice*, 7 *Barb.* 157.

7. The fact that a subscription, unexceptionable in other respects, was not made in a

book opened by the company for that purpose,—*Held*, to be no ground of invalidity. *Ashtabula & New Lisbon R. R. Co. v. Smith*, 15 *Ohio St.* 328.

8. It is no defence to a suit on a subscription for stock in a company, which has been accepted by them, that the subscription was made in a small blank book, before the stock book for subscriptions had been regularly opened, and that the subscription has not been transferred to the regular books of the company. *Ind. Supreme Ct.* 1862, *Brownlee v. Ohio &c. R. R. Co.* 18 *Ind.* 68.

9. Mere receipt. The stockholder paid for his stock in full, and on receiving his certificate gave a receipt therefor on the margin of the scrip-book. *Held*, a subscription within the meaning of a provision of the charter requiring a certain amount to be subscribed.* *N. Y. Superior Ct.* 1848, *Lohman v. N. Y. & Erie R. R. Co.* 2 *Sandf.* 89. See also, *Carrick's case*, 1 *Sim. N. S.* 505; *Clements v. Todd*, 1 *Exch.* 268.

10. That the erasure of a subscription for stock does not, *per se*, prevent suit upon it; but explanatory parol evidence is admissible,—see *Johnson v. Wabash &c. Co.* 16 *Ind.* 389.

11. It is no defence to an action to recover on a subscription, that the name of another subscriber was erased from the articles of association before they were filed, where it appears that the erasure was made, with the knowledge of the defendant and of all the directors, and at the request of the person whose name was erased, and without fraudulent intent. *N. Y. Supreme Ct.* 1855, *Rensselaer & Washington Plank-road Co. v. Wetzel*, 21 *Barb.* 56.

12. Form of contract. In subscribing for stock in a railroad company, the charter of which creates and defines the terms of the

contract, it is only necessary that the writing should indicate the intention to become a stockholder, and the number of shares that are taken by the subscriber. The taking of stock creates a contract to pay for it in the mode prescribed by the charter. *Ky. Ct. of Appeals*, 1859, *Fry v. Lexington & Big Sandy R. R. Co.* 2 *Metc.* 314.

13. Subscription constitutes membership. Where a statute, incorporating certain individuals who have associated for particular purposes, embraces those, in its provisions, who may subsequently associate, a person who subscribes the articles of association after the passing of the statute, becomes a member.* *Mass. Supreme Ct.* 1819, *Chester Glass Co. v. Dewey*, 16 *Mass.* 94. Compare *New Albany R. R. Co. v. McCormick*, 10 *Ind.* 499.

14. Each subscription is an independent undertaking, and in no way affected by the terms of other subscriptions. *Vt. Supreme Ct.* 1852, *Connecticut and Passumpsic R. R. Co. v. Bailey*, 24 *Vt.* 465.

15. The contract is several. Subscribers for corporate stock, promising to pay to, &c. a specified amount for each share of stock set opposite their names, are liable each on his several contract only, and for the amount opposite his own name.† *Ind. Supreme Ct.* 1862, *Price v. Grand Rapids & Indiana R. R. Co.* 18 *Ind.* 187. But as to joinder in equity, compare *Herron v. Vance*, 17 *Ind.* 595.

16. Where upon a list signed by numerous other subscribers a defendant had subscribed in his own name simply, for a number of shares of railroad stock, and at the same time subscribed for a certain number of other shares for an estate of which he was executor, writing his name again and annexing thereto the letters "Exr."—*Held*, that these subscriptions were two separate and independent contracts, and that the pendency of an action

* The act of incorporation of the Thames Tunnel Company provided, that "the persons who had subscribed, or who should thereafter subscribe or advance money towards making the tunnel," should pay the money by them subscribed, at the time and place, and in the manner directed by the company; and in case any such subscriber should neglect, the company are empowered to sue for and recover the money; and that the whole £160,000 required for the undertaking should be subscribed before the act should be put in force. *Held*, that the word "subscribers," in the act, meant only those who *had stipulated to pay*, and not those who *had paid* money, and, therefore, a person whose name was inserted in the act, and who paid a deposit on shares, *but who had not signed the contract*, was not a subscriber within the act, nor liable to be sued by the company. *K. B.* 1897, *Thames Tunnel Co. v. Sheldon*, 6 *Barr. & C.* 841.

* Where A. subscribed for shares in a corporate stock, on account of B, but without authority from him,—*Held*, that A. did not thereby become a member of the corporation. *Mass. Supreme Ct.* 1829, *Salem Mill Dam Corporation v. Ropes*, 9 *Wak.* 187.

† A written promise to pay a corporation \$125, for five shares of the capital stock of such corporation, in such manner and proportion, and at such time and place as the corporation should require,—*Held*, a good promissory note within the statute, though it had not the words "bearer," or "order." [6 *T. R.* 128; 2 *Ld. Raym.* 1545; 3 *Cal.* 187.] It is not a note payable on a contingency, but is in effect payable on demand. *N. Y. Supreme Ct.* 1812, *Goshen Turnpike Co. v. Hurtin*, 9 *Johns.* 217; 8 *P.* 1817, *Dutchess Cotton Factory v. Davis*, 14 *Id.* 238.

to enforce the payment of the first, afforded no ground for abating an action to enforce payment of the second. *N. Y. Ct. of Appeals*, 1865, *Erie & N. Y. City R. R. v. Patrick*, 2 *Keyes*, 256.

17. **Mode of taking.** The charter of a corporation giving it authority to take subscriptions for stock, without specifying in what manner, is sufficient evidence in a suit on such subscription, no proof being offered that the mode adopted in taking the defendant's subscription is at variance with any law applicable to the subject, that the corporation was authorized to enter into the contract with the defendant; especially, where by signing the contract the defendant has given his assent to the mode adopted by the company. *Md. Ct. of Appeals*, 1858, *Wellersburg & West Newton Plank Road Co. v. Young*, 12 *Md.* 476. But compare *Shurtz v. Schoolcraft & Co. R. R. Co.* 9 *Mich.* 269.

18. Where a corporation, at its first meeting, passed a vote authorizing one of its members to solicit subscriptions, a subscription paper, bearing date the same day, must be considered as authorized by the corporation, no other subscription paper being proved to exist. *Mo. Supreme Ct.* 1849, *South Bay Meadow Co. v. Gray*, 30 *Mo.* (17 *Shepl.*) 547.

19. That a subscription made at a meeting not authorized by the corporation, if afterward transferred to the books of the company, may be enforced by them,—see *Mobile & Ohio R. R. Co. v. Yandal*, 5 *Sneed*, 294.

20. **Employing agent.** A corporation under its common law power to make contracts, may agree with an agent to compensate him for obtaining subscriptions to the stock. *Ind. Supreme Ct.* 1856, *Cincinnati & C. R. R. Co. v. Clarkson*, 7 *Ind.* 595.

21. **Ratification of unauthorized acts.** A corporation may recover stock subscriptions procured by one who acted as agent, though not at the time authorized, provided the act of their pretended agent has been ratified, and the commencement of an action to recover such subscription, amounts to a ratification on their part. *Miss. Ct. of Errors*, 1857, *Walker v. Mobile & Ohio R. R. Co.* 34 *Miss.* 245.

22. **Notice.** Where notice is directed to be given of the time and place for receiving subscriptions for stock in an incorporated company, the object is to prevent a monopoly

of the stock, and the want of the notice is no defence to one who does subscribe. *Md. Ct. of Appeals*, 1820, *Hagerstown Turnpike Co. v. Creeger*, 5 *Har. & J.* 122.

23. **Mistake.** A subscription to a railroad company is valid, though made to one who was not a commissioner to receive subscriptions; and though made under a mistaken belief that he might forfeit his stock at his pleasure. *S. C. Ct. of Appeals*, 1857, *North Eastern R. R. Co. v. Rodriguez*, 10 *Rich. Law*, 278.

24. Where a person subscribed to the stock of a railroad company, which was already chartered, but was waiting for subscriptions to complete its organization under the charter, with the intention, as he alleged, of renewing an old subscription which had fallen through; but in fact subscribed for double the amount, and, upon discovering his mistake immediately after, suffered the company to organize and act upon the faith of his subscription for several months, without notice of his alleged mistake,—*Held*, that a court of equity could not grant him relief and rescind the contract on the ground of a mistake of facts. *R. I. Supreme Ct.* 1858, *Diman v. Providence, Warren & C. R. R. Co.* 5 *R. I.* 180.

25. **Additional subscriptions.** If the whole amount of stock provided for by the charter has been issued, and the trustees are empowered to increase the capital, their determining upon such increase is a condition precedent to their right of collecting further subscriptions, and must be alleged in order to sustain an action against a subscriber for stock beyond the limit. *Ind. Supreme Ct.* 1859, *McCord v. Ohio & C. R. R. Co.* 13 *Ind.* 220.

26. The charter of defendants, after providing for the receipt of subscriptions and the organization of a railroad corporation by commissioners, provided that the directors might, from time to time, cause the books of subscription to be opened until a sum sufficient to complete the work should be subscribed. *Held*, that the directors might receive subscriptions and issue stock without restriction as to time, place, or notice; and that they might receive payment in the obligations of the company. *N. Y. Superior Ct.* 1848, *Lohman v. N. Y. & Erie R. R. Co.* 2 *Sandf.* 39.

27. A joint stock company, authorized to

create additional shares of 100% each, created new shares of 50% each, some of which defendant purchased and received the benefit of. *Held*, on winding up the affairs of the company, that he was estopped from denying the validity of the shares. *Exch.* 1860, Hull &c. Co. v. Wellesley, 6 *Hurlst. & N.* 88.

28. **Delivery in escrow.** It is not a defence to a subscription to the stock of a railroad, that it was delivered in escrow to one of the commissioners, appointed to receive subscriptions. It should have been delivered to a third person, to become effectual, as an escrow. Subscribers are presumed to know the conditions of the charter, and if they desire to make their subscriptions conditional, it must be so expressed in the subscription. *Ky. Ct. of Appeals*, 1855, Wight v. Shelby R. R. Co. 16 *B. Monr.* 4.

29. **Subscriptions in others names.** The provision in the charter of a bank, that "it shall not be lawful for any person to subscribe for shares in the name of other persons," does not exclude a *bona fide* subscription by an attorney in the name of his principal. But the commissioners to take the subscription may, if they doubt the good faith of the subscription, require further evidence than the mere production of a power of attorney, to remove their doubts. *S. C. Ct. of Appeals*, 1854, State v. Lehre, 7 *Rich. Law*, 234.

30. Where the directors and other agents of a corporation have, for many years, acquiesced in a subscription for stock, made by a person in the names of his children or others, who have exercised acts of ownership over it, and voted on it without objection, as their own, the corporation will not afterwards be allowed to treat the subscription as if it were a fraudulent use, by the original subscriber, of mere names, to secure a greater number of votes than he would be entitled to if the stock stood in his own name. *Ohio Supreme Ct.* 1852, Creed v. Lancaster Bank, 1 *Ohio St.* 1.

31. A subscription to stock in the name of a third person, without authority, is an act which may be ratified, and the giving a proxy to vote at a meeting of the company, is some evidence of such ratification. *Pa. Supreme Ct.* 1858, McCully v. Pittsburgh &c. R. R. Co. 32 *Pa. St.* 25.

32. But after a subscriber has been released, giving an incomplete power of attorney to vote for him, at a meeting of the corporation

on the acceptance of an amendment of the charter, does not thereby revive his liability. *Id.*

33. Where an individual subscribed for a certain number of shares in the capital stock of the plaintiff's company, in the defendant's name during the life of the latter, but without his authority,—*Held*, that the subsequent declaration of the intestate that he had stock of the kind and amount subscribed for, did not amount to a ratification of the purchaser's act. *Vt. Supreme Ct.* 1857, Rutland & Burlington R. R. Co. v. Lincoln, 29 *Vt.* 306. Compare Philadelphia &c. R. R. Co. v. Cowell, 28 *Pa. St.* 329.

34. Where an agent for collecting subscriptions for stock, subscribed on his own account,—*Held*, that the statute of limitations did not begin to run against his liability until the time when the book containing it, with other subscriptions obtained by him as agent, was delivered to the company. *Pa. Supreme Ct.* 1860, Pittsburgh &c. R. R. Co. v. Plummer, 37 *Pa. St.* 418.

35. **By heirs.** A subscription by one of several heirs, as follows: "Estate of N. W. 100 shares, \$10,000," is not binding either upon himself or his co-heirs.* *N. Y. Supreme Ct.* 1854, Troy & Boston R. R. Co. v. Warren, 18 *Barb.* 310.

36. An infant subscriber, in a railway company, is in the same situation as in regard to real estate, or any other valuable property, which he may have purchased and received a conveyance of. If, upon coming of age, he disclaim the contract, and restore the thing, with all advantages arising from it, his liability is terminated, and he cannot be made liable for calls. *Exch.* 1851, London & North Western Railw. Co. v. McMichael, 5 *Exch.* 114; 15 *Jur.* 132; 20 *Law J. N. S.* *Exch.* 97; 6 *Eng. Railw. Cas.* 618; Birkenhead &c. Railw. Co. v. Pilcher, 5 *Exch.* 121; 6 *Eng. Railw. Cas.* 622.

37. That the administrator of a subscriber to a projected undertaking, deceased before the act passes for making it, cannot be sued as a subscriber to the undertaking, or proprietor of shares,—see Weald of Kent Canal Co. v. Robinson, 5 *Taunt.* 801.

38. A subscription by a partnership name

* A trust estate,—*Held*, not liable for new shares subscribed for by one of the trustees, in a peculiar case. *Sheriff v. Butler*, 14 *Week. Rep.* 620.

is a compliance with the provision in the general railroad act—requiring each subscriber to the articles of association to subscribe thereto “his name, place of residence, and amount by him subscribed”—especially where the subscription was made by one partner in the name of both, and the other subsequently ratified it. *N. Y. Supreme Ct.* 1856, *Ogdensburgh, Rome & Clayton R. R. Co. v. Frost*, 21 *Barb.* 541.

39. Subscription in trust for the company. The directors of a joint stock company, in order to procure their act of Parliament, subscribed for a large number of additional shares, and signed a declaration that they held them in trust for the company, but did not pay the deposit on, or register them. Afterwards, at a special general meeting of the company, it was unanimously resolved that the trust should be annulled and the shares transferred to the secretary for the use of the company. The directors then proceeded to make calls on the registered shares. *Held*, that the said directors were primarily liable in respect of the shares subscribed for in trust for the company, as any other trustee would be, although they might be entitled to indemnity from their *cestuis que trust*; that the proceedings taken to annul the trust did not relieve them of such liability; and that it was the duty of the directors to make the calls in respect of such shares equally with the calls on the registered shares. *V. Chan. Ct.* 1840, *Preston v. Grand Collier Dock Co.* 2 *Eng. Railw. Cas.* 335; 11 *Sim.* 327; 10 *Law J. N. S. Ch.* 78.

40. A subscription to the full amount named in the articles as the capital stock of the company, is not a condition precedent to the right of recovery upon a subscription.*

*Where the number of shares constituting the capital stock of a corporation was undetermined by charter, and the by-laws of the corporation fixed the amount of the capital,—*Held*, that it was not essential to the validity of an assessment on the shares of a subscriber, who promised merely to pay for the shares he should take, that the whole number as fixed should have been subscribed for, although his subscription was made after the vote was passed. *Ms. Supreme Ct.* 1852, *Kennebec & Portland R. R. Co. v. Jarvis*, 34 *Me.* 360; *Kennebec & Portland R. R. Co. v. Palmer*, 34 *Me.* 366.

A shareholder in a registered joint stock company, who has executed the deed of settlement, with a recital therein that the whole number of shares have not been subscribed for, cannot resist a claim for calls, on the ground that the directors have proceeded with less than the stipulated amount subscribed. *C. P.* 1853, *London &c. Ass. Society v. Redgrave*, 4 *C. D. N. S.* 524.

N. Y. Supreme Ct. 1855, *Rensselaer v. Washington Plank-road Co.* 21 *Barb.* 56; *Ind. Supreme Ct.* 1862, *Hoagland v. Cincinnati & Fort Wayne R. R. Co.* 18 *Ind.* 452.

41. Where a given amount of stock is required to be subscribed before a corporation can go into operation, such requisition must be regarded as an indispensable condition precedent to the bringing of an action for subscription.* *Ky. Ct. of Appeals*, 1859, *Fry v. Lexington & Big Sandy R. R. Co.* 2 *Metc.* 314. And see, *Topeka Bridge Co. v. Cummings*, 3 *Kan.* 55; *Shurtz v. Schoolcraft &c. R. R. Co.* 9 *Mich.* 269.

42. Where the charter requires the capital stock to be a certain amount, subscriptions for stock are to be deemed to have reference thereto, and are therefore conditional upon the whole amount being subscribed; and after a part only has been subscribed, it is not competent for the legislature to pass an act allowing the capital to be reduced, so that such part shall be enough, and thereby make the subscriptions binding without the whole original sum being subscribed. The subscribers are not corporators, under such a charter, until the whole sum contemplated is subscribed; and the legislature cannot by an amendment of the charter make them shareholders, so as to subject them to liability for assessments, without their several consent. *Ms. Supreme Ct.* 1855, *Oldtown &c. R. R. Co. v. Veazie*, 39 *Me.* 571.

43. A subscription for “preferred stock,” which is to draw ten per cent. interest at once, cannot be reckoned as part of the stock required by the charter. *Ms. Supreme Ct.* 1860, *Lewey’s Island R. R. Co. v. Bolton*, 48 *Me.* 451.

44. Ultimate deficiency. Where the terms of a subscription provided that a certain percentage of the estimated cost of sections of a railroad should be subscribed for by responsible persons before the construction was commenced,—*Held*, that if the subscriptions were obtained in good faith, from persons ap-

* The record-book of a corporation recited that a meeting of the stockholders for the purpose of organisation was held, pursuant to notice given by the persons, who, by the charter, were authorised to call such a meeting when \$500,000 of the capital stock had been subscribed. *Held*, that the record was evidence of the fact recited, and also presumptive evidence of the fact that the requisite amount of capital had been previously subscribed, and was, unless rebutted by other evidence, sufficient proof. *Conn. Supreme Ct.* 1863, *Lane v. Brainerd*, 30 *Conn.* 565; *S. P. Marlborough &c. R. R. Co. v. Arnold*, 9 *Gray*, 150.

parently able to pay, the fact that some of them finally proved to be worthless could not render the assessments illegal. *Me. Supreme Ct.* 1855, *Penobscot R. R. Co. v. Dummer*, 40 *Me.* 172; 1856, *Penobscot R. R. Co. v. White*, 41 *Me.* 512; 1860, *Lewey's Island R. R. Co. v. Bolton*, 48 *Me.* 451. But compare *Phillips v. Covington & Co.* 2 *Me. (Ky.)* 219.

45. **Construction of contract.** Whenever the subscription papers refer to the charter of the company, the subscription must be construed as if all the provisions of the statute affecting the liability of the subscriber, or his title to the stock purchased by him, were incorporated in his agreement. *N. Y. Ct. of Appeals*, 1849, *Small v. Herkimer Manufacturing Co.* 2 *N. Y. (2 Comst.)* 330; 1854, *Rensselaer & W. Plank-road Co. v. Barton*, 16 *N. Y.* 457, *note*; *S. P. Williams v. Lakey*, 15 *How. Pr.* 206.

46. **Place of performance.** A contract of subscription to the shares in the capital stock of a foreign railroad corporation is to be performed in the State, by whose laws the corporation was established, and where its business is carried on, and its officers chosen. *Mass. Supreme Ct.* 1858, *Penobscot & Kennebec R. R. Co. v. Bartlett*, 12 *Gray*, 244.

47. **Promise to pay is implied.** Whatever may be the form or language of a subscription to the stock of an incorporated company, every person who, in any manner, becomes a subscriber for, or engages to take any portion of the stock of such company, thereby assumes to pay for the same, according to the conditions of the charter. An express promise to pay in terms is not necessary. *N. Y. Ct. of Appeals*, 1857, *Rensselaer & Washington Plank-road Co. v. Barton*, 16 *N. Y.* 457, *note*. To similar effect, *N. Y. Superior Ct.* 1829, *Harlem Canal Co. v. Seixas*, 5 *Hall*, 504; The same *v. Spear*, 2 *Id.* 510; *N. Y. Supreme Ct.* 1835, *Spear v. Crawford*, 14 *Wend.* 20; 1855, *Rensselaer & Washington Plank-road Co. v. Wetsel*, 21 *Barb.* 56; 1856, *Ogdensburgh, Rome & Clayton R. R. Co. v. Frost*, 21 *Barb.* 541; *N. Y. Chancery*, 1846, *Sagory v. Dubois*, 3 *Sandf. Ch.* 466, 492; *N. Y. Superior Ct.* 1849, *Palmer v. Lawrence*, 3 *Sandf.* 161; *Conn. Supreme Ct.* 1853, *Danbury & Norwalk R. R. Co. v. Wilson*, 22 *Conn.* 435; *S. P. Buckfield Branch R. R. Co. v. Irish*, 39 *Me.* 44; *Dexter & Mason Plankroad Co. v. Millard*, 8 *Mich.* 91; *Carson v. Arctic Mining Co.* 5 *Mich.* 288.

48. **Contra.** A mere subscription for stock creates no promise, and gives no security to the corporation beyond the value of the stock; but a promise superadded gives a right of action, where there are parties in being to give and take the promise. This distinction is reasonable; for as the objects for which such corporation are applied for and granted are generally experimental, and as expenses must be incurred in trying the experiment, it is right and just that those who embark in the same cause should be holden to each other for a fair apportionment of the expenses; and it is not unjust, if a majority of those who associate should determine to complete the object, that those, in whose promises they confide to bear their proportion of expense, should be compelled to pay. But all such promises are in their nature conditional, and depend upon the terms on which they are made with reference to the capacity, duties and powers of the other party to the contract, the corporation; who cannot extend the effect of the promise beyond the original meaning and extent of it, any more than the other party can limit it.* *Mass. Supreme Ct.* 1827, *Salem Mill Dam Corporation v. Ropes*, 6 *Pick.* 23; *Del. Superior Ct.* 1849, *Odd Fellows Hall Co. v. Glazier*, 5 *Harring.* 172; *Me. Supreme Ct.* 1850, *Kennebec & Portland R. R. Co. v. Kendall*, 31 *Me.* 470.

49. **Express promise.** If a member of a turnpike corporation expressly promise the corporation to pay his proportion of the legal assessments, such promise is good in law, and an action may be maintained for the breach of it, notwithstanding the general remedy of forfeiture provided by statute. *Mass. Supreme Ct.* 1809, *Worcester Turnpike Corporation v. Willard*, 5 *Mass.* 80.

50. **A parol declaration made by a member to the other corporators at a corporate meeting, of his willingness to spend money**

* A written agreement, signed and delivered to a corporation subject to Mass. Rev. Sta. c. 33, § 44, by which the subscribers severally promise "to pay into the funds of the said company, in such installments as the president and directors may under the provisions of law require," a certain sum for each share subscribed for, is a promise to the corporation, and will support an action by the corporation for the amount of an assessment, voted by the stockholders, pursuant to Mass. Rev. Sta. c. 33, § 13, and also voted by the directors, against one who has had notice of the votes, and a demand made upon him for payment of the assessment. *Mass. Supreme Ct.* 1853, *City Hotel v. Dickinson*, 6 *Gray*, 586.

in carrying out the purposes of the corporation, and made upon the occasion of doubling his subscription for stock,—*Held*, not to amount to a contract to pay the subscription, which would enable the company to sustain an action thereon. *Mass. Supreme Ct.* 1810, *Andover & Medford Turnpike Co. v. Hay*, 7 *Mass.* 102.

51. Consideration. The advantages to be derived from being a member of a corporation formed for profit, and of the consequent right to participate in the pecuniary dividends, is a positive benefit; and where the agreement secures that advantage to the subscriber, on the organization of the company, the objection of a want of consideration cannot be made with success. [2 Hill, 153; 3 Den. 45, 417; 14 *Mass.* 172.] *N. Y. Supreme Ct.* 1849, *Hamilton & Deansville Plank-road Co. v. Rice*, 7 *Barb.* 157; 1856, *Poughkeepsie & Salt Point Plank-road Co. v. Griffin*, 21 *Id.* 454; *Ct. of Appeals*, 1854, *Schenectady & Saratoga Plank-road Co. v. Thatcher*, 11 *N. Y. (1 Kern.)* 102; 1857, *Lake Ontario &c. R. R. Co. v. Mason*, 16 *N. Y.* 451; *Me. Supreme Ct.* 1852, *Kennebec & Portland R. R. Co. v. Jarvis*, 34 *Me.* 260;* *Ohio Supreme Ct.* 1864, *Ohio Wesleyan Female College v. Love's Executor*, 16 *Ohio St.* 20.

52. Failure of consideration. Subscribers to stock in a railroad corporation will not be released from payment by a suspension of the work for want of funds. Otherwise, if the work be abandoned by the company, and payment be not necessary to satisfy any existing demand. *Ky. Ct. of Appeals*, 1854, *McMillan v. Maysville & Lexington R. R. Co.* 15 *B. Monr.* 218.

53. If the undertaking for which the company is incorporated is not commenced *bona fide*, within the period prescribed by the charter, and there is no evidence of acquies-

cence by the subscriber, no action can be maintained for the subscription. *Pa. Supreme Ct.* 1858, *McCully v. Pittsburg &c. R. R. Co.* 32 *Pa. St.* 25.

54. Subscriptions were made to stock in a railroad company upon condition that the road should be so located and constructed as to make C. a point in the road; otherwise, the subscriptions to be null and void; to be paid in such installments, and at such times as the directors should require. *Held*, that the subscriptions were to be paid if the road was so constructed as to make C. a point, and that the completion of the road was not a condition precedent. *Ky. Ct. of Appeals*, 1854, *McMillan v. Maysville & Lexington R. R. Co.* 15 *B. Monr.* 218. See also, *Henderson & Nashville R. R. v. Leavell*, 16 *Id.* 358.

55. Subscribers to stock in a railroad company must pay their subscriptions as the work progresses, such being the intent of the parties as gathered from the nature of the work to be accomplished. *Id.*

56. The consideration of a subscription for stock in a railroad company must be deemed to be the shares of stock, and not such collateral and incidental advantages as the subscribers may expect to obtain from the building of the road; and if, from the non-completion of the road, he does not obtain these advantages, he cannot allege a failure of the consideration of his subscription. *Ind. Supreme Ct.* 1861, *Bish v. Bradford*, 17 *Ind.* 490.

57. The legal obligation of an original subscription to the capital stock of a railroad not vitiated by the sale of the road or the incapacity of the company to complete it. See *Smith v. Gower*, 2 *Duv.* 17; *Dill v. Wabash &c. R. R. Co.* 21 *Ill.* 91.

58. Organization. As a general rule, strict compliance with its charter, as to organization, must be shown by a corporation seeking to enforce payment of subscriptions to its stock; but in some cases compliance will be presumed, and in others it may be waived. *Md. Ct. of Appeals*, 1860, *Maltby v. Northwestern &c. R. R. Co.* 16 *Md.* 422.

59. An individual having subscribed for stock in, and assisted in the organization of, a company, under a statute authorizing the formation of companies to construct plank-roads, cannot avoid the payment of the stock subscribed for, upon the ground that the company was not organized in strict con-

* S. P. Birmingham & Bristol Railway Co. v. White, 1 Q. B. 232; *Pendergast v. Turton*, 1 *Younge & C. Ch.* 93; *Baltimore &c. Turnp. Co. v. Barnes*, 6 *Harris & J.* 57; *Hall v. United States Insurance Co.* 5 *Gill*, 484; *Small v. Herkimer Man. Co.* 2 *Comst.* 330; *Mann v. Pentz*, 2 *Sandf. Ch.* 257; *Gayle v. Cahawba & Marion R. R. Co.* 8 *Ala.* 536; *Stokes v. Lebanon Turnp. Co.* 6 *Humph.* 241; *Hartford & New Haven R. R. Co. v. Kennedy*, 12 *Conn.* 499; *Harlaem Canal Co. v. Seixas*, 2 *Ell.* 504; *Essex Bridge Co. v. Tuttle*, 2 *Vt.* 293; *Union Locks & Canal Co. v. Towne*, 1 *N. H.* 44; *Tonica &c. R. R. Co. v. McNeely*, 21 *Ill.* 71; *Dutchess Cotton Manufactory v. Davis*, 14 *Johns.* 238; *East Tennessee & Virginia Railroad Co. v. Gammon*, 5 *Sneed*, 567; *Thigpen v. Mississippi Central Railw.* 32 *Miss.* 343.

formity to law. *Mo. Supreme Ct.* 1852, Central Plank-road Co. v. Clemens, 16 *Mo.* 359.

60. A subscriber to the certificate of association, filed to organize a bank, is liable for the amount of the shares subscribed for by him; and payment may be enforced at the suit of a receiver of the bank, on its becoming insolvent, to satisfy the just demands of creditors of the bank. The fact that the bank never chose a board of directors, or did any business except to contract debts, does not alter the case. *N. Y. Superior Ct.* 1860, Dayton v. Borst, 7 *Bosc.* 115.

61. If a certificate of association, executed under section 16 of the Banking Associations Act, is abandoned by the association, and a new and different certificate executed, and the organization takes place under the latter, the association cannot hold the subscribers under the provisions of the former. *N. Y. Ct. of Appeals*, 1853, Burrows v. Smith, 10 *N. Y.* (6 *Seld.*) 550. Compare Valk v. Crandall, 1 *Sandf. Ch.* 179.

62. Effect of not organizing. Persons who have subscribed for and taken stock in a corporation do not become copartners in consequence of an omission to comply with the requisitions of the law, in the organization of the corporation by which its proceedings are rendered void, so as to give validity to acts of some members in disposing of the property, as against the other members. The personal liability of members of a copartnership is inconsistent with the character and nature of a corporation. And the members of a corporation cannot be made subject to the liabilities of partners in the absence of all statutory provision imposing such liabilities. *Mass. Supreme Ct.* 1851, Fay v. Noble, 7 *Cush.* 188.

63. The invalidity or irregularity of one subscription to the stock of a corporation does not affect the validity of the organization so as to entitle another subscriber to refuse to pay his own, regular, subscription. An objection which a subscriber may have to the sufficiency of other subscriptions than his own, should be taken before the Commissioners for opening the books. *Conn. Supreme Ct.* 1860, Litchfield Bank v. Church, 29 *Conn.* 137.

64. Subscription for convertible stock. A corporation in the habit of issuing stock in two forms, issued to a creditor, stock in

the form which had the lower market value, upon an agreement that it might be converted into the other form, but subsequently refused to convert it. *Held*, that the creditor could not therefore rescind the exchange of his demand for the stock. The exchange was executed, and for a breach of the promise to convert the stock, he must look to his agreement. *N. Y. Superior Ct.* 1848, Lohman v. New York & Erie R. R. Co. 2 *Sandf.* 89.

65. Calls on stock. Where the president and directors are authorized to manage the affairs of the company, an order made by them requiring payment of an installment is valid. *N. Y. Supreme Ct.* 1803, Union Turnpike Co. v. Jenkins, 1 *Cai.* 381.

66. Where a subscription for stock was not payable until called for by resolution of the directors,—*Held*, that the company could not set off the amount of the subscription against a debt due from them, without proof of such a resolution. *N. Y. Com. Pl.* 1855, Bouton v. Dry Dock &c. Stage Co. 4 *E. D. Smith*, 420.

67. Where the power to require payment from the stockholders is vested in a board of directors, an action will not lie to recover installments, unless all the prerequisites of the charter have been complied with. *Ill. Supreme Ct.* 1851, Banet v. Alton & Sangamon R. R. Co. 18 *Ill.* 504.

68. That several installments may be called for by one vote to be payable at different times,—see Rutland &c. R. R. Co. v. Thrall, 35 *Vt.* 536.

69. A call upon subscribers for stock "to pay an installment of ten per cent. every thirty days,"—*Held*, sufficient to prove a call for such installment in thirty days from the publication of the call. *Ind. Supreme Ct.* 1861, Heaston v. Cincinnati & Fort Wayne R. R. Co. 16 *Ind.* 275.

70. Under the provisions of the Pennsylvania general railroad act of February, 1849, an original subscriber to the capital stock of a railroad company, is held liable for the amount remaining unpaid, after a transfer to another, whether the transfer be made in good faith or not. *Pa. Supreme Ct.* 1857, Pittsburgh &c. R. R. Co. v. Clark, 29 *Pz. St.* 146.

71. A railroad company authorized by its charter to collect installments of stock at such times as may be required by the president and directors, may make contracts for the payment of stock, subject to conditions

as to the calls for installments. Without this right, not merely the condition as to the payment, but the whole contract would be void. *Miss. Ct. of Errors*, 1856, *Roberts v. Mobile & Ohio R. R. Co.* 82 *Miss.* (3 *George*.) 878.

72. Limit of liability. In the case of a corporation created for the private benefit of its projectors, and not for any public object, no contract to pay for its stock any further sum than that required upon the original subscription, is to be implied from such subscription, or from taking certificates of stock stating the further payments to which the stock might be subjected by order of the directors. The effect of such certificate is to give the holder a title conditional upon his making further payments, if called, but leaves such payment optional with him. *N. Y. Ct. of Appeals*, 1862, *Seymour v. Sturgess*, 26 *N. Y.* 134. See also, *Gillan v. Morrison*, 1 *De Gez & S.* 421; 11 *Jur.* 861.

73. Mode of payment. An agreement to take stock in a railroad company, and pay in the stock of a canal company, and an offer of the canal stock, will not make the party liable to pay money. *Md. Ct. of Appeals*, 1847, *Swatara R. R. Co. v. Brune*, 6 *Gill*, 41.

74. Liability to creditors. In the provision of the Massachusetts statute of 1821, ch. 28,—that any member of manufacturing corporations shall be liable, in his individual capacity, for all debts contracted during the time of his continuing a member of such corporation,—the words "debts contracted" do not mean exclusively such debts as are payable in money, *ex contractu*, but include all legal liabilities incurred by the corporation, and which, when fixed by a judgment, award or otherwise, are debts of the corporation. To construe the words so strictly as to include only contracts, would be to defeat the object of the statute, which is remedial in its purpose. [21 *Pick.* 455; 8 *Metc.* 522.] *U. S. Cir. Ct. (Mass.)* 1843, *Carver v. Braintree Mfg. Co.* 2 *Story C. Ct.* 432.

Consult, also, INDIVIDUAL LIABILITY.

75. "Debt." The obligation of the subscriber to pay such sums as may be required from himself and others from time to time, not exceeding a certain limit, is not, while the amount needed by the company remains uncertain, "a debt payable on a contingency," within the meaning of the Bankrupt act de-

fining what debts are provable. *Exch.* 1851, *South Staffordshire Railway Co. v. Burnside*, 5 *Exch.* 129; 6 *Eng. Railw. Cas.* 611; 20 *Law J. N. S. Exch.* 120.

II. CONDITIONS.

76. The act of the president of an incorporated company, in accepting conditional subscriptions, is binding on the company. *Pa. Supreme Ct.* 1861, *Pittsburgh & Connellsville R. R. Co. v. Stewart*, 41 *Pa. St.* 54.

77. What are conditions. A clause of a subscription prescribing a penalty differing from that designated in the charter, will be viewed either as nugatory or as superadding a penalty to that stipulated by the charter, and will not be interpreted into a condition for the benefit of the subscriber. *Fla. Supreme Ct.* 1857, *Kirksey v. Florida & Georgia Plankroad Co.* 7 *Fla.* 23.

78. A proviso annexed to a subscription for railroad stock, that the road be put under contract within a year, and no installments be called for till it is put under contract with conditions to secure its building within twenty months from the time of the contract, constitutes a condition precedent; and the completion of the road before installments were called for is not a substantial compliance, at least if it does not appear that the road could have been sooner built. In such a case the subscriber is not held to have waived the condition by not notifying the company of his intention to insist on it. *Iowa Supreme Ct.* 1864, *Burlington & Missouri River R. R. Co. v. Boestler*, 15 *Iowa*, 555.

79. A stipulation by which a committee was appointed "to see that the stipulations are and will be complied with, before the subscriptions are paid,"—*Held*, not to make the action of the committee a condition precedent to a recovery of the price of the stock. *Shaffner v. Jeffries*, 18 *Mo.* 512.

80. Setting opposite one's subscription the words "to be expended between the C. river and the east line of the State," is not a condition precedent to the becoming a stockholder; but if it were, it is waived by the subscriber becoming a director, and acting as such. *Conn. Supreme Ct.* 1862, *Lane v. Brainerd*, 30 *Conn.* 565.

81. What conditions are illegal. Under a charter authorizing absolute subscriptions for stock in a corporation, for the construction of a public highway, subscriptions, con-

ditioned on the adoption of a particular locality or terminus, are void as against public policy. *N. Y. Supreme Ct.* 1841, *Butternuts & Oxford Turnpike Co. v. North*, 1 *Hill*, 518; *N. Y. Ct. of Appeals*, 1857, *Fort Edward & C. Plankroad Co. v. Payne*, 15 *N. Y.* 588; *Pa. Supreme Ct.* 1840, *Cumberland Valley R. R. Co. v. Raab*, 9 *Watts*, 458.

To the contrary, *Wis. Supreme Ct.* 1860, *Racine & C. Bank v. Ayres*, 13 *Wis.* 519.

82. Conditions attached to subscriptions to stock of a railroad company by the commissioners appointed to receive them made preparatory to the procurement of a charter, are nugatory. The commissioners are agents with limited powers, incapable of offering any other terms to a subscriber than those prescribed by the legislature. *Pa. Supreme Ct.* 1864, *Bedford R. R. Co. v. Bowser*, 48 *Pa. St.* 29. To similar effect, *Babington v. Pittsburgh R. R. & C. Co.* 84 *Id.* 358; *Pittsburgh & C. R. R. Co. v. Biggar*, 84 *Id.* 455.

83. Contra. A subscription for stock, on the condition, expressed in writing, that the road shall be permanently located on a specified line, makes that location and permanency in it, conditions precedent.* *Ind.*

* Where a subscription was made for a given number of shares of stock in a railroad company, payable at such times and in such installments as the directors might prescribe, provided the road should be "permanently located" on a given route, and that a "freight house and depot be built" at a point named,—*Held*, 1. That upon the permanent location of the road, according to the terms proposed, and the acceptance of the subscription, the latter became absolute. 2. That the provision in relation to the erection of the buildings was a stipulation merely, and its performance not a condition precedent to the right to collect the amount of the subscription. *Ohio Supreme Ct.* 1864, *Chamberlain v. Painesville & Hudson R. R. Co.* 15 *Ohio St.* 225; *Ashtabula & New Lisbon R. R. Co. v. Smith*, 15 *Ohio St.* 328.

A person subscribed for shares in the stock of a railroad company, on the express condition that the company should locate and construct their railroad along a specified route, and having paid one installment and part of the second, delayed the payment of the balance, as the calls were made, until the company, before the road was constructed along the route mentioned, suspended operations; after which payment was refused on the ground that though the road had been located by the company, they had not constructed it, according to the condition in the subscription. In an action for the subscriptions,—*Held*, that the promise of subscription being precedent to that of construction upon the part of the company, the defendant could not insist upon performance by the railroad company while he refused performance on his part; and that the road having been located as stipulated, and completed so far as the means of the company would allow, it was a compliance with the condition, and that the plaintiffs were entitled to recover. *Pa. Supreme Ct.* 1861, *Miller v. Pittsburgh & Connellsville R. R. Co.* 40 *Pa. St.* 237.

The condition in the contract of subscription was not a condition precedent, and did not require the completion of

Supreme Ct. 1858, *Evansville & C. R. R. Co. v. Shearer*, 10 *Ind.* 244; *Jewett v. Lawrenceburgh & C. R. R. Co.* *Id.* 589. To very similar effect, *Fla. Supreme Ct.* 1859, *Martin v. Pensacola & C. R. R. Co.* 8 *Fla.* 370. And see, *New Albany R. R. Co. v. McCormick*, 10 *Ind.* 499.

84. A condition in a railroad subscription that the road shall be located within a certain distance of a town, is satisfied only by an actual construction and use within that distance. *Ind. Supreme Ct.* 1858, *Jewett v. Lawrenceburgh & C. R. R. Co.* 10 *Ind.* 589. Compare *North Missouri R. R. Co. v. Winkler*, 29 *Mo.* 818; *O'Neal v. King*, 3 *Jones & Law*, 517; *Chapman v. Mad River & Lake Erie Railw. Co.* 6 *Ohio St.* 119.

85. Illegality cured by performance. A conditional subscription to stock is a continuing offer, and becomes final and absolute when accepted. Hence, all contracts for stock in consideration of a particular location, when complied with by the company, are as binding on both parties as if the contract had been absolute and unconditional; for however adverse to public policy such conditions prior to the formation of the corporation, the location and construction of the road is the province and duty of the president and directors, and a contract made by them in execution of their corporate powers must be presumed to be made in promotion of the public interest, unless shown to the contrary. *Md. Ct. of Appeals*, 1866, *Taggart v. Western Maryland R. R. Co.* 24 *Md.* 563. Compare *Pittsburgh & C. R. R. Co. v. Plummer*, 87 *Pa. St.* 418.

86. A promise to take a certain amount of stock in a proposed road company, provided a certain route is adopted, rests on sufficient consideration and is valid.* *Pa. Supreme Ct.* 1856, *Rhey v. Ebensburg & C. Plank-road Co.* 27 *Pa. St.* 261; 1840, *Cumberland Valley R. R. Co. v. Raab*, 9 *Watts*, 458.

87. What are legal. A subscription for stock in a railroad, made upon the condition that it shall not be payable until needed for

the road before payment could be required, but only that, when located and constructed it should occupy the route designated, the undertaking being, on the part of the subscriber, to pay as calls should be made by the directors, and on the part of the company to locate as stipulated, and to construct as fast as their means would allow. *Id.*

* That a wager on the time when a railroad should be built, is not contrary to public policy as tending to influence subscriptions to the stock,—see *Beadles v. Bess*, 27 *Id.* 330.

the construction of a certain portion of the road, and that the amount paid shall be applied solely to such construction, is not invalid, as against public policy. *Wis. Supreme Ct.* 1860, Milwaukee &c. R. R. Co. v. Field, 12 *Wis.* 840.

88. Interest. A stipulation for the payment of interest on the amount paid in on a stock subscription in a railroad company, until the declaration of a dividend, does not invalidate the subscriptions.* *Wis. Supreme Ct.* 1860, Racine &c. Bank v. Ayers, 12 *Wis.* 512. Compare Rutland &c. R. R. Co. v. Thrall, 35 *Vt.* 536.

89. In an action against a subscriber to the stock of an incorporated company to recover assessments upon his shares, the defendant, who has signed a recommendation, contained in the subscription paper, that interest be paid to stockholders on payments for stock, cannot resist payment of his subscription on the ground that such interest has been paid. *Mass. Supreme Ct.* 1866, Agricultural Branch R. R. Co. v. Winchester, 18 *Allen*, 29.

90. A form was prescribed by the charter of a railroad company in which subscriptions to stock should be taken, and it was further provided that the company should have all the powers incident to a corporation at common law. A subscription followed the language of the form and contained additional stipulations, not inconsistent with those prescribed by the form, which would have been competent at common law for the parties to make. *Held*, that the subscription was valid. *Ind. Supreme Ct.* 1856, Fisher v. Evansville & Crawfordsville R. R. Co. 7 *Ind.* 407.

91. Stock promised to bondholders. An arrangement made by defendants by their public proposals for a loan, by which subscribers to the loan had the privilege of becoming shareholders, with a condition that if they did not advance all the installments of the loan, according to the terms of their subscription, they should not be entitled to shares,—*Held*, not illegal on the ground that

* Where a railroad company received subscriptions to its stock on a guarantee that they would pay interest on stock "as soon as paid," until the road was finished,—*Held*, that interest did not accrue until the stock was fully paid; and that a subscriber, who had paid but a small portion of the calls, could not, in a suit against him for the balance, set up the non-payment of interest on his stock by the company as a breach of condition. *Pa. Supreme Ct.* 1861, Miller v. Pittsburgh & Connellsville R. R. Co. 40 *Pa. St.* 287.

it gave an unlimited option to subscribers to take stock at any time they might choose; but that it only gave the option until the full payment of installments. The conditions of such a subscription having been fully performed, the subscriber acquired a right to scrip for the stock, and the defendants were bound to deliver to him the scrip on his demand. *N. Y. Superior Ct.* 1861, Van Allen v. Illinois Central R. R. Co. 7 *Bow.* 515.

92. Condition as to amount of stock. Where a subscription to the capital stock of a corporation is made upon condition that the company shall not be organized, or shall not enter upon the principal object of its organization, until a given amount of its stock shall be subscribed, such condition is a condition precedent, and the company will not be authorized to enforce the collection of such subscription until the conditions are complied with on its part.* *Ms. Supreme Ct.* 1855, Penobscot & Kennebec R. R. Co. v. Dunn, 39 *Ms.* (4 *Heath*), 587; *S. P. Pa. Supreme Ct.* 1857, Philadelphia & West Chester R. R. Co. v. Hickman, 28 *Pa. St.* 318.

93. Where the charter of a railroad corporation provided that the construction of the railway should not be begun, until three fourths of the estimated cost was subscribed for by responsible persons,—*Held*, that the corporation need not show a compliance

* A railroad corporation voted to issue a certain number of additional shares, and to allow each stockholder to take one new share for every two shares already held by him, provided he should by a certain day subscribe therefor, and pay a part of the price, and give notes for the remainder. *Held*, that there was no implied condition, that the whole number of the new shares should be issued, and that the failure of the corporation to issue that number was no ground for maintaining an action by a stockholder to recover back money so paid by him, nor for defeating an action on notes so given by him. *Mass. Supreme Ct.* 1856, Nutter v. Lexington & West Cambridge R. R. Co. 6 *Gray*, 55.

Where a contract was made "to take and fill" a certain number of shares in the capital stock of a railroad corporation established in Maine, which by its charter was to consist of not less than four thousand nor more than ten thousand shares, upon the condition that "the corporation may organize when four thousand shares have been subscribed, but no contract for the building and completing the road shall be entered into until seven thousand shares have been subscribed,"—*Held*, that the subscriber was liable after four thousand shares had been subscribed and the corporation organized, although the maximum number of shares as fixed by the charter had not been taken, it appearing that no contract for building the road was made until after more than seven thousand shares were subscribed. *Mass. Supreme Ct.* 1858, Penobscot & Kennebec R. R. Co. v. Bartlett, 12 *Gray*, 244.

with this provision in order to maintain an action against a subscriber for an assessment upon the stock. *Me. Supreme Ct.* 1856, Penobscot R. R. Co. v. White, 41 *Me.* 512. Compare Watts v. Salter, 10 *C. B.* 477; 12 *Eng. L. & Eq.* 482.

94. Where a party subscribes to the capital stock of a corporation, upon condition that a certain number of shares shall be subscribed for, it is not competent for him to introduce evidence to show that number has not been subscribed for by persons pecuniarily responsible, unless it appears that the corporation has acted in bad faith. *Me. Supreme Ct.* 1856, Penobscot Railroad Co. v. White, 41 *Me.* 512.

95. Construction contracts. In an action for a subscription to railroad stock which contained the condition, that the company would "put the said road under contract in one year from Sept. 1, 1853, with condition to be built" to a certain town "within twenty months from the time of letting such contract,"—*Held*, that this was a condition precedent, and that a completion of the road upon the first day of September, 1858, without letting the contract within the time limited, or with the conditions stipulated, was not a sufficient compliance therewith to entitle plaintiff to recover. *Iowa Supreme Ct.* 1864, Burlington &c. R. R. Co. v. Boestler, 15 *Iowa*, 555.

96. Repayment on abandonment. If the directors in a provisional organization, in order to induce subscriptions, make it a part of the contract of subscription that in the event of no charter being obtained, the entire deposit shall be repaid without deduction, they are bound thereby, notwithstanding the subscriber's agreement also authorized the directors to expend money in the mode they did. *Q. B.* 1854, Mowatt v. Londesborough, 25 *Eng. L. & Eq.* 25; 3 *EU. & B.* 367; 23 *Lav. J. N. S. Q. B.* 177; *C. P.* 1852, Ward v. The Same, 12 *C. B.* 252; 22 *Eng. L. & Eq.* 402.

97. The declarations of the president of a plank-road company, relative to the manner in which the money subscribed for the road should be appropriated, are not admissible evidence for a delinquent subscriber for stock, when it is not shown that such declarations influenced the defendant's subscription, or that they were made while the declarant was acting as the agent of the company in receiving subscriptions for stock. *Ala. Su-*

preme Ct. 1857, Smith v. Tallahassee Branch of Central Plank-road Co. 30 *Ala. N. S.* 650.

98. The acceptance of a part payment, by the company, of a subscription made upon other conditions than those named in the article of incorporation, is a sufficient concurrence in the condition to create mutuality. See *Nichols v. Burlington &c. Co.* 4 *Greene*, 42.

99. Waiver of condition. The giving of absolute notes for the amount of a subscription does not of itself amount to a waiver of the maker's right to have the road located as he had stipulated, before payment of the notes can be compelled. *Ind. Supreme Ct.* 1862, Parker v. Thomas, 19 *Ind.* 213. But compare *Keller v. Johnson*, 11 *Ind.* 337; *O'Donald v. Evansville &c. R. R. Co.* 14 *Id.* 259; *Taylor v. Fletcher*, 15 *Id.* 80.

100. Although a subscription paper is expressed to be upon the condition that a specific sum shall be raised, yet, if a subscriber co-operates in prosecuting the enterprise, and incurring liabilities with knowledge that the full amount has not been subscribed, these acts operate as a waiver of the condition. *N. Y. Supreme Ct.* 1865, Hutchins v. Smith, 46 *Ba. b.* 235; 1859, Reformed Protestant Dutch Church v. Brown, 17 *How. Pr.* 287. Compare *Wilmington &c. R. R. Co. v. Robeson*, 5 *Ired. Law*, 301.

101. Parol evidence is not admissible to show that an instrument, containing, on its face, an absolute promise for a subscription to stock in a corporation, is conditional. *Ind. Supreme Ct.* 1855, Madison & Indianapolis Plankroad Co. v. Stevens, 6 *Ind.* 379; *N. C. Supreme Ct.* 1857, North Carolina R. R. Co. v. Leach, 4 *Jones, Law*, 340; *Me. Supreme Ct.* 1852, Kennebec & Portland R. R. Co. v. Waters, 34 *Me.* 369; *Fla. Supreme Ct.* 1860, Johnson v. Pensacola & Georgia R. R. Co. 9 *Fla. (1 Galb.)* 299; *S. P. Cunningham v. Edgefield &c. R. R. Co.* 2 *Head, (Tenn.)* 23; *Thigpen v. Miss. Central R. R.* 32 *Miss.* 348.

Otherwise of a subscription made by putting the name on a blank sheet of paper, and subsequently transferred to the subscription books of the company, without any further authority. *Tonica &c. R. R. Co. v. Stein*, 21 *Ill.* 96.

102. Evidence of performance. That a stipulation in a subscription that an order of the board of directors shall be accepted as

evidence of a required location having been made, does not preclude other evidence of the fact,—see *Moore v. New Albany & Co. Co.* 15 *Ind.* 78.

III. FRAUD.

103. **Fraud vitiates subscription.** An allottee of shares in a projected railway company, who has paid his deposit and executed the usual subscriber's deed, may recover back the deposit, in an action for money had and received, if the scheme fails, and he can show that he was induced by fraud to sign the deed. *Each.* 1848, *Atkinson v. Pocock*, 12 *Jur.* 60; 17 *Law J. N. S.* 97; *S. P. Wontner v. Shairp*, 4 *O. B.* 404; *Jarrett v. Kennedy*, 6 *Id.* 819.

104. Where the governor of the State was authorized to subscribe for stock, on behalf of the State, in an incorporated company, upon notification in writing, that the individual subscribers had paid into the treasury of the company ten per cent. of their stock,—*Held*, that the State was not bound by the subscription made on its behalf, if the money were not paid, and the subscription obtained by a false certificate. *Tenn. Supreme Ct.* 1842, *State v. Jefferson Turnpike Co.* 8 *Humph.* 305.

105. A subscriber for stock, when sued therefor, may show in defence that the agent of the company for procuring subscriptions made representations to him, in addition to the statement put forth by the company, which were false, and that he was thus by fraud induced to subscribe. A principal cannot adopt the contract of his agent, and repudiate the fraud by which it was procured. *Va. Ct. of Appeals*, 1851, *Crump v. United States Mining Co.* 7 *Gratt.* 852; *La. Supreme Ct.* 1861, *New Orleans, Opelousas & Great Western R. R. Co. v. Williams*, 16 *La. Ann.* 815.

106. If it be shown that the defendant was induced to subscribe for stock by representations made by the officers of the corporation which were false and fraudulent, he is not liable in an action for such subscription. It is therefore competent for the defendant to prove the declarations of the officers made at the time of the subscription. *Ala. Supreme Ct.* 1857, *Rives v. Plankroad Co.* 80 *Ala. N. S.* 92. To similar effect, *Tex. Supreme Ct.* 1856, *Henderson v. R. R. Co.* 17 *Tex.* 560; *Miss. Ct. of Errors*, 1856, *Hester v. Memphis & Charleston R. R. Co.* 32 *Miss.*

878; *East Tenn. & C. R. R. Co. v. Gammon*, 5 *Sneed*, 567. And see *Wert v. Crawfordsville & Co. Co.* 19 *Ind.* 242.

107. Nor is he liable to calls for the purpose of paying the expenses of the company. *V. Chan. Ct.* 1857, *In re Royal British Bank*, *Brockwell's Case*, 29 *Law Times*, 875. But compare *Ogilvie v. Knox Ins. Co.* 23 *How.* 880.

108. A purchaser of bank stock, who was induced to purchase through the fraudulent representations of the agents of the bank, is not liable to the receiver of such corporation for the amount of his subscription. Although the receiver represent the creditors he cannot enforce a claim which the corporation could not. *Conn. Supreme Ct.* 1860, *Litchfield Bank v. Peck*, 29 *Conn.* 384. Compare *Ashmead v. Colby*, 26 *Id.* 287.

Otherwise where the subscriber was himself one of the fraudulent originators of the undertaking. *Conn. Supreme Ct.* 1860, *Litchfield Bank v. Church*, *Id.* 29 *Conn.* 187.

109. **What constitutes fraud.** In such cases it is not necessary that there should be indictable fraud; it is sufficient to show either moral fraud in the defendant, practised either directly or by his adopting the misrepresentation of others, as by his receiving money knowing that it has been paid in consequence of such misrepresentation; or that a fraud has been committed by an agent of the defendant acting in the course of his business. *Each.* 1848, *Atkinson v. Pocock*, 12 *Jur.* 60; 17 *Law J. N. S.* *Each.* 97.

110. A shareholder in a mining company, to entitle himself to be relieved from his subscription, must show that he acted upon the false representations of the directors, in respect to matters of fact material to the value of the enterprise, and not upon the mere speculation of the directors, or upon his own exaggerated ideas of the prospective success and value of the undertaking. *Rolle Ct.* 1853, *Jennings v. Broughton*, 19 *Eng. Law & Eq.* 420; 22 *Law J. N. S.* *Ch.* 585; 17 *Jur.* 905.

111. **Prospectuses.** The directors of a railway company, who make representations on behalf of the company, to induce persons to subscribe for the stock, so far represent the company, in the transaction, that if they induce such subscription, by a substantial fraud, the contract will be set aside, in a court of equity. The proper inquiry in

such case is, "Whether the prospectus, so issued, contains such representations, or such suppression of existing facts, as, if the real truth had been stated, it is reasonable to believe, the plaintiff would not have entered into the contract, that is, that he would not have taken the shares allotted to him, and those which he purchased." But the omission to state in a prospectus the number of shares taken, by the directors, or other persons, in their interest, is no such fraud as will enable a subscriber to avoid his subscription.* *Rolls Ct.* 1853, *Pulsford v. Richards*, 19 *Eng. Law & Eq.* 387; 23 *Law J. N. S. Ch.* 559; 17 *Jur.* 865. Compare *Ross v. Estates Investment Company*, 36 *Law J. N. S.* 54.

112. An officer of a corporation induced the plaintiff to subscribe and pay for stock upon an agreement that he might at his option, take certain lands of the company and pay in stock; this agreement the officer had no authority to make, but they both erroneously supposed he had. *Held*, that the company, if they refused to perform the agreement, were liable to the subscriber in an action to recover back the money advanced. Such an agreement is an entire contract, and, if the company would retain the money the land must be conveyed, on demand, according to the terms of the agreement. *Ohio Supreme Ct.* 1846, *Weeden v. Lake Erie & Mad. River R. R. Co.* 14 *Ohio*, 563. But compare *Crossman v. Penrose Ferry Bridge Co.* 26 *Pa. St.* 69.

113. Contra. Parol representations or agreements, made at the time of subscribing for stock in a corporation, and inconsistent with the written terms of the subscription, are inadmissible, inoperative, and void. *Vt. Supreme Ct.* 1852, *Connecticut & Passumpsic R. R. Co. v. Bailey*, 24 *Vt.* (1 *Deane*,) 465; *N. H. Supreme Ct.* 1859, *Piscataqua Ferry Co. v. Jones*, 39 *N. H.* 491; *Ala. Supreme*

* In an action by an allottee of a railway company for the recovery of his deposit, it appeared that the company issued a prospectus, which stated the capital to consist of 60,000 shares of a certain value, and the plaintiff, after having paid his deposit executed the subscriber's agreement, which contained the usual terms as to the disposition of the deposits. At the time when he executed the deed, the deposits upon the whole number of shares allotted had not been paid, which fact was not communicated to him. *Held*, that as the withholding of the above fact did not amount to such a fraud as to avoid the deed, the plaintiff was not entitled to recover back his deposit. *Esch.* 1848, *Vane v. Cobbald*, 1 *Esch.* 798; 17 *Law J. N. S. Esch.* 97; 12 *Jur.* 60.

Ct. 1857, *Smith v. Plank-road Co.* 30 *Ala. N. S.* 650; *Ind. Supreme Ct.* 1858, *Johnson v. Crawfordsville R. R. Co.* 11 *Ind.* 280. And see *Blodgett v. Merill*, 2 *Vt.* 509.

So held of representations as to the condition of the company and expenses of the enterprise, &c. *Miss. Ct. of Errors*, 1857, *Walker v. Mobile & Ohio R. R. Co.* 34 *Miss.* 245; *Ogilvie v. Knox Ins. Co.* 22 *Hov. U. S.* 880; *Ind. Supreme Ct.* 1860, *Andrews v. Ohio &c. R. R. Co.* 14 *Ind.* 169.

So held of misrepresentations as to the amount of stock which had been subscribed. *Ind. Supreme Ct.* 1860, *Hardy v. Merriwether*, 14 *Ind.* 203; 1861, *Bish v. Bradford*, 17 *Ind.* 490; *S. P.* 1862, *Brownlee v. Ohio &c. R. R. Co.* 18 *Id.* 68; *Parker v. Thomas*, 19 *Id.* 213; *Ill. Supreme Ct.* 1863, *Goodrich v. Reynolds*, 31 *Ill.* 490.

So held of representations as to future prospects, value, &c. *Ind. Supreme Ct.* 1860, *Vawter v. Ohio & Mississippi R. R. Co.* 14 *Ind.* 174; *Hardy v. Merriwether*, *Id.* 203; *Mass. Supreme Ct.* 1829, *Salem Mill Dam Corporation v. Ropea*, 9 *Pick.* 187.

So held of representations as to what the company would do. *Ind. Supreme Ct.* 1858, *Johnson v. Crawfordsville &c. R. R. Co.* 11 *Ind.* 280; *Ark. Supreme Ct.* 1859, *Mississippi &c. R. R. Co. v. Cross*, 20 *Ark.* 443; *Ind. Supreme Ct.* 1859, *Evansville &c. R. R. Co. v. Posey*, 12 *Ind.* 363; *Eakright v. Logansport &c. R. R. Co.* 13 *Id.* 404; *Carlisle v. Evansville &c. R. R. Co.* *Id.* 477.

114. Parol declarations made by officers of a proposed company on public occasions, if admissible at all to invalidate a subscription for stock, cannot avail a subscriber who does not show that such declarations amounted to fraud on the part of the company, inducing error on his own part when he subscribed. *La. Supreme Ct.* 1857, *Vicksburgh &c. Railroad v. McKean*, 12 *La. Ann.* 633; *Fla. Supreme Ct.* 1859, *Martin v. Pensacola & Georgia R. R. Co.* 8 *Fla.* 376. Compare *Cunningham v. Edgfield*, 2 *Head*, 23.

115. One of the commissioners appointed by an act incorporating a railroad company to take subscriptions, the board consisting of five, has no authority to give any assurance to subscribers, as to the route which shall be adopted by the company in the location of their road. *N. C. Supreme Ct.* 1857, *North Carolina R. R. Co. v. Leach*, 4 *Jones, Law*, 340.

116. A subscriber to stock has no right to

rely on the representations of the soliciting agent as to what the agreement to be subscribed to contains; and therefore he cannot rely upon the falsity of such representations, as a defence, to a suit on his subscription. *Ind. Supreme Ct.* 1860, Thornburgh v. Newcastle & Danville R. R. Co. 14 *Ind.* 499. But compare Wert v. Crawfordville &c. Co. 19 *Ind.* 242.

117. That a subscription upon the faith of an agreement made with a previous subscriber that he would not be required to pay his subscription unless the road should be built, is void,—see Lagrange &c. Plank-road Co. v. Mays, 29 *Mo.* 64.

118. Obtaining charter by fraud. A subscriber to the stock of a corporation when estopped from showing charter was obtained by fraud. *Smith v. Heidecker*, 89 *Mo.* 157.

119. Colorable subscriptions. Where a general statute provided that the governor of the State might subscribe for one-half of the stock of any railroad to be constructed therein, upon the directors certifying that the stock of individual subscribers was well secured, and that ten per cent. upon such amount had been paid in,—*Held*, that it was not a compliance with such requisition for the stockholders to hand in ten per cent. of their subscriptions to the company's treasurer and immediately receive it back, on giving a receipt therefor, but under an obligation to do so much work upon the road; although the charter provided that stock might be paid for in work, and the stockholders are directors and contractors. But, if such acts be done without intentional fraud, and the State directors affirm them, the State will be bound by its subscription. *Tenn. Supreme Ct.* 1842, State v. Jefferson Turnpike Co. 8 *Humph.* 805.

120. A colorable subscription to stock in an incorporated company by a person of influence, shown to the defendant to induce him to subscribe, does not avoid his subscription, unless, relying on it, he was thereby induced to subscribe. *Miss. Ct. of Errors*, 1857, Walker v. Mobile & Ohio R. R. Co. 84 *Miss.* 245.

121. That the objection that part of the subscriptions were fictitious is waived by the deceived subscriber if he subsequently accepts the charter, and by his own act puts it into operation,—see Centre &c. Turnpike Co. v. M'Conaby, 16 *Serg. & R.* 140.

122. Favoritism. An individual sued upon a stock subscription cannot set up, as a defence to the action, that by means of a fraudulent agreement with the directors of the company other subscribers were allowed to obtain their stock upon more favorable terms. Such an arrangement is a nullity, and of no avail to the parties in whose behalf it was made. *Ind. Supreme Ct.* 1859, Anderson v. Newcastle & Richmond R. R. Co. 12 *Ind.* 376.

123. The commissioners may subscribe for and award stock to themselves [1 *Johns. Ch.* 18]; but a subscription by one in his own name, on a secret trust for another, would be a fraud upon the commissioners. * *N. Y. Chancery*, 1833, Walker v. Devereaux, 4 *Paige*, 229.

124. Agreements secretly made, with subscribers for stock in a company, that their subscriptions shall be merely colorable, or dischargeable on part payment, are a fraud upon other subscribers, and the subscriptions should be enforced without regard to them. *Wis. Supreme Ct.* 1860, Downie v. White, 12 *Wis.* 176; *Pa. Supreme Ct.* 1858, Robinson v. Pittsburgh & Connellsville R. R. Co. 82 *Pa. St.* 334. To similar effect are, *White Mountains R. R. Co. v. Eastman*, 84 *N. H.* 124; *Mann v. Cooke*, 20 *Conn.* 178; *New Albany R. R. Co. v. Fields*, 10 *Ind.* 187; *New Albany R. R. Co. v. Slaughter*, *Id.* 218.

125. A party to the fraud. A discharge from a stock subscription on the ground of fraud, cannot be obtained by one who was himself a party to the fraud. *Ind. Supreme Ct.* 1854, Southern Plankroad Co. v. Hixon, 5 *Ind.* 165; *Conn. Supreme Ct.* 1860, Litchfield Bank v. Church, 29 *Conn.* 137; *Pa. Supreme Ct.* 1858, Graff v. Pittsburgh &c. R. R. Co. 81 *Pa. St.* 499.

126. After a long delay (seven years in this case,) a subscriber to the capital stock

* Commissioners appointed to receive subscriptions were required by the statute to apportion the stock among the subscribers, at their discretion and in a manner most advantageous to the interests of the company. A. advanced to B. \$1,000, to be applied in making the necessary payments upon subscriptions, which B. was to procure to be made by third persons for A.'s benefit, under an arrangement that immediately upon their receiving a distribution of the stock it was to be transferred to A. *Held*, that A.'s object being to defeat the statute by concealing the fact that he was the real subscriber, the contract was void, and he could not recover back his advance. [5 *Johns.* 384; 6 *Cow.* 431.] *N. Y. Supreme Ct.* 1884, Perkins v. Savage, 15 *Wend.* 412.

of a railroad company cannot avoid his subscription, on the ground of the false representations of the company's soliciting agent, until he accounts for his delay. *Ind. Supreme Ct.* 1862, *Dynes v. Shaffer*, 19 *Ind.* 165. Compare *Deposit & General Life Ins. Co. v. Ayscough*, 6 *Ellis & B.* 761; *Cunningham v. Edgfield & Co. R. R. Co.* 2 *Head*, 28.

IV. ALLOTMENT OF STOCK.

127. Discretionary power of commissioners. If, by the charter, the commissioners are vested with a discretionary power to distribute the stock among, or between the subscribers therefor, in such proportions as they shall deem most advantageous to the corporation, they may exclude some of the subscribers entirely from any share, and may award stock to themselves and friends, being subscribers.* *N. Y. Chancery*, 1883, *Walker v. Devereaux*, 4 *Paige*, 229. See also, *Clarke v. Brooklyn Bank*, 1 *Edw.* 361.

128. Assignment unnecessary. No excess of subscriptions being shown, the presumption is that the subscription books were closed as soon as all the stock was taken. The title of the several subscribers to the number of shares respectively taken by them becomes perfect the moment the books are closed, and their certificates of stock are merely evidences of title. *N. Y. Ct. of Appeals*, 1856, *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 *N. Y. (4 Kern.)* 336.

129. Especially where the subscriber has acted as a stockholder, in the meetings of the corporation. *Conn. Supreme Ct.* 1853, *Danbury & Norwalk R. R. Co. v. Wilson*, 22 *Conn.* 435.

130. The contract of subscription is mutual, although the commissioners appointed to receive subscriptions be empowered at their option to reject any subscription before the organization of the company, if they do not in fact reject it.† *Vt. Supreme Ct.* 1852, *Connecticut & Passumpsic R. R. Co. v. Bailey*, 24 *Vt.* 465.

* But compare *Meads v. Walker*, *Hopk.* 567, where the commissioners were enjoined from inequitably appropriating the stock.

† Defendant gave his note for his subscription to stock under an agreement that it should not be valid unless he elected to accept the stock. *Held*, that a renewal of such note at maturity by him on the assurance of the cashier that the interest paid would come back to him in a dividend, was an election to take stock and to become absolutely bound. *N. Y. Supreme Ct.* 1857, *Cowles v. Gridley*, 24 *Burb.* 301.

131. Mere proposition. A subscription for stock, payable by the conveyance of a specific tract of land, and conditioned that in case the company should decline to take the land at the price named, the subscription should be void, is a mere proposition, and until accepted by the company, is not binding upon the subscriber. The acceptance of such an offer of subscription can only be made by the board of directors of the company, or perhaps through an authorized agent. *Ind. Supreme Ct.* 1860, *Junction R. R. Co. v. Reeve*, 15 *Ind.* 236.

132. Acceptance. In an action upon a subscription to the stock of an incorporated seminary,—*Held*, that the delivery of the subscription to the plaintiff, followed by his demand of payment, and subsequent action, was sufficient evidence of acceptance; and either the obligation resting upon the corporation to issue stock to the defendant, or the loss sustained by them in erecting buildings in reliance upon the subscription, was a sufficient consideration to render the subscription binding upon the defendant. *N. Y. Ct. of Appeals*, 1866, *Richmondville Union Seminary v. McDonald*, 34 *N. Y.* 379.

133. What constitutes a sufficient allotment and acceptance under the English joint stock companies act,—see *Bog Lead Mining Co. v. Montague*, 10 *C. B. N. S.* 481; *New Brunswick & Co. Railw. Co. v. Muggenridge*, 4 *Hurlst. & N.* 160, 590; *Wontner v. Shairp*, 11 *Jur.* 378; 4 *Eng. Railw. Cas.* 542.

V. NECESSARY PAYMENTS.

134. Condition. Under a charter declaring that, "upon subscription for shares the subscribers shall pay the sum of \$5 on each share, provided that said company may commence the construction of their railroad and boating so soon as three thousand shall be subscribed,"—*Held*, that the payment was not a condition precedent either to the existence of the corporation or its right to commence business; and that the neglect to pay it did not render void the subscription. *Ga. Supreme Ct.* 1855, *Mitchell v. Rome R. R. Co.* 17 *Ga.* 574; *S. P. Commonwealth v. West Chester R. R. Co.* 3 *Grant*, 300.

135. Voidable. Where an article in the by-laws of a corporation provided that "ten per cent. shall be payable upon subscription, or the subscription shall be void,"—*Held*, that

a subscription made without paying any thing was not void, but voidable only at the election of the corporation. *N. H. Supreme Ct.* 1859, Piscataqua Ferry Co. v. Jones, 89 *N. H.* 491; *S. P. Ala. Supreme Ct.* 1857, Smith v. Plank-road Co. 80 *Ala. N. S.* 650. To somewhat similar effect, *McRea v. Russell*, 12 *Ired.* 224. But see *Erie & C. Plank-road Co. v. Brown*, 25 *Pa. St.* 156; *Mitchell v. Rome R. R. Co.* 17 *Ga.* 574; *Wight v. Shelby R. R. Co.* 16 *B. Monr.* 4.

136. Percentage computed on aggregate. The requirement of a statute that ten per cent. must be paid in before organization, means not ten per cent. upon each separate share subscribed; for the word "thereon" does not refer to the shares separately; but ten per cent. upon such a sum of subscriptions as in the aggregate would make a total subscription of \$1,000 for every mile of road proposed to be made. *N. Y. Ct. of Appeals*, 1857, Lake Ontario & C. R. R. Co. v. Mason, 16 *N. Y.* 451; 1854, Rensselaer & Washington Plank-road Co. v. Barton, *Id.* 457, note.

137. Omission to pay. Where the charter required that every subscriber should, at the time of subscribing, pay to the commissioners ten dollars for each share subscribed by him,—*Held*, that a subscription without such payment was a nullity, and that no action would lie upon the subscription to pay the ten dollars a share.* *N. Y. Ct. of Errors*, 1804, Jenkins v. Union Turnpike Co. 1 *Cai. Cas.* 86; 1814, Highland Turnpike Co. v. McKean, 11 *Johns.* 98. See also *Hibernia Turnpike Co. v. Henderson*, 8 *Serg. & R.* 219; *Charlotte & C. R. R. Co. v. Blakely*, 3 *Strobbs.* 245.

138. Contra. A subscriber to the capital stock of an incorporated railroad company, who omitted, at the time of subscribing, to pay the installments required by the charter, cannot avail himself of such neglect to avoid the payment of the subscription. *La. Supreme Ct.* 1857, Vicksburg & C. Railroad v. McKean, 12 *La. Ann.* 688; *Ky. Ct. of Appeals*,

1855, Wight v. Shelby Railroad Co. 16 *B. Monr.* 4.

139. Subsequent payment. Under a statute (*N. Y. General Railroad Act of 1850*), prescribing that no subscription to the stock shall be taken without a payment of ten per cent. on the amount in money, it is not necessary that the payment should be made at the same time with the subscription, if the statute is complied with before suit brought. If both the subscription and the actual cash payment of ten per cent. have been made, the contract is binding, although the acts are not simultaneous. *N. Y. Ct. of Appeals*, 1864, Ogdensburgh & C. R. R. Co. v. Wolley, 84 *How. Pr.* 64; *Ga. Supreme Ct.* 1852, Napier v. Poe, 12 *Ga.* 170.

140. Mode of payment. A corporation can take nothing in payment of stock subscribed, except money, unless by express provision of its charter.* *N. O. Supreme Ct.* 1859, Neuse River Navigation Co. v. Commissioners of Newbern, 7 *Jones, Law*, 275.

141. A railroad company may compromise subscriptions for stock, which are doubtful, upon receiving part payment; or may receive payment in labor or materials, or in damages which the company is liable to pay, or in any other liability of the corporation. *Pa. Supreme Ct.* 1857, Philadelphia & West Chester R. R. Co. v. Hickman, 28 *Pa. St.* 818. But compare *Henry v. Vermilion & C. R. R. Co.* 17 *Ohio*, 187.

142. Under a charter of a corporation which provided that each stockholder should be liable for the company's debts, to the amount of the balance unpaid on his stock,—*Held*, that money paid to, and receipted for, by one who conveyed land to the corporation, necessary for its purposes, such payment being credited to the stockholder on the company's books, was a good payment *pro tanto* on the stock and could not be affected by an error in judgment as to the value of such lands. *Pa. Supreme Ct.* 1856, Carr v. Le Fevre, 27 *Pa. St.* 418.

143. A resolution was passed by the directors invalidating such payments, but pro-

* The contrary,—*Held*, where the subscriber was himself a commissioner to receive the money and procure the stock to be taken. *Ill. Supreme Ct.* 1851, Ryder v. Alton & Sangamon R. R. Co. 18 *Ill.* 516.

The charter of a bank reserved to the State the privilege of subscribing to a certain portion of the stock, "to be paid for at such time or times as might be convenient for the State" *Held*, that it was optional with the State to pay at any time before the termination of the charter. *N. O. Supreme Ct.* 1857, Attorney General v. State Bank, 1 *Dev. & B. Ch.* 545.

* That on refusal to furnish materials pursuant to a subscription, payable in materials, the subscription becomes demandable in money,—see *Haywood & C. Plank-road Co. v. Bryan*, 6 *Jones, Law*, 83.

That one who is indebted to a bank upon a subscription to the stock, cannot insist upon paying his debt in the notes of the bank,—see *Dunlap v. Smith*, 12 *Ill.* 399; *King v. Elliot*, 5 *Smed. & N.* 428.

viding that stockholders, unable or neglecting to pay an additional installment, might return their old certificates and receive new ones to the amount of their actual cash payments. *Held*, that such resolution was binding upon no stockholder, unless he voluntarily consented thereto. The presence of a stockholder as director when the resolutions were passed, can only authorize the inference that he assented to them as a whole, and if so, he had a right to avail himself of the provisions for those unable or unwilling to pay. *Id.*

144. Cash. Under section 4 of the New York general railroad act, which requires the payment of ten per cent. in money, by each subscriber, at the time of subscribing, a payment in money, *eo nomine*, at the time of subscribing to the capital stock of a railroad company, is not necessary to the validity of the subscription as against the subscriber. A subsequent payment will operate as a waiver of the condition, and the party making it will be considered as recognizing his original liability.* *N. Y. Supreme Ct.* 1858, *Beach v. Smith*, 28 *Barb.* 254; *N. Y. Ct. of Appeals*, 1862, *Black River & Utica R. Co. v. Clarke*, 25 *N. Y.* 208; *S. P. Haywood & Co. Plank-road Co. v. Bryan*, 6 *Jones, Law*, 82; *Hall v. Selma & Tenn. R. R. Co.* 6 *Ala. N. S.* 741. But compare *Fiser v. Mississippi & Tenn. R. R. Co.* 82 *Miss.* 359; *Barrington v. Mississippi Central R. R. Co.* 82 *Miss.* 768; *Klein v. Alton & Sangamon R. R. Co.* 18 *Ill.* 514.

145. A credit of a wrongful dividend, as payment of a call upon the stock, is not payment as against the receiver of the corporation; nor is a resolution of the directors, before the dissolution, that they would make no further calls upon the shares, of any force. *N. Y. A. V. Chan. Ct.* 1846, *Sagory v. Du-bois*, 8 *Sandf. Ch.* 466.

146. Securities. Under a charter, which confers upon the directors of a corporation the power to decide the time, manner and proportions, in which the subscribers to stock should "pay the money due," the directors

may receive securities in payment of the shares subscribed by the shareholders.* *Wis. Supreme Ct.* 1860, *Blunt v. Walker*, 11 *Wis.* 284; *N. C. Supreme Ct.* 1851, *McRae v. Russell*, 12 *Ired. Law*, 224; *Vt. Supreme Ct.* 1848, *Vermont Central R. R. v. Claya*, 21 *Vt.* 80. But compare *Hayne v. Beauchamp*, 5 *Smed. & M.* 515; *Leighty v. Susquehanna & Co. Turnpike Co.* 14 *Serg. & R.* 434.

147. By virtue of the inherent power possessed by railroad companies, to take and negotiate promissory notes in the ordinary course of their business, a promissory note may be received in payment of subscriptions to the capital stock of a railroad. *Ill. Supreme Ct.* 1868, *Goodrich v. Reynolds*, 81 *Ill.* 490.

148. So also of a bond or promissory note secured by a mortgage on real estate, instead of money. *Wis. Supreme Ct.* 1863, *Lyons v. Ewings*, 17 *Wis.* 61; *Andrews v. Hart*, 17 *Wis.* 297. To the same effect, *Clark v. Farrington*, 11 *Id.* 806.

149. Nor does a provision in the charter of the company, authorizing the directors to require payment on subscriptions to its capital stock in such proportions not exceeding a certain amount at one installment, and under such other conditions as they may deem fit, prohibit by implication the company from taking such bond and mortgage. *Wis. Supreme Ct.* 1863, *Western Bank of Scotland v. Tallman*, 17 *Wis.* 530.

150. Not only estoppels, technically so called, but estoppels, *in pais*, operate both for and against corporations. Thus, where the charter of a corporation requires the payment of five per cent. on the amount subscribed, at the time of subscription, if the subscriber, instead making the cash payment, gives his note therefor, participates in the organization of the company, becomes one of the directors, and pays his note, he cannot afterwards insist, as a defence to an action to recover an installment, that he did not pay the five per cent. at subscription. *Ala. Supreme Ct.* 1843, *Selma & Tennessee R. R. Co. v. Tipton*, 5 *Ala. N. S.* 787; *S. P. Greenville & Co. R. R. Co. v. Woodside*, 5 *Rich. Law*, 145. And see *Chamberlain v. Painesville & Hudson R. R. Co.* 15 *Ohio St.* 223.

* Where commissioners who were by law required to receive a percentage of the subscriptions in cash, took uncurrent money and worthless checks.—*Held*, that the distribution was wholly void, payment of cash being a condition precedent to subscription, and that the check was therefore void as without consideration, and a violation of the law. *N. Y. Supreme Ct.* 1839, *Crocker v. Crane*, 21 *Wend.* 211. But compare *Thorp v. Woodhull*, 1 *Sandf. Ch.* 411.

* Such securities may properly be made payable to the president, although the articles of association require they should be taken to the bank. *N. F. A. V. Chan. Ct.* 1845, *Valk v. Crandall*, 1 *Sandf. Ch.* 179.

151. As to validity of mortgages given by subscribers to stock, under the New York Banking Association law,—see *Valk v. Crandall*, 1 *Sandf. Ch.* 179; *Thorp v. Woodhull*, 1 *Sandf. Ch.* 411; *Burrows v. Smith*, 10 *N. Y.* (6 *Seld.*) 550; *Leavitt v. Pell*, 27 *Barb.* 322.

VI. PRELIMINARY SUBSCRIPTIONS.

152. The right of membership is a sufficient consideration for a subscription to stock in a corporation about to be formed. *N. Y. Ct. of Appeals*, 1857, *Lake Ontario R. R. Co. v. Mason*, 16 *N. Y.* 451; *Ala. Supreme Ct.* 1848, *Selma & Tennessee R. R. Co. v. Tipton*, 5 *Ala. N. S.* 787; and see *Buffalo & N. Y. R. R. Co. v. Dudley*, 14 *N. Y.* (4 *Kern.*) 386.

153. Amount. Where an agreement is entered into by individual subscribers to the stock of a proposed corporation, to pay the sums set opposite their names, provided a sufficient sum to construct the company's works shall be subscribed, it is not a compliance with the condition, that a sufficient sum was in good faith subscribed, such as, in the opinion of the directors, or of the company, or a jury, would lead them to believe that they might, with reasonable safety, begin the enterprise, and afterwards, by the aid of the capital actually subscribed, and the prospect of success in its execution, would give them a credit, and enable them to raise money sufficient to proceed and complete the enterprise. The contract looks to the raising of a capital stock sufficient to meet the cost, and the payment, by each individual, of an aliquot part of that capital; but as the actual sum was uncertain at the date of the subscription, such an estimated amount is taken, instead of a fixed capital in money; and this condition is of the essence of the subscriber's contract. *Mass. Supreme Ct.* 1857, *People's Ferry Co. v. Balch*, 8 *Gray*, 808.

154. An agreement to take a certain number of shares of the capital stock subscribed previously to the incorporation of the company, creates, if not an express, an implied promise to pay, which will sustain an action by the company after its complete incorporation, to recover calls on the stock.* *N. Y. Ct. of Appeals*, 1856, *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 *N. Y.* (4 *Kern.*) 386;

1854, *Rensselaer & Washington Plankroad Co. v. Barton*, 16 *N. Y.* 457, *note*; 1856, *Eastern Plankroad Co. v. Vaughan*, 14 *N. Y.* (4 *Kern.*) 546; *N. Y. Supreme Ct.* 1841, *Stanton v. Wilson*, 2 *Hill*, 158; 1849, *Hamilton & Deansville Plankroad Co. v. Rice*, 7 *Barb.* 157; *Tenn. Supreme Ct.* 1853, *Gleaves v. Brick Church Turnpike Co.* 1 *Sneed*, 491; *Me. Supreme Ct.* 1855, *Penobscot R. R. Co. v. Dummer*, 40 *Me.* 172; *Ill. Supreme Ct.* 1864, *Johnston v. Ewing Female University*, 35 *Ill.* 518. And see, *Tonica & C. R. R. Co. v. McNeely*, 21 *Ill.* 71. To similar effect, *Ind. Supreme Ct.* 1859, *Anderson v. Newcastle & Richmond R. R. Co.* 12 *Ind.* 376; 1861, *Johnson v. Wabash & C. R. R. Co.* 16 *Ind.* 389. Compare, however, *Troy & Boston R. R. Co. v. Tibbits*, 18 *Barb.* 297.

155. Until all the requirements of the statute have been complied with, and the articles of association filed, the subscription of any person to the articles is a mere proposition to take the number of shares specified, of the capital stock of the corporation thereafter to be formed, which is revocable, and not a binding promise to take and pay. *N. Y. Supreme Ct.* 1857, *Burt v. Farrar*, 24 *Barb.* 518; *N. Y. Ct. of Appeals*, 1861, *Poughkeepsie & Salt Point Plankroad Co. v. Griffin*, 24 *N. Y.* 150.

156. Under the *N. Y.* general statute regulating the incorporation of religious societies (3 *Rev. Stat.* 282, § 4),—it is not necessary that an agreement of subscription made in contemplation of the incorporation of such society should be to or with the society in its corporate capacity. The society, on becoming incorporated, becomes vested with the right to demand from such a subscriber the amount of his subscriptions. [2 *Hill*, 153; 7 *Barb.* 157; 14 *Mass.* 172.] *N. Y. Ct. of Appeals*, 1861, *Reformed Protestant Dutch Church v. Brown*, 24 *How. Pr.* 76.

157. A subscription paper by which sub-

* But compare, to the contrary, *Strasburg R. R. Co. v. Echternacht*, 21 *Pa. St.* 220.

Although it was not contemplated by the general railroad law of Indiana that suits against subscribers for stock should be brought on the articles of association, which were not intended to be articles of subscription; yet, where the subscribers to the articles of association set opposite their names certain amounts of subscriptions,—*Held*, that the corporation might sue on the preliminary articles, they constituting the cause of action; and give in evidence copies of them certified by the secretary of state to prove the existence of the corporation. *Ind. Supreme Ct.* 1861, *Heaton v. Cincinnati & Fort Wayne R. R. Co.* 16 *Ind.* 275.

scribers merely agree to take stock in an association to be incorporated, does not authorize the trustees to involve the subscribers beyond the amounts of their subscriptions. *N. Y. Ct. of Appeals*, 1868, *Shibley v. Angle*, 37 *N. Y.* 627.

158. A mere agreement to subscribe for stock when the books of the company shall be opened, does not make the party a stockholder, so as to render him liable for calls; but he is liable for the breach of agreement only to the amount of the actual damage resulting from his failure to subscribe. The par value of the stock is not the measure of damages. *Ill. Supreme Ct.* 1861, *Thrasher v. Pike &c. R. R. Co.* 25 *Ill.* 398.

159. Organizing. That under a subscription, which provides for the organization when a certain sum is subscribed, and on a specified notice, the subscribers may, at a meeting properly called, organize as an incorporation, so as to bind the other subscribers,—see *Robinson v. Edinboro' Academy*, 8 *Grant*, 107.

160. Where a corporation was organized without the whole amount of stock being subscribed on the books in the hands of the commissioners,—*Held*, that the corporation might be regarded as succeeding to the powers previously vested in the commissioners to dispose of the shares remaining unsubscribed, but without regard to the conditions imposed on them, and had power as to such further subscriptions to waive a strict compliance with the provisions of the charter relative to original subscriptions. The preliminaries prescribed by the charter are conditions intended to be strictly observed prior to the organization of the company. *Md. Ct. of Appeals*, 1866, *Taggart v. Western Maryland R. R. Co.* 24 *Md.* 563.

161. *Suit*. If the promise is to the trustees and their successors, and the company is afterwards incorporated, the corporation may sue in the name of the trustees designated. *N. Y. Supreme Ct.* 1838, *Townsend v. Goewey*, 19 *Wend.* 424; *S. P.* 1843, *Cross v. Jackson*, 5 *Hill*, 478.

162. Or in that of the president, if suits generally are properly brought in his name. *N. Y. Supreme Ct.* 1841, *Stanton v. Wilson*, 2 *Hill*, 153.

163. *Estoppel*. The rule that a party contracting with a corporation as such, is estopped from denying its corporate existence

at the time of the contract, does not apply to a suit brought on a subscription made with a view to the organization of a corporation. *Ind. Supreme Ct.* 1866, *Williams v. Franklin Township Academical Association*, 26 *Ind.* 310.

VII. MUNICIPAL SUBSCRIPTIONS.

164. A municipality has no power to subscribe for stock in a public improvement unless authorized by statute.* *U. S. Supreme Ct.* 1865, *Thomson v. Lee County*, 8 *Wall* 837.

165. The legislature have power to authorize municipalities to subscribe to the stock of a corporation for the purpose of promoting public works, such as railroads, &c., which would probably benefit the inhabitants. Taxation for such purposes is not taking private property for public uses without compensation, within the meaning of the prohibition contained in the constitution.† *Conn. Supreme Ct.* 1848, *City of Bridgeport v. Hou-*

* To the same effect *Ark. Supreme Ct.* 1861, *Mississippi &c. R. R. Co. v. Mayor &c. of Camden*, 23 *Ark.* 300; *Pa. Supreme Ct.* 1861, *Commonwealth v. Councils of Pittsburgh*, 41 *Pa.* 378. But compare *Copes v. Mayor &c. of Charleston*, 10 *Rick. Law*, 491.

As to power of municipal corporations to invest their stock, money &c. in other corporations,—see *Pennsylvania R. R. Co. v. city of Philadelphia*, 47 *Pa.* 189.

† To the same effect are the following authorities: *N. Y. Supreme Ct.* 1857, *Clarke v. City of Rochester*, 24 *Earb.* 446; 5 *Abbott's Fr.* 107; *S. C.* 14 *How. Pr.* 186; *Grant v. Courter*, 24 *Earb.* 293; *N. Y. Ct. of Appeals*, 1858, *Bank of Rome v. Village of Rome*, 18 *N. Y.* 88; *Ohio Supreme Ct.* 1852, *Cincinnati &c. R. R. Co. v. Clinton Co.* 1 *Ohio St.* 77; *Steubenville &c. R. R. Co. v. North Township*, *Id.* 145; 1858, *Cass v. Dillon*, 2 *Ohio St.* 607; *Thompson v. Kelly*, *Id.* 647; *Loomis v. Spencer*, 1 *Ohio St.* 138; *Ky. Ct. of Appeals*, 1849, *Talbot v. Dent*, 9 *E. Monr.* 526; *La. Supreme Ct.* 1853, *Polloe Jury v. Succession of McDonough*, 8 *La. Ann.* 841; *Pa. Supreme Ct.* 1858, *Sharpless v. Mayor of Philadelphia*, 31 *Pa.* 147; *Moers v. City of Reading*, *Id.* 188; *Commonwealth v. Councils of Pittsburgh*, 41 *Pa.* 378; *Tenn. Supreme Ct.* 1848, *Nichol v. Mayor &c. of Nashville*, 9 *Humph.* 252; 1854, *Louisville &c. R. R. Co. v. County Court of Davidson*, 1 *Sneed*, 687; *Ala. Supreme Ct.* 1854, *Stein v. Mayor &c. of Mobile*, 24 *Ala. N. S.* 591; *Mo. Supreme Ct.* 1855, *City &c. of St. Louis v. Alexander*, 23 *Mo.* 438; *U. S. Circ. Ct. (Pa.)* 1858, *McCoy v. Washington v. S Phil.* 290. See also *Butler v. Dunham*, 27 *Ill.* 474; *Starin v. Town of Genoa*, 23 *N. Y.* 489; *People v. Mead*, 35 *N. Y.* 224.

So held, also, of a subscription to stock of a corporation formed for improving the navigation of a river contiguous to the municipality. *N. C. Supreme Ct.* 1855, *Taylor v. Commissioners of Newberne*, 2 *Jones, Eq.* 141. Compare *Low v. Mayor of Marysville*, 5 *Cal.* 314.

The object of a tax in respect to a railroad passing through the county, or through or near a municipal corporation is a "county purpose," within the provision of the constitution of Tennessee authorizing taxes for county or corporation purposes. *Tenn. Supreme Ct.* 1854, *Louisville & Nashville R. R. Co. v. County Court of Davidson*, 1 *Sneed*, 687; 1848, *Nichol v. Mayor &c. of Nashville*, 9 *Humph.* 252.

astonic R. R. Co. 15 *Conn.* 473; *N. Y. Ct. of Appeals*, 1858, *Bank of Rome v. Village of Rome*, 18 *N. Y.* 38.

166. The provision of a constitution of a State restricting the State from incurring indebtedness does not preclude the legislature from authorizing a municipality of the State to make such subscription. Such a provision does not relate to the subdivisions of the State. *Ohio Supreme Ct.* 1858, *Cass v. Dillon*, 2 *Ohio St.* 607; *Thompson v. Kelly*, *Id.* 647; *Ill. Supreme Ct.* 1858, *Prettyman v. Supervisors*, 19 *Ill.* 406; *La. Supreme Ct.* 1858, *Police Jury v. Succession of McDonough*, 8 *La. Ann.* 841. To similar effect is *Slack v. Maysville & Lex. R. R. Co.* 18 *B. Monr.* 9; *State v. Common Council of Madison*, 7 *Wis.* 688. Compare *Griffith v. Commissioners of Crawford Co.* 20 *Ohio*, 609.

See also CONSTITUTIONS.

167. This authority can be conferred in such a manner that the objects can be obtained either with or without the sanction of the popular vote. *U. S. Supreme Ct.* 1865, *Thomson v. Lee County*, 3 *Wall.* 327.

168. Submission to vote. A statute which authorizes a municipal corporation or a county to subscribe to a railroad, is not unconstitutional as involving a delegation of legislative power, in that it provides for a submission to the vote of the inhabitants interested, of the question whether or not the municipal body should subscribe. *N. Y. Ct. of Appeals*, 1858, *Bank of Rome v. Village of Rome*, 18 *N. Y.* 38; 1861, *Starin v. Town of Genoa*, 28 *Id.* 439; *Gould v. Town of Sterling*, 28 *Id.* 456.*

169. Implied power. The power may be given indirectly by a statute authorizing bonds issued by municipalities for such purposes to be issued and sold in a particular way. *U. S. Supreme Ct.* 1863, *Gelpcke v. City of Dubuque*, 1 *Wall.* 220.

170. And the power to subscribe gives by implication the power to issue notes for

payment.* *Tenn. Supreme Ct.* 1848, *Nichol v. Mayor &c. of Nashville*, 9 *Humph.* 252.

Compare *POWERS*.

171. Ratification. Where a legislature possesses the power to authorize such an act to be done, it can pass a retrospective act to cure evils which have arisen from irregular exercise of the power thus conferred. *U. S. Supreme Ct.* 1865, *Thomson v. Lee County*, 3 *Wall.* 327.

172. Repeal. A law giving to a municipal corporation permission to subscribe for stock in a particular corporation, is not to be regarded as necessarily repealed by implication, from the subsequent general enactment prohibiting a subscription for stock in any corporation. *Mo. Supreme Ct.* 1867, *State of Missouri v. Missouri & Mississippi R. R. Co.* 41 *Mo.* 453.

173. The vote of the inhabitants to subscribe to the stock of a railroad company does not vest a right in the company which they can enforce.† *Ill. Supreme Ct.* 1859, *People v. County of Tazewell*, 29 *Ill.* 147; *S. P. U. S. Supreme Ct.* 1859, *Aspinwall v. Daviess*, 23 *How.* 364.

174. The municipality having issued the bonds, they may be compelled to raise money to pay the interest. *Mo. Supreme Ct.* 1863, *Flagg v. Mayor &c. of Palmyra*, 33 *Mo.* 440. And see *St. Joseph & Denver City R. R. Co. v. Buchanan County Court*, 39 *Mo.* 485.

175. Inability to effect a sale by diligent advertisement, &c.—*Held*, a sufficient answer to a *mandamus*. *N. C. Supreme Ct.* 1859, *Neuse River Navigation Co. v. Commissioners of Newbern*, 7 *Jones, Law*, 275.

176. After the bonds have been issued and sold, the power given to the corporation, by the statute authorizing the issue, to lay taxes for their payment, is a contract within the meaning of the Constitution, and cannot be repealed until the contract is satisfied. The municipality may be compelled by *mandamus* to lay the necessary tax, notwithstanding that the Legislature have assumed to repeal the

* To the same effect. *N. Y. Supreme Ct.* 1857, *Clarke v. City of Rochester*, 24 *Barb.* 446; 5 *Add. Pr.* 107; 14 *How. Pr.* 193; *Grant v. Courier*, 24 *Barb.* 239; *Ohio Supreme Ct.* 1859, *Cincinnati &c. R. R. Co. v. Clinton Co.* 1 *Ohio St.* 77; *Ky. Ct. of Appeals*, 1859, *Slack v. Maysville & Lex. R. R. Co.* 18 *B. Monr.* 9; *La. Supreme Ct.* 1858, *Police Jury v. Succession of McDonough*, 8 *La. Ann.* 841; *Pa. Supreme Ct.* 1858, *Moers v. City of Reading*, 21 *Pa. St.* 168; *Cal. Supreme Ct.* 1860, *Hobart v. Supervisors*, 17 *Cal.* 23.

* That it would be otherwise of a tax to pay for stock in a manufacturing corporation. *Tenn. Supreme Ct.* 1854, *Louisville &c. R. R. Co. v. County Court of Davidson*, 1 *Sneed*, 637.

† Instances of ratification by subsequent legislative acts. First Municipality of N. O. v. Orleans Theatre Co. 2 *Rob. (La.)* 309; *Winn v. City Council of Macon*, 21 *Ga.* 275; *Copes v. Mayor &c. of Charleston*, 10 *Rich. Law* 491; *Commonwealth v. Councils of Pittsburgh*, 41 *Pa. St.* (5 *Wright*), 273.

law. *U. S. Supreme Ct.* 1866, *Von Hoffman v. City of Quincy*, 4 *Wall.* 485.

177. Submission to vote. County bonds, issued on a subscription for a railroad, are not invalid because the submission to the people did not state the rate of interest, nor the times of its payment, nor at what time the proposition, if adopted, would go into effect. *Iowa Supreme Ct.* 1859, *Whittaker v. Johnson*, 10 *Iowa*, 161.

178. In ordering an election, to determine whether a county will subscribe for stock to aid in building a railroad, it is improper to submit the question, whether two different roads shall be so aided, by a single vote, so that the two propositions cannot be voted upon separately. The county may be restrained from issuing bonds in pursuance of such a vote; but when issued, they are not necessarily void, in the hands of a *bona fide* holder.* *Ill. Supreme Ct.* 1862, *Clarke v. Supervisors of Hancock County*, 27 *Ill.* 305. Compare *McMillan v. Lee County*, 8 *Clarke*, 311; *Meyer v. City of Muscatine*, 1 *Wall.* 385.

179. Majority. Where the common council of a city are authorized by statute to issue bonds of the city, on the petition of a certain proportion of the voters, the jurisdictional fact of the number of voters petitioning may be determined by the common council, it being from its organization and general duties fit to be the depository of the trust; and in such a case, when sued upon the bonds by innocent holders for value, it is too late to show that the petitioners did not constitute the due proportion of the legal voters of the city. *U. S. Supreme Ct.* 1860, *Bissell v. City of Jeffersonville*, 24 *How.* 287.

180. The minority must acquiesce upon the question of issuing bonds for such subscriptions.† *Conn. Supreme Ct.* 1843, *City of Bridgeport v. Housatonic R. R. Co.* 15 *Conn.* 475; *Ky. Ct. of Appeals*, 1849, *Talbot v. Dent*, 9 *B. Monr.* 526; 1852, *Slack v. Maysville & Lex. R. R. Co.* 13 *Id.* 9; *Tenn. Supreme Ct.* 1854, *Louisville & C. R. R. Co. v. County Court of Davidson*, 1 *Sneed*, 637; *Va. Ct. of*

Appeals, 1835, *Goddin v. Crump*, 8 *Leigh*, 120.

181. The power is not necessarily exhausted by an adverse vote when the question is first submitted, nor lost by delay where no limit is fixed by the act. *Conn. Supreme Ct.* 1860, *Society for Savings v. City of New London*, 29 *Conn.* 174.

182. What officers. Where the power to subscribe for stock in an incorporated company is directly and exclusively conferred by the legislature upon the mayor and aldermen of a municipal corporation, a proposition to that effect need not be submitted to a vote of the inhabitants of the city.* *Tenn. Supreme Ct.* 1859, *McCallie v. Mayor &c. of Chattanooga*, 8 *Head*, 317.

182. a. A statute authorizing a municipal corporation to issue bonds in payment of a subscription for stock in a railroad company, appointed the board of council of the city as the agent of the city to make the subscription on the part of the corporation. *Held*, that it was immaterial by whom the subscription was signed on behalf of the city or whether there was such signature at all, as the substantial acts had been previously performed in the vote of the city to make the subscription. *Ky. Ct. of Appeals*, 1859, *Maddox v. Graham*, 2 *Metc.* 56.

183. Although the boards of supervisors only, in Illinois, have power to order an election to determine whether the county will subscribe to stock in a railroad company, and to issue the bonds therefor, and cannot delegate their power; yet, after they have taken all necessary action in the matter, they may direct that the bonds shall be signed by the county judge, as their instrument. *Ill. Supreme Ct.* 1862, *Clarke v. Supervisors of Hancock County*, 27 *Ill.* 305. Compare *Hull v. Marshall*, 12 *Iowa*, 142; *Casady v. Woodbury County*, 13 *Id.* 113.

184. Receiving subscription. A statute authorizing a municipal corporation to subscribe its bonds for a certain railroad stock, authorizes that railroad to receive the subscription. *Wis. Supreme Ct.* 1859, *Clark v. City of Janesville*, 10 *Wis.* 136; 1860, *Bushnell v. Beloit*, 10 *Wis.* 195.

* The fact that the proposal submitted to vote named two roads, in alternative, conditioned on the selection of route to be made by the company proposing to construct one of the roads, does not invalidate the proceedings. *Tenn. Supreme Ct.* 1854, *Louisville & C. R. R. Co. v. County Court of Davidson*, 1 *Sneed*, 637, 684.

† But that fact is, it seems a reason for construing the power strictly. *Starin v. Town of Genoa*, 33 *N. Y.* 480.

* Where a statute authorized a county to subscribe on condition that the holders of real estate therein should, by a majority, vote for such subscription, and the question was submitted by the county court to all the voters of the county,—*Held*, that the levy of a tax for that purpose was invalid. *Bullock v. Curry*, 2 *Metc.* (Ky.) 171.

185. Issuing bonds instead of paying. Where a municipal corporation was empowered to take stock in a railroad company, and the latter received the bonds of the corporation as cash, in payment of the subscription, instead of requiring the city to raise the money upon them,—*Held*, that the transaction was lawful, and not beyond the corporate powers of either the city or the railroad company.* *Ind. Supreme Ct.* 1860, *Evansville &c. R. R. Co. v. City of Evansville*, 15 *Ind.* 395. To similar effect, *U. S. Supreme Ct.* 1863, *Meyer v. City of Muscatine*, 1 *Wall.* 384; 1860, *Curtis v. County of Butler*, 24 *How.* 435; *Pa. Supreme Ct.* 1861, *Commonwealth v. Councils of Pittsburgh*, 41 *Pa. St.* 278.

To the contrary, *N. Y. Ct. of Appeals*, 1861, *Starin v. Town of Genoa*, 23 *N. Y.* 489.

186. Sale below par. Where an act authorized a corporation to take stock in a public enterprise, to a certain amount, and the only means provided for raising the money, was by issuing bonds, and the amount of the bonds to be issued, was restricted to the amount of the stock to be taken,—*Held*, that these bonds could not be sold for less than par. *N. C. Supreme Ct.* 1859, *Neuse River Navigation Co. v. Commissioners of Newbern*, 7 *Jones, Law*, 275.

187. If sold below par, in violation of the statute, the municipality may, by a proceeding in equity, compel the holder to receive in satisfaction of the bonds the sum paid by the first purchaser with interest. *Pa. Supreme Ct.* 1864, *County of Armstrong v. Brinton*, 47 *Pa. St.* 357.

188. Compliance with terms of statute. A county cannot refuse to issue their bonds on the ground that the statute contemplated payment of the subscription in three annual installments, and the stock provides for five. This is more favorable for the tax-payers, and were it otherwise, they could not object

* The authority to levy and collect the tax is not invalidated, nor is the obligation to pay it destroyed, because the statute provides that, with the assent of the city, the citizens who shall actually pay the tax by which her debt for the stock is to be discharged, are to receive from the city the stock itself, for which they shall have paid. The validity of the tax, and the obligation of the city to pay it, depend upon the right of the government to contract the debt or duty, and to discharge it by taxation, and cannot be affected by the disposition which is made of that for which the debt was contracted. *Ky. Ct. of Appeals*, 1849, *Talbot v. Dent*, 9 *B. Monr.* 536; 1853, *Slack v. Maysville & Lexington R. R. Co.* 13 *Id.* 9.

against their own vote. *Tenn. Supreme Ct.* 1854, *Louisville & Nashville R. R. Co. v. County Court of Davidson*, 1 *Sneed*, 637, 638.

189. If the statute require the amount of the proposed subscription to be first designated and recommended by a board of officers, their recommendation to subscribe "not exceeding" a specified sum, is insufficient to justify a subscription. They cannot delegate their discretion. *Pa. Supreme Ct.* 1856, *Mercer County v. Pittsburgh & Erie R. R. Co.* 27 *Pa. St.* 389. And see, *Wetumpka v. Winter*, 29 *Ala. N. S.* 651.

190. A statute requirement that the parish insert in the ordinance the number and amount of shares proposed to be subscribed, does not necessarily inhibit the insertion of such other clauses and conditions as they may think expedient. *La. Supreme Ct.* 1856, *Vicksburg &c. R. R. Co. v. Parish of Ouachita*, 11 *La. Ann.* 649.

191. The municipal authorities of a city authorized to issue bonds, and subject only to a restriction as to the amount to be issued in each year, may, in the exercise of their discretion, issue them in payment of bonds overdue. *Ill. Supreme Ct.* 1861, *City of Quincy v. Warfield*, 25 *Ill.* 317.

192. A statute authorized a city guaranteeing railroad bonds to exact a bond that the moneys collected from the sale of bonds should be employed on the road; but the city did not exact the bond. *Held*, that it was a privilege to the city, and not an obligation upon them, to require such bond, and that a mortgage given to the city by the railroad in consideration of such guaranty was not vitiated by this failure. *Ky. Ct. of Appeals*, 1858, *Sinking Fund Commissioners v. Northern Bank*, 1 *Metz.* 174.

193. Municipal corporations cannot modify or alter the subscription as authorized by the statute. A compromise by them with a railroad company, which does so modify or alter the subscription, is, accordingly, void. *U. S. Supreme Ct.* 1866, *Bell v. Railroad Co.* 4 *Wall.* 598.

194. Conditions. A county meeting having voted to aid in the construction of a railroad, the "amount to be expended only in the event of said railroad being constructed and running centrally through the county,"—*Held*, that the county judge might issue the bonds, on being satisfied that the road would be built centrally through the county. *Iowa*

Supreme Ct. 1854, *State v. Bissell, 4 Greens*, 828.

195. **Time.** Before the charter of a municipal corporation became operative, the city council, following its provisions, submitted to a popular vote the question of a subscription to a railroad, and, the vote being in the affirmative, they issued city bonds accordingly. *Held*, that the whole proceeding was a nullity, and not capable of ratification by the council after the charter took effect. *Wis. Supreme Ct.* 1861, *Clark v. City of Janesville*, 13 *Wis.* 414; *Town of Rochester v. Alfred Bank*, 18 *Wis.* 482; *Berliner v. Town of Waterloo*, 14 *Wis.* 878; 1859, *Clarke v. City of Zanesville*, 10 *Id.* 186.

196. **Informalities** occurring in giving notice, and in conducting an election to determine whether a county will authorize a subscription to a railroad, do not make a bond given for the stock void, if no objection is made until the bond becomes due. *Ill. Supreme Ct.* 1860, *Johnson v. County of Stark*, 24 *Ill.* 75; 1863, *Clarke v. Supervisors of Hancock County*, 27 *Ill.* 805.

197. **What company.** After a statute had authorized a municipal corporation to vote to issue bonds in aid of a specified railroad; but before the vote was taken the railroad corporation was merged by legislative authority in a new corporation, which took all the rights and assumed the obligations of the old,—*Held*, it appearing that the new company was substantially the same as the old one, that the city acted legally in voting to issue the bonds to the new company.* *Conn. Supreme Ct.* 1860, *Society for Savings v. City of New London*, 29 *Conn.* 174. And see *Commonwealth v. City of Pittsburgh*, 41 *Pa. St.* 278.

198. It will be presumed that the bonds of a municipal corporation, issued in apparent compliance with the law authorizing the issue, have been actually issued in conformity with the law, especially in the hands of *bona fide* holders. The *bona fide* holders will be held to a knowledge of the law authorizing the issue of bonds by the town,

but they will not be held, in the absence of actual notice, to inquire into the fulfilment of all the formal prerequisites to the issue. The issuing of the bonds authorizes the receiver or purchaser to suppose all the things required by law to have been done in the time, form, and substance required by law.*

Mo. Supreme Ct. 1863, *Flagg v. Mayor &c. of Palmyra*, 33 *Mo.* 440; *Conn. Supreme Ct.* 1860, *Society for Savings v. City of New London*, 29 *Conn.* 124; *U. S. Supreme Ct.* 1863, *Meyer v. City of Muscatine*, 1 *Wall.* 885; *S. P. Ill. Supreme Ct.* 1861, *City of Quincy v. Warfield*, 25 *Ill.* 817.

199. **Interest.** A railroad company may lawfully allow interest on stock subscribed by a municipal corporation. *Ind. Supreme Ct.* 1860, *Evansville &c. R. R. Co. v. City of Evansville*, 15 *Ind.* 895.

200. **Fraud** in an election authorizing the issue of county bonds in aid of a proposed railroad must be set up in apt time, before rights have accrued. *Ill. Supreme Ct.* 1861, *Butler v. Dunham*, 27 *Ill.* 474.

201. Where the statute made it a condition precedent that the grand jury recommend the subscription,—*Held*, no valid objection to the bonds issued in payment of the sub-

* Bonds issued by a municipal corporation in aid of a railroad, under a statute which directs that the bonds shall be negotiable and transferable by the order of the president and directors of the company, are properly made payable to the company, "its assignee or bearer." *Ky. Ct. of Appeals*, 1859, *Maddox v. Graham*, 3 *Meto.* 56.

Where no place is fixed by statute at which the bonds or coupons issued by a municipal corporation are to be made payable, the place of payment rests in the discretion of the city council, the body empowered to make the bonds. *Id.*

A municipal corporation authorized to issue bonds bearing eight per cent. interest only, which, however, issues them with interest at twelve per cent. is liable for the payment of interest at the former rate, the bonds being valid *pro tanto*. *Ill. Supreme Ct.* 1861, *City of Quincy v. Warfield*, 25 *Ill.* 817.

A contract between a railroad company and a county issuing bonds as a subscription to its stock, that the former should pay the interest on the bonds until the road should be completed, does not affect the holder of the bonds, nor prevent him from recovering the interest from the county. *Pa. Supreme Ct.* 1860, *Commonwealth v. Commissioners of Allegheny County*, 37 *Pa. St.* 287.

A misstatement on the face of the bonds, of the statute under which they were issued, is not necessarily material. *N. Y. Ct. of Appeals*, 1861, *Gould v. Sterling*, 23 *N. Y.* 454.

Nor is the fact that the bonds were antedated. *Mo. Supreme Ct.* 1863, *Hagg v. Mayor &c. of Palmyra*, 33 *Mo.* 440.

The substitution of smaller bonds for one bond of the full amount of the subscription made by a county to a railroad stock, simply changing the evidence of the indebtedness,—*Held*, no objection to the bonds so substituted. *Pu. Supreme Ct.* 1860, *Commonwealth v. Commissioners of Allegheny Co.* 37 *Pa. St.* 287.

* That a pledge to an unorganized corporation is not within the legal authority of the county court for "making subscriptions of stock,"—see *Winchester &c. Co. v. Clarke*, 3 *Meto.* (Ky.) 140.

What is a railroad "to" or "through" a city within the meaning of such statutes. *Evansville &c. R. R. Co. v. City of Evansville*, 15 *Ind.* 895; *Aurora v. West*, 9 *Ind.* 74; *Van Hook v. Madison City*, 1 *Wall.* 291.

scription, that the officers of the railroad company were admitted to the grand jury-room, and permitted to urge the subscription. Nor was it any defence to the bonds in the hands of an innocent purchaser, that the recommendation of the subscription was obtained by unfair and corrupt means. *Pa. Supreme Ct.* 1860, *Commonwealth v. Commissioners of Allegheny County*, 87 *Pa. St.* 237.

202. A municipal subscription to the stock of a railroad company, that had previously released its private subscribers from their subscriptions, is not valid. *Pa. Supreme Ct.* 1858, *County of Crawford v. Pittsburgh & Erie R. R. Co.* 82 *Pa. St.* 141.

203. A municipal corporation, which, in making a subscription to the capital stock of a railroad, receives more favorable terms as to the time of payment than other subscribers, cannot, in order to defeat the subscription, allege that other stockholders were thereby defrauded. *Ind. Supreme Ct.* 1860, *Evansville & C. R. R. Co. v. City of Evansville*, 15 *Ind.* 395.

204. Construction of peculiar statutes authorizing counties or other municipalities to subscribe for railroad stock. *Woods v. Lawrence county*, 1 *Black*, 386; *Gould v. Venice*, 29 *Barb.* 442; *Brown v. County Commissioners*, 21 *Pa. St.* 37; *Treadwell v. Commissioners*, 11 *Ohio St.* 183; *State v. Commissioners*, 12 *Id.* 596; *Goshen v. Shoemaker*, 12 *Id.* 624; *Piatt v. People, ex rel. Amer. Centr. R. R. Co.* 29 *Ill.* 54; *Clapp v. County of Cedar*, 5 *Clark*, 15; *Maddox v. Graham*, 2 *Metc. (Ky.)* 56; *Bullock v. Curry*, *Id.* 171; *State v. County of Wapello*, 13 *Iowa*, 338; *Supervisors of Schuyler county v. People*, 25 *Ill.* 181; *California & C. R. R. Co. v. Supervisors*, 18 *Cal.* 671; *Board of Commissioners v. Bright*, 18 *Ind.* 93; *Minnesota & Pacific R. R. Co. v. Sibley*, 2 *Minn.* 13; *Hord v. Rogersville & Jefferson R. R. Co.* 3 *Head*, 208; *St. Louis v. Alexander*, 23 *Mo.* 483; *City of Atchison v. Butcher*, 3 *Kans.* 104.

VIII. DISCHARGE OF SUBSCRIBERS.

205. Where a charter becomes void by its terms, in consequence of the work not being commenced within the time fixed, the subscribers for stock are discharged, and their liability cannot be revived by an act of the legislature extending the time, and declaring

the subscriptions valid. *Pa. Supreme Ct.* 1861, *Plankroad Co. v. Davidson*, 39 *Pa. St.* 435.

206. Illegality. A stockholder who has given his note to the corporation for his subscription stock, cannot resist payment because the charter required the capital to be invested in public securities, and the corporation received this note and others in violation of that provision. He cannot for such cause avoid his contract, which, as between him and the company, was made on sufficient consideration. *Mass. Supreme Ct.* 1812, *Little v. O'Brien*, 9 *Mass.* 423; *S. P. La. Supreme Ct.* 1842, *First Municipality of New Orleans v. Orleans Theatre Co.* 2 *Rob.* 209; *N. Y. V. Chan. Ct.* 1840, *Ely v. Sprague*, 1 *Clarke*, 351.

207. Where a statute, fixing the amount of the capital stock of a railroad company, is amended by another statute providing that the capital required for the construction of the road shall be a less sum, subscriptions taken to an amount larger than the capital allowed by the last statute, but less than the capital fixed by the first statute, are valid. *Mass. Supreme Ct.* 1866, *Agricultural Branch R. R. Co. v. Winchester*, 13 *Allen*, 29.

208. Assessments upon the shares of a subscriber to the capital stock of a railroad company, may be collected, although, contrary to the provisions of the charter, the construction of the road was commenced before twenty per cent. of each share subscribed was paid in. *Mass. Supreme Ct.* 1866, *Agricultural Branch R. R. Co. v. Winchester*, 13 *Allen*, 29.

209. Application of funds. Where a railroad company is authorized by charter to build the road in three sections, with a separate and distinct capital stock for each, subscriptions obtained subsequent to the completion of the first, for the second and third sections, may be collected, although it does not appear whether the whole of defendant's subscription is to be expended upon one of the sections only, or, if divided, how much is to be applied to each section. *Id.* Compare *Dill v. Wabash & C. R. R. Co.* 21 *Ill.* 91; *Vicksburg R. R. Co. v. McKean*, 12 *La. Ann.* 683.

210. An irregularity in the location of a railroad, whatever its effect may be on the rights of others, or whatever may be the nature of the remedy by the stockholders for a misapplication of the funds or the credit of

the corporation, furnishes no defence to the stockholders in an action to recover the installments of the stock. Such an action is not adapted to the purpose of investigating the legality of the doings of the corporation or its officers in these respects. *Conn. Supreme Ct.* 1853, *Danbury &c. R. R. Co. v. Wilson*, 23 *Conn.* 385; *Ark. Supreme Ct.* 1857, *Exp. Booker*, 18 *Ark.* 388.

211. A departure in the location of a railroad from the route fixed by the charter does not exonerate subscribers for stock. The change if unauthorized, leaves the original location valid. *Conn. Supreme Ct.* 1853, *Danbury &c. R. R. Co. v. Wilson*, 23 *Conn.* 435. To the contrary, *Miss. Ct. of Errors*, 1858, *Champion v. Memphis & Charleston R. R. Co.* 35 *Miss.* 692.

212. Any material departure from the points designated in a railroad charter for the location of the road, is a violation of the charter, for which the corporate franchise may be seized upon *quo warranto*, unless the legislature has waived the right of the State to seize the franchise, by acts legalizing the violation of the charter. *Ark. Supreme Ct.* 1859, *Mississippi &c. R. R. Co. v. Cross*, 20 *Ark.* 443.

213. If the directors of a railroad undertake to make an unwarrantable departure from the provisions of the charter, the stockholder has his remedy by injunction, not to enjoin the collection of calls due upon his stock, but to restrain the corporation from the particular violation or abuse of its charter. *Ark. Supreme Ct.* 1859, *Mississippi &c. R. R. Co. v. Cross*, 20 *Ark.* 443.

214. Conditional subscription. After the organization of a railroad company, a question arose among the stockholders as to which of two routes should be adopted, and the defendant, to induce the company to take the route he desired, agreed to subscribe a certain number of shares, provided that route was taken. The company took that route. *Held*, that this fact alone fixed the liability of the defendant on his contract to take the shares subscribed, whatever might have been the terms of the original subscriptions. *S. Ct. of Appeals*, 1860, *Spartanburg & Union R. R. Co. v. De Graffenreid*, 12 *Rich. Law*, 675; *S. P. Hester v. Memphis & Charleston R. R. Co.* 32 *Miss.* 378; *Frankfort &c. Turnpike Co. v. Churchill*, 6 *Monr.* 427. Compare *Wawter v. Ohio & Mississippi R. R. Co.*

14 *Ind.* 174; *Greenville &c. R. R. Co. v. Coleman*, 5 *Rich. Law*, 118.

215. A subscription for the stock of a railroad company, provided that the money so subscribed should be expended in the construction of the road from S. to Derby Line, and, also, that it should not be binding until the whole of said road should be put under contract for grading. *Held*, that this was not merely a general description of the road, requiring the whole of it to be put under contract before the subscription was payable, but that it created an express condition to the validity of the subscription, that the road should be put under contract as far north as Derby Line. *Vt. Supreme Ct.* 1860, *Connecticut & Passumpsic Rivers R. R. Co. v. Baxter*, 33 *Vt.* 805.

216. That where the charter authorizes the directors to locate the road, at their discretion, a true representation that a certain location had been adopted, does not invalidate the subscriptions in case the directors should afterwards change the location,—see *Ellison v. Mobile &c. R. R. Co.* 36 *Miss.* 572.

217. Abandonment of work. If a railroad company ceases to prosecute work, attempts to misapply its means, or attempts any radical change in the character of the enterprise, it may be enjoined from collecting the obligations given to support the original undertaking. *Ill. Supreme Ct.* 1862, *Illinois Grand Trunk R. R. Co. v. Cook*, 29 *Ill.* 287.

218. An alteration of the charter by adding objects essentially different, or authorizing the same objects to be advanced by methods essentially different from those originally contemplated, does not bind a subscriber for stock, without his express consent; and he will not be liable for assessments on the stock, made subsequent to such alterations. *N. H. Superior Ct.* 1817, *Union Locks v. Towne*, 1 *N. H.* 44; *Wis. Supreme Ct.* 1863, *Kenosha &c. R. R. Co. v. Marsh*, 17 *Wis.* 18; *Sparrow v. Evansville & Crawfordsville R. R. Co.* 7 *Ind.* 369.

219. Instances. *So held* where the subscription was to stock under a charter for the purpose of establishing a railroad, an amendment superadding a steamboat line. *N. Y. Supreme Ct.* 1843, *Hartford & New Haven R. R. Co. v. Croswell*,* 5 *Hill*, 383; *S. P.*

* Approved in *McCullough v. Moss*, 5 *Den.* 580; and see *Stephens v. Rutland R. R. Co.* 1 *Am. Law Reg.* 154; but commented on as an extreme case, *Schenectady & Saratoga*

Marietta &c. R. R. Co. v. Elliott, 10 Ohio St. 57.

So held, of a statute dividing the route of a turnpike, and the company itself apportioning the members into two new companies. *Pa. Supreme Ct.* 1880, Turnpike Co. v. Phillips, 2 *Pa. (Penn. & W.)* 184; *S. P. Ill. Supreme Ct.* 1859, Supervisors &c. v. Mississippi & Wabash &c. R. R. Co. 21 *Ill.* 388.

So held, of a change of a terminus of a railroad, and running the line in a different route so as to connect at an intermediate point with another road, in order to reach the other terminus. *Ga. Supreme Ct.* 1852, Winter v. Muscogee Railroad Co. 11 *Ga.* 488; *S. P. Hester v. Memphis &c. R. R. Co.* 82 *Miss.* 378.

So held, of a change in the route of a turnpike. *Mass. Supreme Ct.* 1811, Middlesex Turnpike Co. v. Locke, 8 *Mass.* 268.

So held, of an act changing the terminus of a railroad company. *Pa. Supreme Ct.* 1858, Manheim &c. Plankroad Co. v. Arndt, 31 *Pa. St.* 317; *Ark. Supreme Ct.* 1859, Witter v. Mississippi &c. R. R. Co. 20 *Ark.* 463.

220. That if the proposed alteration of route be abandoned, the subscriptions may be enforced,—see Rutland &c. R. R. Co. v. Thrall, 35 *Vt.* 536.

221. Contrary rule. An amendment of a charter in an immaterial respect,—*a. g.* by changing the name of the corporation,—or one which grants a benefit merely,—*e. g.* permitting them to enlarge their works, beyond the limit prescribed by the original charter, if made at the instance of the corporation, or, what is the same thing, at the request of the managers, will not release subscribers from their obligations. *Pa. Supreme Ct.* 1840, Clark v. Monongahela Navigation Co. 10 *Watts*, 364.

222. Instances. *So held*, of an act extending the time for the completion of a railroad. *Mass. Supreme Ct.* 1866, Agricultural Branch R. R. Co. v. Winchester, 18 *Allen*, 29. But compare Henderson v. R. R. Co. 17 *Tex.* 560.

So held, of an act extending the time for completing a plankroad, and allowing the company to take tolls before laying the plankway. *N. Y. Ct. of Appeals*, 1861, Poughkeepsie & Salt Point Plankroad Co. v. Griffin, 24 *N. Y.* 150.

Plankroad Co. v. Thatcher, 11 *N. Y. (1 Kern.)* 103; and doubted, Buffalo & New York City R. R. Co. v. Dudley, 14 *N. Y. (4 Kern.)* 386.

So held, of an act authorizing the company to extend its road, and otherwise to assume new and increased responsibilities. *Rice v. Rock Island &c. R. R. Co.* 21 *Ill.* 93; Hayworth v. Junction R. R. Co. 13 *Ind.* 348.

So held, of an act changing the name of the company, and the length and termini of the road. *N. J. Supreme Ct.* 1852, Delaware & Atlantic R. R. Co. v. Irick, 3 *Zabr.* 321.

So held, where the change of route did not make an improvement of a different character, and the subscriber's interest was not materially affected by the alteration. *Ill. Supreme Ct.* 1851, Banot v. Alton & Sangamon R. R. Co. 18 *Ill.* 504.

So held, of a change in the direction, location and construction of a railroad. *Del. Superior Ct.* 1855, Delaware R. R. Co. v. Tharp, 1 *Houst.* 149; *Mo. Supreme Ct.* 1852, Central Plankroad Co. v. Clemens, 16 *Mo.* 359.

So held, of a change in the location of a road, to the prejudice of the subscriber's expectations of the benefits he should derive from the first location. *Pa. Supreme Ct.* 1881, Irvin v. Turnpike Co. 2 *Pa. (Penn. & W.)* 466; *Ky. Ct. of Appeals*, 1859, Fry v. Lexington & Big Sandy R. R. Co. 2 *Metc.* 314.

To the contrary. *Ala. Supreme Ct.* 1857, Rives v. Plankroad Co. 80 *Ala. N. S.* 92.

So held, of the extension of a railway route, and the purchase of a canal by the railway company. *Exch.* 1847, Midland Great Western Railway Co. of Ireland v. Gordon, 11 *Jur.* 440; 16 *Law J. N. S. Exch.* 165.

So held, of the reduction of the capital of a railroad company, from \$1,500,000 to \$325,000; one terminus being changed so as to shorten the road nearly one-half of the original distance; and the company then transferring a part of the road, and leasing the rest, to another corporation, during the continuance of their charter. *N. Y. Supreme Ct.* 1854, Troy & Rutland R. R. Co. v. Kerr, 17 *Barb.* 581.

So held, of acts authorizing the stockholders to elect additional directors, and providing that no stockholder should vote on stock not held by him for thirty days previously, and an act passed for the financial relief of the company enabling it to issue preferred stock if a majority of the stockholders should vote to do so. *Pa. Supreme Ct.* 1857, Everhart v. West Chester & Philadelphia R. R. Co. 28 *Pa. St.* 339.

223. No absolute rule can be laid down as to what is a material departure in the location of a railroad line, as contrasted with the route defined by the original charter, to be applied in all cases. Each case depends very much upon its own circumstances. The materiality of the change of the route is a question of law, to be determined by the court, upon the facts ascertained by the jury, or agreed upon by the parties. *Ark. Supreme Ct.* 1859, *Witter v. Mississippi &c. R. R. Co.* 20 *Ark.* 463.

224. An alteration in the charter, which consists only of an increase of the corporate powers, or of a different organization of the corporate body, leaving it with lawful power to execute, what may be regarded as substantially the original object of its creation, will not exonerate subscribers to the stock of the company. *Mo. Supreme Ct.* 1855, *Pacific Railroad v. Hughes*, 22 *Mo.* 291; *Ill. Supreme Ct.* 1856, *Peoria & Oquawka R. R. Co. v. Elting*, 17 *Ill.* 429; 1859, *Rice v. Rock Island & Alton R. R. Co.* 21 *Ill.* 93; *Terre Haute & Alton R. R. Co. v. Earp*, 21 *Ill.* 291.

225. Mere statute. Subscribers who do not assent to an amendment changing the purposes of the charter, may prevent the company from proceeding to act under it; or permit the company to proceed under the amended charter, and dissolve their connection with the company upon equitable terms. But the mere passage of the amendment, conferring such additional powers upon the company, which it has not attempted, and may never attempt to exercise, does not operate *per se* to exonerate a shareholder from liability to pay his subscription. *Ky. Ct. of Appeals*, 1859, *Fry v. Lexington & Big Sandy R. R. Co.* 2 *Metc.* 314; *Miss. Ct. of Errors*, 1858, *Hawkins v. Mississippi & Tennessee R. R. Co.* 35 *Miss.* 688.

226. Ineffectual change. A subscriber to stock of a railroad corporation is not exonerated from liability to pay for his stock by reason of a change in the charter of the company, procured by a part of the stockholders, and adopted by the board of directors. He must show that the change was ratified by a majority of the stockholders, otherwise it does not become effective.* *Ark. Supreme*

Ct. 1863, *M. O. & R. R. Railroad Co. v. Gaster*, 24 *Ark.* 97.

227. If the authority to make the change—a. g. a consolidation of two railroad companies—had been given by the statute before the making of the subscription, its exercise does not release the subscriber. And it is of no importance, that the consolidation took place without the actual knowledge of the subscriber. When he contracted, an authority to consolidate existed, and his contract having been made under that law, must be presumed to have been made with reference to it, and cannot, therefore, be impaired by the law, because the law is a part of the contract. [13 *Mass.* 16; 13 *Shep.* 191.] *Ind. Supreme Ct.* 1856, *Sparrow v. Evansville & Crawfordsville R. R. Co.* 7 *Porter*, (*Ind.*) 369; *Ind. Supreme Ct.* 1863, *Biah v. Johnson*, 21 *Ind.* 299; *S. P. Ill. Supreme Ct.* 1862, *Illinois River R. R. Co. v. Beers*, 27 *Ill.* 185. Compare *Booe v. Junction R. R. Co.* 10 *Ind.* 93.

228. It is no defence to an action for calls, that the directors have altered the location of the company's road, if by the charter they had the discretion to do so. *Ind. Supreme Ct.* 1851, *Colvin v. Liberty & Abington Turnpike Co.* 2 *Cart.* 511; *Railsback v. Liberty & Abington Turnpike Co.* 2 *Cart.* 656; *S. P. Ky. Ct. of Appeals*, 1859, *Fry v. Lexington & Big Sandy R. R. Co.* 2 *Metc.* 314.

229. Incorporation. A member of a joint stock company, under articles of association providing that the company shall become incorporated, is not, without his assent, bound by a charter obtained, which creates a new corporation without making reference to any existing company, but which is accepted by vote of the association. *Vt. Supreme Ct.* 1840, *Wallingford Manufacturing Co. v. Fox*, 12 *Vt.* 304.

230. It is not competent for the legislature to authorize a corporation, established for the purpose of building a railroad, to enforce subscriptions made under a previous charter granted for a different road. *Pa. Supreme Ct.* 1858, *Pittsburgh &c. R. R. Co. v. Gazzam*, 32 *Pa. St.* 340.

231. What amounts to assent. A subscriber to a public work, who has permitted it to be carried on without objection, cannot be

* When the State consents to the consolidation of two railroad companies by an act of the legislature, the act of the companies in making it is not void, though, without his

consent, a stockholder is discharged from his subscription. *Ind. Supreme Ct.* 1857, *McCray v. Junction R. R. Co.* 9 *Ind.* 356.

relieved from the payment of his subscription on the ground that the plan was changed, and that the work is of no benefit. *Ohio Supreme Ct.* 1834, *Doane v. Treasurer of Pickaway &c. Wright*, 753.

232. Where a stockholder in a corporation gave his note for the first installment of stock, all of which was subsequently forfeited for non-payment of calls,—*Held*, that he was relieved from payment of his note by a material alteration of the charter. *Ga. Supreme Ct.* 1855, *Mitchell v. Rome R. R. Co.* 17 *Ga.* 574; *S. P. Ind. Supreme Ct.* 1861, *Evansville &c. R. R. Co. v. Dunn*, 17 *Ind.* 603.

233. Part payment of the subscription, after a change in the par value of shares, may be regarded as an assent to the change. *Me. Supreme Ct.* 1852, *Kennebec & Portland R. R. Co. v. Palmer*, 34 *Me.* 366.

234. That where articles of incorporation of a railroad company provide for a change in them by the votes of the directors, a change in the amount and time of payment of the installments so made, will be binding upon stockholders who subscribed previous to such alteration,—see *Burlington &c. R. R. Co. v. White*, 5 *Clarke*, (*Iowa*), 409.

235. Participating in the organization of the company, and voting at the election for directors, in right of his subscription, is an assent, and such subscriber must be deemed cognizant of the change. *Pa. Supreme Ct.* 1864, *Bedford R. R. Co. v. Bowser*, 48 *Pa. St.* 29; *S. P.* 1840, *Clarke v. Monongahela Nav. Co.* 10 *Watts*, 364. To the contrary, *Me. Supreme Ct.* 1855, *Oldtown &c. R. R. Co. v. Veazie*, 39 *Me.* 571; *N. Y. Supreme Ct.* 1854, *Macedon & Bristol Plankroad Co. v. Lapham*, 18 *Barb.* 313.

236. Legislative power to amend. Where a general law of the State provides that all acts of incorporation shall be liable to be amended, incorporated or repealed by the legislature, or the special charter contains a similar reserved power, it is no defence to an action by a corporation whose charter is expressed to be subject thereto, brought to recover a subscription for stock, that since the date of the subscription the legislature has passed an act increasing the liability of stockholders in such corporation. *Me. Supreme Ct.* 1849, *South Bay Meadow Dam Co. v. Gray*, 30 *Me.* 547; *N. Y. Ct. of Appeals*, 1854, *Schenectady & Saratoga Plankroad Co. v. Thatcher*,

11 *N. Y.* (1 *Kern.*) 102; *N. Y. Supreme Ct.* 1851, *Northern R. R. Co. v. Miller*, 10 *Barb.* 260; *Mo. Supreme Ct.* 1853, *Pacific Railroad v. Renshaw*, 18 *Mo.* 210. To the same effect., *C. P.* 1856, *Cork & Youghal Railw. Co. v. Patterson*, 18 *C. B.* 414; 37 *Eng. L. & Eq.* 398. And see *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 *N. Y.* (4 *Kern.*) 336, 348. To the contrary, *Wis. Supreme Ct.* 1863, *Kenosha &c. R. R. Co. v. Marsh*, 17 *Wis.* 13; and see *Oldtown &c. R. R. Co. v. Veazie*, 39 *Me.* 571.

237. Acceptance of renewal of charter. Where a corporation suffered a breach of condition in their charter, but, having obtained subscriptions to their stock to a large amount, the defendant being one of the subscribers, and the company having organized, and chosen directors, the defendant being one of them, the legislature revived and renewed the charter, and extended the time for the performance of such condition; and subsequent to this a meeting of the stockholders was called by the commissioners, in which the defendant took part, and at which additional directors were appointed, and at a meeting of directors, the defendant being present, a call was made upon the subscriptions,—*Held*, that this amounted to an acceptance of the renewal of the charter, and was such a recognition of the former organization of the company as to amount to a sufficient organization under the new charter, and that the defendant was estopped by his conduct from denying the regularity of these proceedings, and was liable to pay calls on his stock. *Conn. Supreme Ct.* 1853, *Danbury &c. R. R. Co. v. Wilson*, 23 *Conn.* 435.

238. Burden of proof. A stockholder in a railroad company, who seeks to avoid the payment of his subscription on the ground of a material alteration in the enterprise, must show that the alteration was made without his concurrence and consent. *N. C. Supreme Ct.* 1857, *North Carolina R. R. Co. v. Leach*, 4 *Jones, Law*, 340; *Fla. Supreme Ct.* 1859, *Martin v. Pensacola & Georgia R. R. Co.* 8 *Fla.* 370. To the contrary, *N. H. Superior Ct.* 1817, *Union Locks & Canals v. Towne*, 1 *N. H.* 44.

239. Withdrawal. A subscriber or partner in an intended undertaking, subscribing an agreement to take measures to carry out the same, cannot withdraw his name and discharge himself of liability without the

consent of the rest of the subscribers. *Each.* 1816, Kidwelly Canal Co. v. Raby, 2 Price, 93; *Ala. Supreme Ct.* 1848, Selma & Tennessee R. R. Co. v. Tipton, 5 *Ala. N. S.* 787; *Ind. Supreme Ct.* 1861, Johnson v. Wabash & Co. 16 *Ind.* 889. See also, United Society v. Eagle Bank, 7 *Conn.* 456.

240. The contract of the directors of a projected railway company will not excuse a subscriber from paying calls, if the terms of the subscriber's agreement require it.* *Chancery*, 1852, *Exp.* Mowatt, 1 *Drew.* 247.

241. The authority of an agent appointed to receive subscriptions to the stock of a company is exhausted by the act of receiving the subscription. The subscription instantly inures to the benefit of the company, creating a contract between it and the subscriber, which the agent cannot rescind. Notice to the agent, in such a case, of the intention to revoke the subscription, is a mere nullity. *Tenn. Supreme Ct.* 1858, Lowe v. E. & K. R. R. Co. 1 *Head.* 659. Compare Cunningham v. Edgfield & Co. R. R. Co. 2 *Id.* 23; Hutchins v. Smith, 46 *Barb.* 285.

242. A party who makes a conditional subscription of stock to a company, by agreement with a person who is not its authorized agent, may withdraw or revoke his subscription at pleasure, without notice to the company, at any time while the subscription book remains in the hands of such person, and before the company has acquired any right to or interest in the same. *Id.*

243. A secret agreement entered into between the directors of a corporation and a subscriber, that he may within a specified time reduce the number of shares thus subscribed for, the subscription being held out

as *bona fide* for the full amount, in order to induce others to become subscribers, is void, as a fraud upon the other subscribers; and the original subscription may be enforced for its full amount between the corporation and the subscriber. *N. H. Supreme Ct.* 1856, White Mountains R. R. Co. v. Eastman, 34 *N. H.* 124.

244. When a stock company releases a part of its subscribers and returns them their money, other subscribers, not consenting thereto, are discharged. *Pa. Supreme Ct.* 1858, McCully v. Pittsburgh & Connellsville R. R. Co. 32 *Pa. St.* 25.

245. An original subscriber to the stock of a railroad company, was, by resolutions and acts of the company, released from his subscription, but allowed to renew the same, by an agreement made with the president, and to pay therefor in materials. *Held*, that the original contract had been superseded by the special contract; and that a payment by the subscriber, in cash without call, after such special contract would not estop him from setting up the contract, as a defence against a claim to the payment of the whole subscription in cash. *Pa. Supreme Ct.* 1861, Pittsburgh & Connellsville R. R. Co. v. Stewart, 41 *Pa. St.* 54.

246. Subscriptions made before a company is organized must be unconditional. But after the organization, the company may stipulate with subscribers that they may pay in any manner mutually agreed on; and they can enforce a subscription only according to its conditions. *Id.*

247. Novation. Where the charter of an incorporated company provided that a mortgage stockholder might transfer his stock, and be released from his mortgage, upon the new stockholder furnishing a mortgage to the satisfaction of the president and directors of the company,—*Held*, that no personal liability on the part of the original stockholder remained after a transfer so made. *La. Supreme Ct.* 1858, Haynes v. Palmer, 13 *La. Ann.* 240.

IX. ACTIONS.

248. Remedies are cumulative. A stockholder is liable in assumpsit on his subscription to the stock, notwithstanding a remedy by forfeiture of the stock is given to the corporation by the charter. *N. Y. Supreme Ct.* 1808, Union Turnpike Co. v. Jenkins, 1

*The directors of an association formed under the N. Y. Banking Act of 1838, have no power, even with authority from the stockholders, to permit a stockholder to withdraw, or to pay back or contract to pay back to any stockholder any portion of the money or other consideration paid in by him as a part of the capital; such contracts are mischievous and dangerous in their tendency. *N. Y. V. Chan. Ct.* 1843, Mather v. Bates, 2 *N. Y. Leg. Obs.* 218. Compare Pettibone v. Hawkins, 2 *N. Y. Leg. Obs.* 210.

The charter of a railroad company gave any stockholder who might be dissatisfied with the route selected, a right to withdraw his subscription, after the selection of the route, provided such stockholder should have designated, at the time of subscribing, the route he desired to be selected for the location of the road. It did not appear that the defendant, at the time of subscribing, made any designation of a route. *Held*, that he was a stockholder, without the right to withdraw his subscription. *S. C. Ct. of Appeals*, 1852, Greenville & Columbia R. R. Co. v. Smith, 6 *Rich. Law*, 91.

Cai, 381. To the same effect, 1812, Goshen Turnpike Co. v. Hurin, 9 *Johns* 217; 1817, Dutchess Cotton Manufactory v. Davis, 14 *Johns* 238; 1854, Troy & Rutland R. R. Co. v. Kerr, 17 *Barb* 581; 1856, Ogdensburg &c. R. R. Co. v. Frost, 21 *Id.* 541; S. P. Beene v. Cahawba &c. R. R. Co. 3 *Ala. N. S.* 660; *H. of Lords*, 1852, Inglis v. Great Northern Railway Co. 16 *Jur.* 895; 1 *Macq.* 112.

Consult, also, *Stock*.

249. The mere existence in the charter of authority to declare a forfeiture, affords no objection to an action at law. *N. Y. Supreme Ct.* 1851, Northern R. R. Co. v. Miller, 10 *Barb* 260.

250. If the corporation elect to forfeit and take back their stock, they cannot also collect the price subscribed. In that case, they take back the whole consideration for the subscriber's promise, with the right to retain whatever may have been paid. It would, after that, be inequitable to permit them to retain the stock and still prosecute. And it can make no difference that the installments for which the suit is brought became due before the forfeiture was declared. [13 *Johns* 54.] The provision for forfeiture is not in the nature of a mortgage to secure the whole subscription; but the transaction is rather a conditional sale of the stock by the company to the subscriber. *N. Y. Ct. of Appeals*, 1849, Small v. Herkimer Manufacturing Co. 2 *N. Y. (2 Comst.)* 330.

Compare *Stock*.

251. Distinction between action on the subscription and action for deficiency after forfeiture and sale. Troy & Greenfield R. R. Co. v. Newton, 1 *Gray*, 544; Amherst & Belchertown R. R. Co. v. Watson, 4 *Gray*, 61.

252. The company are not bound to make their election either to exact a forfeiture, or to sue upon the subscription, and to give defendant notice thereof, before suit. *Ind. Supreme Ct.* 1854, New Albany & Salem R. R. Co. v. Pickens, 5 *Ind.* 247.

253. Who liable. An original subscriber to the stock of a corporation is personally liable for installments on his subscription called while he remains the holder of his stock. By the act of subscribing, each associate undertakes to raise his proportion of the capital as it may be called for by the directors, and the right to call implies a corresponding duty to pay. A purchaser

from an original subscriber is substituted to his obligations and rights, and when accepted by the company, a privity is established between them. *Pa. Supreme Ct.* 1867, Merrimac Mining Co. v. Levy, 54 *Pa. St.* 227.

254. Transfer. A subscription to the stock of a railroad company, creates a debt against the subscriber from which he cannot relieve himself by an assignment or transfer made without the sanction of the directors. *Pa. Supreme Ct.* 1858, Graff v. Pittsburgh & Steubenville R. R. Co. 31 *Pa. St.* 489.

255. Plaintiffs. That where the installments are payable to the "treasurer of the company," an action lies by any one who is treasurer at the time the action is commenced, —see *Silk Company v. Anderson*, 1 *McMull.* 300.

256. Calls. Under the *N. Y.* general statute for organization of stage companies, the amounts subscribed by stockholders do not become payable until the subscriptions are called for by resolution of the board of directors. *N. Y. Com. Pl.* 1855, Bouton v. Dry Dock &c. Stage Co. 4 *E. D. Smith*, 420.

257. That a board of directors of a railroad corporation have no power to require payment of subscriptions in a manner other than that fixed by the contract, —see *Ohio, Indiana & Illinois R. R. Co. v. Cramer*, 28 *Ind.* 490.

258. Notice, though necessary to the subscriber on proceeding under the charter to forfeit the stock for non-payment, is not necessary to render him liable to an action. *N. Y. Ct. of Appeals*, 1857, Lake Ontario &c. R. R. Co. v. Mason, 16 *N. Y.* 451; *Pa. Supreme Ct.* 1850, Grubb v. Mahoning Navigation Co. 14 *Pa. St.* (2 *Harris*), 302. To the same effect, *Ind. Supreme Ct.* 1859, Smith v. Indiana & Illinois R. R. Co. 12 *Ind.* 61; *Eakright v. Logansport &c. R. R. Co.* 13 *Id.* 404.

259. If the subscription paper fixes the times of payment, no demand before suit is necessary.* *Ind. Supreme Ct.* 1854, New

* Where a subscription contained a provision, "that payment shall be made at such times and places as shall hereafter be directed, by the directors, to be applied to the construction of the road," —*Held*, that the subscription did not become payable until the directors, at a regular meeting, had fixed the time and place of payment; but that it was not necessary to give notice to the subscribers of the time and place of payment. *Ind. Supreme Ct.* 1855, Ross v. Lafayette R. R. Co. 8 *Ind.* (6 *Port.*) 297.

A railroad stock subscription provided that each subscriber might pay by taking and performing a contract for earth-

Albany &c. R. R. Co. v. Pickens, 5 *Ind.* (8 *Port.*) 247. So if the time be fixed by a by-law passed when the defendant, an officer, was present. *N. Y. Ct. of Appeals*, 1854, Schenectady & Saratoga Plankroad Co. v. Thatcher, 11 *N. Y.* (1 *Kern.*) 102; *Ga. Supreme Ct.* 1852, Winter v. Muscogee R. R. Co. 11 *Ga.* 488.

260. Shares of stock of a railroad company were subscribed for, to be paid for by installments of ten per cent. every sixty days after the work was put on contract. *Held*, that the subscriber was not entitled to notice of the time of the contract, and that bringing the suit upon the subscription was a sufficient demand. *Ind. Supreme Ct.* 1859, Breedlove v. Martinsville & Franklin R. R. Co. 12 *Ind.* 114.

261. Where subscriptions for capital stock are not payable until a certain amount is subscribed, even if notice that such amount had been subscribed is necessary, a call for payment of the subscription is sufficient notice. *N. Y. Superior Ct.* 1829, Harlem Canal Co. v. Seixas, 2 *Hall*, 504; The same v. Spear, 2 *Id.* 510.

262. Unless notice of the assessments and calls is required by the charter, it is not an indispensable requisite of a suit to collect stock subscriptions. *Ala. Supreme Ct.* 1859, Eppes v. Mississippi &c. R. R. Co. 35 *Ala. N. S.* 83.

263. Under a statute requiring notice to

work "by bidding off the same at public letting," or by taking so much at private letting of any portion not otherwise or before let, as shall be wanting to make up the amount at the estimate of the engineer; that the work should be executed under the direction of the engineer, &c.; and that the company should arrange, so far as consistent with the above, that each subscriber might work on his own lands. *Held*, in an action by the corporation against a defaulting subscriber, whose shares were specified to be taken "all in work."

1. That upon failure by the subscriber to take a contract at the "public letting," it was for him, within a reasonable time, to notify the company of his election to take one at private letting, and that in the absence of such notice, he was bound to pay in money.

2. That the subscriber was not entitled to have the whole route to select from for a private letting, but that he could only select from what was left, if any, from the public letting.

3. That an advertisement by the company for proposals, was a "public letting," and that a letting by auction was not exclusively contemplated.

4. That notwithstanding the privilege for each to work on his own land, the company had a right, after the subscription, to change the location so as not to run over the subscriber's land, no final location, but only a survey, having been made before the subscription. *Ala. Supreme Ct.* 1859, Eppes v. Mississippi &c. R. R. Co. 35 *Ala. N. S.* 83.

be given "of the place and time" when and where payments are to be made, a thirty days' notice, designating the individuals authorized to receive payment, by name, and the city or village in which they reside, is sufficient, in the absence of evidence on the part of the subscriber that his default was occasioned by difficulty in finding the individuals. *N. Y. Supreme Ct.* 1839, Troy Turnpike & R. R. Co. v. McChesney, 21 *Wend.* 296. Compare Rutland &c. R. R. Co. v. Thrall, 35 *Vt.* 536.

264. That notice of acceptance is not necessary before a suit,—see *New Albany R. R. Co. v. McCormick*, 10 *Ind.* 499.

265. Tender of a certificate by the company to a subscriber for stock is not a condition precedent, before suit brought on the subscription. *Ind. Supreme Ct.* 1861, Heaton v. Cincinnati & Fort Wayne R. R. Co. 16 *Ind.* 275; 1860, Vawter v. Ohio & Mississippi R. R. Co. 14 *Ind.* 174; Hardy v. Merriweather, *Id.* 208; S. P. Smith v. Gower, 2 *Duv.* 17.

266. Evidence of corporate existence. The signature to a subscription for stock in an alleged railroad corporation, which recites that a company had been formed under the general act, and that the articles of association, with the necessary affidavits, had been duly filed, is conclusive evidence of an incorporation against the subscriber.* *N. Y. Ct. of Appeals*, 1852, Black River & Utica R. R. Co. v. Clarke, 25 *N. Y.* 208.

See INCORPORATION.

267. Organization. It is no defence to an action for the payment of installments on subscriptions to stock of a corporation organized in pursuance of statute, that they were made before the organization was completed. *Ill. Supreme Ct.* 1855, Cross v. Pinckneyville Mill Co. 17 *Ill.* 54.

268. Estoppel. A subscriber to the stock of a corporation, who attends a meeting of the stockholders, and votes on the business of the company, will be estopped from denying the validity of his subscription. *Pa.*

* In a suit on a subscription for stock, it is competent to show, in the absence of record evidence, by oral testimony, that the subscription list, signed by the defendant, was abandoned, and a new one opened, and made the basis of the organization of the company. *Mo. Supreme Ct.* 1860, Southern Hotel Co. v. Newman, 30 *Mo.* 118.

When defects in the company's organization, or departures from the charter enterprise are a defence. *Illinois Grand Trunk R. R. Co. v. Cook*, 20 *Ill.* 287; *Yorke v. Circleville Bank*, 19 *Ohio*, 468.

Supreme Ct. 1855, Erie & Waterford Plankroad Co. v. Brown, 35 Pa. St. 156.

269. A subscriber, after having transferred his stock to another, thus treating it as a valid security, cannot object in a suit against him on the original subscription, that the same was originally invalid, by reason of the non-payment of the sums requisite to give it validity, at the time of making the subscription. *Pa. Supreme Ct.* 1857, Everhart v. Westchester & Philadelphia R. R. Co. 28 Pa. St. 389.

270. Although a corporation cannot be organized without the limits of the State creating it, yet, a subscriber who has given his note for the amount subscribed to the stock of a corporation so illegally organized, when sued upon such note by a *bona fide* endorsee for value before maturity, may be estopped from denying the legal existence of the corporation. *Mo. Supreme Ct.* 1867, Camp v. Byrne, 41 Mo. 525; *S. P. La. Supreme Ct.* 1858, East Pascagoula Hotel Co. v. West, 13 La. Ann. 545.

271. The violation of its charter, by the corporation, is not a defence to a stockholder sued by them on his subscription. *Mass. Supreme Ct.* 1812, Little v. O'Brien, 9 Mass. 428; *Ala. Supreme Ct.* 1857, Smith v. Tallassee Branch of Central Plankroad Co. 30 Ala. N. S. 650; *S. P. Hannibal &c. Plankroad Co. v. Menefee*, 25 Mo. 547.

272. In an action by a railway company to recover for calls upon subscriptions to the capital stock, it is not necessary for the company to show compliance with the provision of its charter, requiring the company not to begin its construction, until a certain proportion of the estimated cost shall have been subscribed by responsible persons. *Ohio Supreme Ct.* 1855, Straus v. Eagle Ins. Co. 5 Ohio St. 59.

273. It is no defence to an action for calls upon a cash subscription to the stock of a railroad company, that its officers had subsequently to the defendant's subscription, taken a large land subscription, which the charter permitted, though at enormous prices. *Ind. Supreme Ct.* 1857, Hornaday v. Indiana &c. Railway Co. 9 Ind. 268; *Maccoun v. Indiana &c. Railway Co.* *Id.* 262.

274. Representations. The failure of the company to fulfil representations as to the location of the route of the railroad, made by the agent of the company in good faith,

and by which the defendant was induced to take stock, constitute no defence to the company's action upon his written subscription, which did not contain and was not intended to contain any stipulation on the subject. *Iowa Supreme Ct.* 1868, Gelpke v. Blake, 15 Iowa. 837.

275. It is no defence to an action brought on a promissory note by the trustee of a banking corporation, that the note was given for stock subscribed for, without an intention to pay for it, but taken merely for the purpose of benefitting the bank, or preventing the predomination of certain stockholders. *Ohio Supreme Ct.* 1854, Bates v. Lewis, 3 Ohio St. 459.

276. In such an action, the defendant can not set off against the claim the amount paid by him since the action was commenced, upon execution on a judgment rendered against him and others, as partners in the bank. *Id.*

277. That it is no defence to an action by a corporation on a stock subscription, that after the subscription was made, a by-law was adopted requiring the payment of the first installment before the subscriber would be entitled to vote on corporation matters, —see *New Albany R. R. Co. v. McCormick*, 10 Ind. 499; *Chandler v. Northern Cross R. R. Co.* 18 Ill. 190.

278. Insufficiency of the notice of an election of directors of an incorporated company will not discharge a subscriber for stock from his liability to pay for it. *Mo. Supreme Ct.* 1852, Central Plankroad Co. v. Clemens, 16 Mo. 359. See also, *Schenectady & Saratoga Plankroad Co. v. Thatcher*, 11 N. Y. (1 Kern.) 102; *Eastern Plankroad Co. v. Vaughan*, 20 Barb. 155; affirmed, 14 N. Y. (4 Kern.) 546.

279. Illegality in the election of directors is no defence to an action on a stock subscription. *Ind. Supreme Ct.* 1858, Johnson v. Crawfordsville &c. R. R. Co. 11 Ind. 280; 1859, Eakright v. Logansport &c. R. R. Co., 13 Ind. 404.

280. That the issue, under authority of a new statute, of preferred stock with dividends guaranteed, does not release an original stockholder, who had not consented to it, from liability on his stock subscription, —see *Rutland &c. R. R. Co. v. Thrall*, 35 Vt. 536.

281. Under a statute authorising a mu-

municipal corporation to impose a tax on property for the benefit of a railroad company, and making the holders of receipts for such taxes stockholders in the company to the amount paid by them,—*Held*, that payment of the tax did not exonerate a stockholder from his liability on his subscription, and that the validity of the statute could not be drawn in question in an action to recover his subscription. *La. Supreme Ct.* 1857, *New Orleans &c. R. R. Co. v. Lea*, 12 *La. Ann.* 388.

282. That to an action on a subscription, it is no defence that the company let off other stockholders or forfeited their stock without payment, nor that the work is abandoned,—see *Dorman v. Jacksonville &c. Plankroad Co.* 7 *Fla.* 265.

283. As to when the statute of limitations begins to run on a contract of subscription for stock,—compare *Taggart v. Western Maryland R. R. Co.* 24 *Md.* 563; *Pittsburgh &c. R. R. Co. v. Byers*, 32 *Pa. St.* 22; *McCully v. Pittsburgh &c. R. R. Co.* *Id.* 25; *New Orleans &c. R. R. Co. v. Lea*, 12 *La. Ann.* 388.

284. Equitable relief. When the subscription of stock under a charter was deemed inadequate to the purposes for which it was subscribed, and no action was taken, for upwards of nine years, to appoint directors or to appropriate the fund subscribed according to the charter, and the object contemplated by the charter was abandoned,—*Held*, that such of the subscribers as, on the faith of the abandonment, had changed their circumstances, and were no longer interested in the object, ought not to be compelled to pay their subscription, and were entitled to be relieved in equity therefrom. *Ky. Ct. of Appeals*, 1847, *Fountain Ferry Turnp. Road Co. v. Jewell*, 8 *B. Monr.* 140.

285. The measure of damages in an action on a promise for subscription of stock in a proposed company is the difference between the market value of the stock at the time of trial, and the amount agreed to be paid for it. *Pa. Supreme Ct.* 1856, *Rhey v. Ebensburg &c. Plankroad Co.* 27 *Pa. St.* 261.

286. Recovering back subscription. A subscriber to a provisionally registered railway company who has received his scrip and signed an agreement authorizing the provisional directors to apply the moneys received

by way of deposit, or otherwise, to the payment of the costs of the undertaking, cannot after they have expended it, recover back the amount of his deposit, should the project fail. *Each.* 1847, *Garwood v. Ede*, 5 *Eng. Railw. Cas.* 134; 1 *Each.* 264; 1848, *Jones v. Harrison*, 2 *Each.* 52; 5 *Eng. Railw. Cas.* 188; *Willey v. Parratt*, 3 *Each.* 211; 6 *Eng. Railw. Cas.* 32. And see *Atkinson v. Pocock*, 1 *Each.* 796.

287. The suppression of the fact that a portion only of the shares of a provisionally registered railway company was allotted, on only a part of which the deposits had been paid, does not amount to fraud, so as to avoid the subscriber's agreement, and will not entitle a subscriber to recover back the amount of his deposit, the scheme having proved abortive. *Each.* 1848, *Vane v. Cobbold*, 5 *Eng. Railw. Cas.* 299; 1 *Each.* 798.

288. A subscriber to the stock of a corporation is not, upon their refusal to deliver the certificates, entitled to maintain an action to recover the subscription as money paid. The same rule is applicable to one who purchased the stock, or the right to it, before the subscription was paid. The remedy in such case, is an action for conversion or for breach of contract to deliver the certificates, in which the measure of damages is not the subscription, but the market value of the stock. *N. Y. Supreme Ct.* 1857, *Arnold v. Suffolk Bank*, 27 *Barb.* 424.

289. If part of the price of a conditional subscription is paid before the performance of the condition, the subscriber may, upon a final breach, recover back the amount so paid. *Ind. Supreme Ct.* 1858, *Jewett v. Lawrenceburgh &c. R. R. Co.* 10 *Ind.* 589.

SUCCESSION.

[This chapter treats of the identity of the corporation under various changes of organization, of name, of charter, of membership, &c., including the rights of successors as against the original corporation, and how far the successors are bound by its acts. But the mode of acquiring and losing members, is under *MEMBERS* and *EXCLUSION*.]

1. Presumption that existence of corporation continues. See *Fuller v. Plainfield Academic School*, 6 *Conn.* 532, 543.

2. Where the inhabitants of a parish or district, previously incorporated for the support of public worship, are afterwards incor-

porated as a town, and the territorial boundaries are the same, the town is not of course, nor by any necessary construction, the successor of the parish. The distinct incorporations may, and, for many purposes in the exercise of their several powers and authorities, must, subsist together, and act apart under the management of different officers. *Mass. Supreme Ct.* 1807, *Dillingham v. Snow*, 3 *Mass.* 276. Compare *Dillingham v. Snow*, 5 *Mass.* 547; *Overseers of Poor of Boston v. Sears*, 23 *Pick.* 122.

3. Change in corporation. As to the power of members of an association or corporation to form and procure a charter for a new corporation, and merge the business and interests of the former body in the new one,—see *Bank of United States v. Lyman*, 12 *How.* 225; 1 *Blatchf.* 297; 20 *Vt.* 666; 1 *Law Rep. N. S.* 156; *Attorney General v. Reformed Dutch Church*, 33 *Barb.* 303; *Table Mountain Tunnel Co. v. Stranahan*, 20 *Cal.* 198; *Knabe v. Pernot*, 16 *La. Ann.* 13; *Polar Star Lodge No. 1 v. Polar Star Lodge No. 1*, *Id.* 53; *Pollard v. Maddox*, 23 *Ala. N. S.* 821.

4. An act authorizing the sale of franchises of a chartered railroad company, and empowering the purchasers to reorganize as a corporation, under a new name, creates no new corporation, but merely continues an old one under a new name. *N. Y. Supreme Ct.* 1853, *Mosier v. Hilton*, 15 *Barb.* 657.

5. Where the road and property of a railroad company are sold on a mortgage, and organized by its purchasers, under the provisions of an act of the legislature, into another company, the new corporation thus formed, although clothed with the same powers as the original company, is not the same corporation, and is not liable for the debts of the original company. *Wis. Supreme Ct.* 1863, *Vilas v. Milwaukee & Prairie du Chien R. R. Co.* 17 *Wis.* 497; 1864, *Smith v. Chicago & Northwestern Railw. Co.* 18 *Wis.* 17.

6. The sale of a railroad under the Pennsylvania Act of April 8, 1861, (Laws of 1861, p. 259),—which provides that persons purchasing railroads, canals, &c., sold by decree of court, shall be vested with all the rights and franchises of such corporations,—does not extinguish the corporation, but creates the purchasers a new corporation with all the rights, &c., of the corporation whose property they have obtained. *Pa. Supreme*

Ct. 1866, *Commonwealth v. Central Passenger Railway*, 52 *Pa. St.* 506.

7. How far new corporation is liable for debts of old one. Where an individual's land was appropriated by a railroad company for the use of its road, and a judgment was obtained, on appeal from the award of the commissioners, for the amount of the damages assessed by them, but before it was paid, the railroad was sold under a mortgage which included the company's right of way, to persons who organized a new corporation pursuant to statute, and continued to use the right of way as laid across the plaintiff's land,—*Held*, that a right of action existed, on the judgment, against the new company. Otherwise, if the company had asserted no right to use the plaintiff's land under its purchase. *Wis. Supreme Ct.* 1864, *Pfeifer v. Sheboygan & Fond du Lac R. R. Co.* 18 *Wis.* 155.

8. The route of a railroad company which extended from the northern to the southern line of Vermont was divided at White River. The northern company retained the northern portion of the route, with all the subscriptions for the capital stock, and the original corporate name. *Held*, that this was not to be deemed a new corporation, but rather a continuation of the original one with a diminished franchise; and, that the defendants, having after their organization elected to take the benefit of the plaintiff's services in effecting the division and organization, and in obtaining subscriptions for stock, with a knowledge of those services, and of the fact that a compensation was claimed therefor, were bound to pay what those services were reasonably worth. *N. H. Supreme Ct.* 1865, *Low v. Connecticut & Passumpsic Rivers Railroad*, 46 *N. H.* 284.

9. Although a banking company, incorporated by the same name with a pre-existing one, appoint the same president and cashier, and the officers receive and issue the notes of the former company, and declare that there is no difference between the notes thus issued and those of the new company, yet the new company, if they have never authorized these proceedings, are not liable to pay such notes. *Mass. Supreme Ct.* 1817, *Wyman v. Hallowell & Augusta Bank*, 14 *Mass.* 58. See also, *Bellows v. Hallowell & Augusta Bank*, 2 *Mass.* 81. Compare *Paxton v. Bacon Mill & Mining Co.* 2 *Nev.* 257.

10. In a statute repealing the charter of an old and incorporating a new hospital, provision was made against the extinguishment of its debts, and the trustees of the former were required to deliver to the trustees of the latter, all property, real and personal, held by them in trust for the old corporation. It was further made the duty of the trustees of the new hospital to "pay out of any funds which may come into their hands all of the debts which may be owing" by the old hospital. *Held*, that the new corporation was bound to pay all the debts of the old, without regard to the sufficiency of the funds received from it. *Cal. Supreme Ct.* 1852, *Johnson v. Trustees of State Marine Hospital*, 2 *Cal.* 819. Compare *Mayor of Colchester v. Brooke*, 7 *Q. B.* 389.

11. **Divisions.** On the division of a body that ought to be a unit, the test for ascertaining which division represents the legitimate, social succession, is, which of them has maintained the regular forms of organization according to the laws and usages of the body, or, in the absence of these, according to the laws, customs, and usages of similar bodies in like or analogous cases. *Pa. Supreme Ct.* 1864, *Kerr v. Trego*, 47 *Pa. St.* 292.

For applications of this principle to divisions in Religious Societies, see RELIGIOUS CORPORATIONS, 49-70.

12. Where part of the inhabitants of an ecclesiastical society, which previously embraced all the inhabitants of the town, organized themselves as a society, under the Connecticut act of 1804,—*Held*, that this continued to be the same ecclesiastical corporation. *Conn. Supreme Ct.* 1819, *Merwin v. Camp*, 3 *Conn.* 85.

13. Upon the incorporation of a parish into a town, the real property originally granted to the parish will become vested in the new corporation, and so remain unless alienated, until a division of the town by setting off a new parish, when it will revert to the original parish. *Mass. Supreme Ct.* 1852, *Lakin v. Ames*, 10 *Cush.* 198.

14. Where a town had become a Congregational parish, by building a meeting house for that denomination, and settling a minister, and afterwards an act was passed whereby certain individuals named, (reciting that they had for their pastor B. R. regularly settled in said town) with their associates and

such others as might afterwards associate with them, were incorporated as the Congregational society in the same town,—*Held*, that the society thus created was the same as that before known in the town as such. *Me. Supreme Ct.* 1828, *Parsonsfield v. Dalton*, 5 *Me.* (5 *Greenl.*) 217.

15. Where a meeting house was built in pursuance of a vote of a town,—*Held*, that the debt thereby contracted was a charge upon the whole town, although it was afterwards divided into two parishes by limits, and the meeting house remained within and belonged to the first parish. *Mass. Supreme Ct.* 1813, *Eager v. Inhabitants of Marlborough*, 10 *Mass.* 430. Compare *Veazie v. Howland*, 47 *Me.* 127.

16. **Unions.** Upon the effect of arrangements intended as a union of two existing corporations,—see *DeWitt v. Chandler*, 11 *Abb. Pr.* 459; *Smith v. Smith*, 3 *Dessaux* 557; *Farnum v. Blackstone Canal Corp.* 1 *Suma.* 46.

As to the Amalgamation or Consolidation of corporations, see CONSOLIDATION.

As to the unions of Religious Societies, see RELIGIOUS CORPORATIONS, 45-48.

17. **Reorganization.** A corporation organized under a special charter, and reorganized subsequently under a general law, with a change of its name, and, to some extent, of its powers, is essentially still the same; and a judgment in an action brought against it by its latter name, to adjudge it dissolved for forfeiture of its charter, may appropriately cover the acts of the original corporation. *N. Y. Supreme Ct. Sp. T.* 1862, *People v. Rensselaer Ins. Co.* 38 *Barb.* 323. Compare *Cushman v. Shepard*, 4 *Id.* 118.

18. The act of a majority of a corporation in effecting a re-incorporation under the general law, merely for the purpose of perpetuating their existence, under a mistake that the original certificate of incorporation had been lost, does not change or dissolve the corporation, nor forfeit their rights. Re-incorporation may be effected for the mere purpose of continuing the corporate existence as well under a general law as by special charter. *N. J. Supreme Ct.* 1848, *Miller v. English*, 1 *Zabr.* 317.

19. Members of a corporation who hold demands against it, do not release them by merely consenting with the other members to

regard the first organization as illegal, to organize anew, and issue and apportion the stock anew, but without professing to surrender their demands. The fact that third persons have purchased stock under the new organization, does not alter the case, if all parties appear to have acted fairly, and there were circumstances to put a purchaser on inquiry as to the length of time the corporation had been organized and whether there were debts outstanding. *Me. Supreme Ct.* 1843, *Longley v. Longley Stage Co.* 23 *Me.* 89.

20. Revival. Upon the power of the Crown, in England, to revive a dormant corporation, —see *Rex v. Grey*, 8 *Mod.* 361; *Rex v. Pasmore*, 3 *Durnf. & E.* 199; *Newling v. Francis*, *Id.* 189; *Mayor &c. of Colchester v. Brooks*, 7 *Q. B.* 339.

21. Where the charter of a corporation has been wholly repealed, a subsequent act declaring that the same be and hereby is "revived," with the further declaration, that such act shall take effect from its passage, creates a new corporation as truly as if a new charter were passed in the same words as the former. It does not revive the old incorporation with all its liabilities, so that an action will subsequently lie against it on a debt of the old corporation, which was extinguished by the repeal. *Miss. Ct. of Errors*, 1849, *President &c. of Fort Gibson v. Moore*, 13 *Smed. & M.* 157. Compare *Crocker v. Crane*, 21 *Wend.* 211.

SUITS.

[This chapter presents the general principles relating to the capacity of corporations to sue and be sued:—the restrictions which apply when the corporation sues or is sued out of the State by which it was created,—and those general rules governing the mode of conducting proceedings in courts of justice by or against corporations, which do not relate either to the nature and elements of the cause of action or defence, or to a particular species of remedy having a distinctive title. Rules relative to the details of procedure, the form and method of the various steps to be taken in suits affecting corporations are too dependent upon local statutes to be advantageously exhibited in this work; they should be sought in works treating of the law of REMEDIES, in the various States. And cases on legal proceedings, by or against corporations, which turn upon the nature of the cause of action,—the right to be enforced or the wrong to be redressed,—the existence of a remedy and what it is, are under the title of the right or wrong;—*a. g.* the power of a corporation to make contracts, and its liability to be sued for violating its contracts, are under CONTRACTS. And rules peculiar to any special remedy are under the title of that remedy:—*a. g.* ATTACHMENT; INDICTMENT; INJUNCTION; MANDAMUS; QUO WARRANTO; REPLEVINS.]

I. THE POWER TO SUE AND BE SUED.

II. PRINCIPLES OF PROCEDURE.

1. The general power of a corporation to bring a suit, upheld, notwithstanding defects of organization, or other peculiar circumstances relied upon to defeat it.* *Holmes v. Gilliland*, 41 *Barb.* 568; *South Bay Meadow Dam Co. v. Gray*, 30 *Me.* 547; *Berkshire v. Evans*, 4 *Leigh*, 223; *Baltimore & Ohio R. Co. v. Gallahue*, 12 *Gratt.* 655; *Town of Shrewsbury v. Brown*, 25 *Vt.* 197; *East River Bank v. Judah*, 10 *How. Pr.* 135; *Bangor &c. R. R. Co. v. Smith*, 47 *Me.* 84; *Heaton v. Cincinnati &c. R. R. Co.* 16 *Ind.* 275.

2. What language confers the power. A resolve of the legislature, authorizing part of a society to hold meetings, choose officers, levy taxes, and repair their meeting house, —*Held*, to give a right to sue for the destruction of such meeting house after they have repaired it. *Conn. Supreme Ct.* 1806, *Tilden v. Metcalf*, 2 *Day*, 259.

3. Where certain members of a voluntary association, to which moneys were due, are incorporated, with authority to receive all those moneys and to give receipts, the authority thus conferred does not empower the corporation to sue therefor. The authority to receive, and to give an effectual discharge, does not necessarily imply an authority to demand, or enforce the payment, by action. *Mass. Supreme Ct.* 1812, *Scots Charitable Society v. Shaw*, 8 *Mass.* 532.

4. In the charter of a private corporation, it is competent for the legislature to direct that controversies between the corporation and individuals, shall be decided by a designated tribunal; and where this is done the jurisdiction will be deemed exclusive, and an action at law cannot be maintained in a case which they have jurisdiction to decide. *Me. Supreme Ct.* 1851, *Bassett v. Carleton*, 33 *Me.* 558.

5. Thus, where, in a charter, authorizing the erection of a dam, subject to the duty of turning logs over the dam, and of supplying

* Corporation aggregate competent to sue out a commission of bankruptcy, as petitioning creditors. See *Exp. Bank of Ireland*, 1 *Moll.* 261.

A corporation aggregate may prove debts before commissioners of bankruptcy, by the affidavit of a person duly authorised by a general power of attorney, and vote in the choice of assignees by a person duly authorised by a special power of attorney under their common seals. See *Exp. Bank of England*, 1 *Swanset.* 10.

water for driving them, the selectmen of the town were directed to decide, in controversies between the corporation and other parties, whether sufficient water had been furnished, and whether the logs were seasonably turned over the dam,—*Held*, that their jurisdiction was exclusive, and that evidence could not be received on these points in a court of law, even though the selectmen had not been called by either party to act on the subject. *Id.*

6. Municipal corporations are not liable to a suit, except when the right of action is given by statute. *Me. Supreme Ct.* 1860, *Mitchell v. City of Rockland*, 52 *Me.* 118.

7. A State which was the owner of a canal, and was, by virtue of sovereignty, exempt from liability to suit by reason of its mismanagement, in order to effect a great public object, transferred the property to a corporation as a board of trustees, in which, by the act of transfer, the State became an associate with the creditors. *Held*, that the State's membership in the corporation, did not protect the corporation against suits. *Ind. Supreme Ct.* 1856, *Moore v. Board of Trustees of Wabash & Erie Canal*, 7 *Ind.* 462.

8. In what name. The general rule is that a corporation can sue or be sued only by its corporate name. *Curtiss v. Murry*, 26 *Cal.* 638; *U. S. Circ. Ct. (Vt.)* 1851, *Bradley v. Richardson*, 2 *Blatchf.* 843; 23 *Vt.* 720.

9. Unless special power is conferred upon it by law,* to come into Court in the name of a natural person,—*e. g.* of one of its officers. *N. C. Supreme Ct.* 1845, *Manney v. Motz*, 4 *Ired. Eq.* 195. Compare *Dart v. Houston*, 22 *Ga.* 506.

10. A corporation can sue only in the name and style given to it by law. *Va. Ct. of Appeals*, 1826, *Porter v. Nekervis*, 4 *Rand.* 359. And see *Minot v. Curtis*, 7 *Mass.* 444.

11. An action upon a contract which was made with a corporation through an agent, must be brought in the name of the corporation. *Vt. Supreme Ct.* 1833, *Binney v. Plumley*, 5 *Vt.* 500; *Mass. Supreme Ct.* 1839, *Commercial Bank v. French*, 21 *Pick.* 486; *Me. Supreme Ct.* 1841, *Garland v. Reynolds*,

20 *Me.* 45; *Ala. Supreme Ct.* 1841, *Alston v. Heartman*, 2 *Ala. N. S.* 699.

12. An action for the installments due on the subscriptions to the capital stock of a railroad company, made to commissioners named in the charter, is properly brought in the name of the company after its organization, the contract being with the commissioners as agents, and for the benefit of the corporation. *N. J. Supreme Ct.* 1852, *DelaWare & Atlantic R. R. Co. v. Irick*, 3 *Zabr.* 321.

13. A corporation, formed of the members of a partnership, can sue in equity in its corporate name for a debt due the partnership. *Va. Ct. of Appeals*, 1851, *Griffin v. Macaulay*, 7 *Gratt.* 476.

14. The trustees of a corporation should sue in the corporate name only.* *N. Y. Supreme Ct.* 1859, *Bundy v. Birdsall*, 29 *Barb.* 31. And see *Legrand v. Hampden Sidney College*, 5 *Munf.* 324; *Leonardsville Bank v. Willard*, 25 *N. Y.* 574.

15. That actions brought by the trustees of a township, in Ohio, should be brought in the name of the corporation,†—see *Wilson v. The Trustees of No. 16*, 8 *Ohio (Ham.)* 174.

16. An action upon a promissory note drawn payable to an individual or to an individual and his successors, although made for the benefit of a corporation in which he is treasurer (or other officer), should be sued in the individual name and not in that of the corporation. *Vt. Supreme Ct.* 1833, *Binney v. Plumley*, 5 *Vt.* 500; *Miss. Ct. of Errors*, 1850, *Haynes v. Covington*, 18 *Smed. & M.* 408; *Conn. Supreme Ct.* 1830, *Society of Chaplin v. Canada*, 8 *Conn.* 286. See also, *Timms v. Williams*, 3 *Ad. & E. N. S.* 413; 2 *Gale & D.* 621; 6 *Jur.* 1012.

17. An action upon a note made payable to the treasurer of a corporation, or his successor in office, for the use of the corporation, is rightfully brought in the name of the

* Under the Kentucky statute of 1814, the trustees of a religious society may maintain suits in their own names for the safe keeping and preservation of land, to the use of which the society is entitled, where the legal title to a moiety only is vested in the trustees. *Ky. Ct. of Appeals*, 1838, *Curd v. Wallace*, 7 *Dana*, 190.

† Trustees of a town who are not incorporated, and have no corporate name by which they can sue or be sued, must, when sued, be individually named. *Ky. Ct. of Appeals*, 1821, *Trustees of Lexington v. McConnell*, 3 *A. K. Marsh.* 324.

* A corporation may sue in their name of creation, though express power be given to them to sue by another name. See *College of Physicians v. Talbot*, 1 *Ld. Raym.* 153.

corporation. *Me. Supreme Ct.* 1839, Warren Academy v. Starrett, 15 *Me.* (3 *Shepl.*) 448.

18. That the general agent of an incorporated association can sue in his own name for the benefit of the association,—see *Habicht v. Pemberton*, 4 *Sandf.* 657; *Myers v. Machado*, 6 *Abb. Pr.* 198.

19. A statute power conferred on a company, to sue and be sued by an officer,—*Held*, upon its language, to extend to enable the secretary to sue for a libel reflecting upon the trading character of the company. See *Williams v. Beaumont*, 3 *More & S.* 705.

20. Such a power,—*Held*, not to extend to enable the company to petition, by the officer, for a commission in bankruptcy, against a debtor. See *Guthrie v. Fisk*, 3 *Barn. & C.* 178.

21. A suit against a corporation must be brought against the corporation by name, and not against the members composing it, or the officers representing it individually. *Ill. Supreme Ct.* 1853, Illinois Insane Hospital v. Higgins, 15 *Ill.* 185; *Ind. Supreme Ct.* 1841, Hay v. McCoy, 6 *Blackf.* 69; *N. Y. Supreme Ct.* 1850, Lucas v. Johnson, 8 *Barb.* 244; *Cal. Supreme Ct.* 1864, Curtiss v. Murry, 26 *Cal.* 633. And see *Trustees of Lexington v. McConnell*, 3 *A. K. Marsh.* 224.

22. In cases of a contract, entered into by certain persons as directors of a corporation, a suit on the contract should be brought against the corporation. *Ind. Supreme Ct.* 1861, Herod v. Rodman, 16 *Ind.* 241.

23. In suits between corporations, the proceedings and judgment must be in the corporate name. Judgment for and against the individual members must be reversed; but amendment may be allowed. *Ill. Supreme Ct.* 1860, Campbell v. Brunk, 25 *Ill.* 225.

24. Change of name. After the name of a corporation has been changed, it should sue or be sued by its new name.* *K. B.* 1766, Mayor &c. of Colchester v. Seaber, 3 *Burr.* 1866; *Ala. Supreme Ct.* 1844, Ready v. Mayor &c. of Tuscaloosa, 6 *Ala. N. S.* 327; *Madison College v. Burke*, *Id.* 494; *Minn. Supreme Ct.* 1862, Gould v. Sub-District No. 3, &c. 7 *Minn.* 203. Compare *Racine County*

* Where, however, the name of a corporation was changed by an amendatory act, and a suit was brought by it in its first name,—*Held*, that it was not necessary that the corporation should show the amendatory act had been rejected by the stockholders. *Ala. Supreme Ct.* 1842, Beene v. Cahawba & Marion R. R. Co. 3 *Ala. N. S.* 660.

Bank v. Ayers, 12 *Wis.* 512; *Eaton &c. R. R. Co. v. Hunt*, 20 *Ind.* 457; *Thrasher v. Pike &c. R. R. Co.* 25 *Ill.* 393.

25. Foreign corporations. In general, by the comity of the States composing the Union,* a corporation created by the laws of one State is deemed capable of prosecuting a suit in the courts of another State; subject to such requirements as to giving security for costs and the like, as the local laws impose.† *Me. Supreme Ct.* 1840, Savage Manuf. Co. v. Armstrong, 17 *Me.* 34; *Mass. Supreme Ct.* 1843, British American Land Co. v. Ames, 6 *Metc.* 391; *N. Y. Ct. of Appeals*, 1855, Mutual Benefit Life Ins. Co. v. Davis, 12 *N. Y.* (3 *Kern.*) 569; *N. Y. Chancery*, 1820, Silver Lake Bank v. North, 4 *Johns. Ch.* 370; *N. Y. Supreme Ct.* 1826, N. J. Protection & Lombard Bank v. Thorp, 6 *Cow.* 46; *Sp. T.* 1854, Bank of Commerce v. Rutland & Washington R. R. Co. 10 *How. Pr.* 1; 1861, Elizabethport Manuf. Co. v. Campbell, 18 *Abb. Pr.* 86; 1868, Fisk v. Chicago &c. R. R. Co. 4 *Abb. Pr. N. S.* 378; *N. Y. Superior Ct.* 1862, Perse & Brooks' Paper Works v. Willett, 14 *Abb. Pr.* 119.

26. A corporation established by the law of one State, may institute a suit in another State, on a contract made in the State in which the corporation was created. [13 *Pet.* 519.] *U. S. Supreme Ct.* 1845, Tombigbee R. R. Co. v. Kneeland, 4 *How.* 16.

27. There is no maxim nor reason of convenience or policy, nor statute, requiring the members of a foreign corporation to sue in their private capacities and names, as individuals and copartners. *Mass. Supreme*

* As the right of a foreign corporation to sue depends upon the comity of the country or State where the suit is brought, the government of the country may decline to exercise this comity and refuse to allow suit to be brought; so, too, it seems that a court may decline to take cognizance of the action if the corporation was instituted for a purpose hostile to the interests of the State. See *American Colonization Society v. Gartrell*, 23 *Ga.* 448.

† A corporation in a foreign country may sue as such in the courts of England, but they must prove that they are incorporated in that country; and it will be left to the jury to say, whether the body so incorporated is the same which sues. *National Bank of St. Charles v. De Bernales*, 1 *Carr. & P.* 569; *Ryan & M.* 190. And see *Henriques v. Dutch W. I. Co.* 3 *Id. Raym.* 1582.

In support of the general proposition in the text,—see also, *Holcomb v. Illinois &c. Canal Co.* 3 *Soam.* 236; *Bank of Washenaw v. Montgomery*, *Id.* 428; *Frazier v. Wilcox*, 4 *Rob. (La.)* 518; *Bank of Edwardsville v. Simpson*, 1 *Mo.* 5; *Lewis v. Bank of Kentucky*, 12 *Ohio*, 133; *New York Fire Ins. Co. v. Ely*, 5 *Conn.* 605; *Hartford Bank v. Barry*, 17 *Mass.* 97; *Gauger Iron Co. v. Dawson*, 4 *Blackf.* 202; *New York Dry Dock v. Hicks*, 5 *McLean*, 111.

Ct. 1818, Portsmouth Livery Co. v. Watson, 10 *Mass.* 91.

28. Where a corporation is chartered in two separate States, and exercises its franchises in each, it may be restrained in either, from expending its funds, for any other than corporate purposes, anywhere; and a plea to the jurisdiction of the courts of either State is not tenable, on the ground that part of the corporate property lies in a different State, or that it owes its corporate existence in part to another State. *Md. Ct. of Appeals*, 1861, State v. Northern Central R. R. Co. 18 *Md.* 193.

29. The courts of a State may grant a *mandamus* to re-instate an officer of a foreign corporation carrying on business within the State, in the office of the corporation which he was exercising there, and from which he had been ousted, by the wrongful act of the directors; for the court may recognize the existence of a foreign corporation, and it may determine the rights of individuals, though it has no jurisdiction over the corporation itself. *Nev. Supreme Ct.* 1867, Curtis v. McCullough, 3 *Nev.* 202.

30. The language of a statute, which provides that "a corporation may be summoned as garnishee," &c., is sufficiently comprehensive to include foreign corporations and render them equally subject, with domestic corporations, to the process of garnishment, in all cases, where an original action may be commenced against them in the courts of the State to recover the debt in respect to which the process of garnishment is served.* *Wis. Supreme Ct.* 1867, Brauser v. New England Fire Ins. Co. 21 *Wis.* 506.

31. A corporation, like a natural person, is subject to the process of foreign attachment, though the words of the act in relation to it are, "When debts due from any person." *Conn. Supreme Ct.* 1833, Knox v. Protection Ins. Co. 9 *Conn.* 430.

32. Suits against them. A corporation created by the laws of one State, is, in general, capable of being sued in the courts of another State; provided the necessary conditions as to service of process and the like,

imposed by the local laws, are complied with.* *Vt. Supreme Ct.* 1841; *N. H. Superior Ct.* 1838, Libbey v. Hodgdon, 9 *N. H.* 394; *N. Y. Chancery*, 1836, Cunningham v. Pell, 5 *Paige*, 607; *N. Y. Supreme Ct.* 1851, Eggleston v. Orange & Alexandria R. R. Co. 1 *Code R. N. S.* 212; *N. Y. Superior Ct. Sp. T.* 1854, New York Floating Derrick Co. v. New Jersey Oil Co. 3 *Duer*, 648. Compare Peckham v. North Parish in Haverhill, 16 *Pick.* 274; Middlebrooks v. Springfield Fire Ins. Co. 14 *Conn.* 301; Whitehead v. Buffalo & Lake Huron Railw. Co. 18 *How. Pr.* 218.

33. Since a corporation created by one State can transact business in another State, with the assent, expressed or implied, of the latter State, [13 *Pet.* 519,] a corporation acting in a State foreign to its creation, under a law of the latter State, which recognizes its existence for the purpose of making contracts within that State, and being sued upon them through notice to its contracting agents in that State, is bound by such statute; and a judgment recovered against the corporation upon a notice given to its contracting agents according to the statute, is valid. *U. S. Supreme Ct.* 1855, Lafayette Ins. Co. v. French, 18 *How.* 404.

34. In New York, a foreign corporation who have appeared as defendants in an action in the Supreme Court, are deemed, for the purposes of the action, as much within, and subjected to, the jurisdiction of the court, as if they were a corporation under the laws of the State. It is true, that for the purposes of certain provisions of the Statute of Limitations, they can never come within the description of those who are called residents, so as to allow the statute to run against them; but their foreign origin does not prevent actions against them, for any cause, when they can be brought within the jurisdiction of the court. *N. Y. Supreme Ct.* 1858, Dart v. Farmers' Bank, 27 *Barb.* 337.

35. Although the statute conferring jurisdiction over foreign corporations may make it essential to the jurisdiction that either the plaintiff should be a resident of

* Whether the process of foreign attachment lies against a corporation created by the laws of another State,—see *Bushel v. Commonwealth Ins. Co.* 15 *Serg. & R.* 173; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 *Mo.* 416; *Union Turnp. Co. v. Jenkins*, 2 *Mass.* 37; *Holland v. Leslie*, 2 *Harring.* 306; *Fortune v. City of St. Louis*, 23 *Mo.* 229; *Mayor &c. of Mobile v. Rowland*, 26 *Ala. N. S.* 493.

* A corporation having property or capable of being sued within a State, though created by the laws of another State, is a corporation "within the State," within the meaning of the laws allowing attachments. *N. H. Superior Ct.* 1838, Libbey v. Hodgdon, 9 *N. H.* 394. Compare *St. Louis Perpetual Ins. Co. v. Cohen*, 9 *Mo.* 416; *Vogie v. New Granada Canal & Steam Nav. Co. of New York*, 1 *Houst.* 294.

the State, or the cause of action should have arisen, or the subject of the action should be situated within it, yet it does not necessarily follow that proof of either of these facts must be made previous to the commencement of proceedings. It is sufficient if a state of facts which sustains the jurisdiction is made to appear upon motion to set proceedings aside. *N. Y. Supreme Ct.* 1856, *Bates v. New Orleans R. R. Co.* 4 *Abb. Pr.* 72; 13 *How. Pr.* 516.

36. The mere grant of authority to a foreign corporation to exercise its franchise and to hold property within a State, is not to be construed as implying a grant of judicial jurisdiction to foreign courts, over the property of such corporation within the State. *Ind. Supreme Ct.* 1863, *Eaton & Co. R. R. Co. v. Hunt*, 20 *Ind.* 457.

37. Joint actions. Two corporations who, as tenants in common, deposit a fund, may maintain a joint action to recover it. *N. Y. Supreme Ct.* 1831, *N. Y. & Sharon Canal Co. v. Fulton Bank*, 7 *Wend.* 412.

38. Two corporations may maintain a joint action on a bond made payable to both of them. *Mo. Supreme Ct.* 1847, *Gathwright v. Callaway County*, 10 *Mo.* 663.

39. Two corporations, claiming lands as tenants in common, cannot join in a writ of entry. *Mass. Supreme Ct.* 1822, *Rehoboth v. Hunt*, 1 *Pick.* 228.

40. The principle that one action for damages may be brought against several defendants for an injury, single in its nature, caused by their concurrent acts, applies to an action against two railroad companies for injury by a collision between their respective trains; and a joint judgment is not improper if both are shown to be liable. *N. Y. Superior Ct.* 1857, *Colegrove v. N. Y. & Harlem R. R. Co.* 6 *Duer*, 382; 20 *N. Y.* 492.

41. Effect of dissolution, &c., on the power to sue. Upon the effect, under various State statutes, of the dissolution of a corporation on an appointment of a receiver, upon its power to bring an action, or to continue the prosecution of one previously brought,—see *Rankin v. Sherwood*, 33 *Me.* 509; *Franklin Bank v. Cooper*, 36 *Me.* 179; *Merrill v. Shaw*, 38 *Me.* 267; *Leather v. Ship Builders' Bank*, 40 *Me.* 386; *Greeley v. Smith*, 3 *Story C. Ct.* 657; *Blake v. Portsmouth & Concord R. R.* 39 *N. H.* 435; *Bank of Lyons v. Demmon, Hill & D. Supp.* 398; *Davenport v. City Bank*

of Buffalo, 9 *Paige*, 12; *Talmage v. Pell*, 12 *Id.* 410; *Miami Exporting Co. v. Gano*, 13 *Ohio*, 269; *Stetson v. City Bank of N. O.* 2 *Ohio St.* 167; *Same v. Same*, 12 *Id.* 577; *Leach v. Thomas*, 27 *Id.* 457; *City of Louisville v. Bank of the United States*, 3 *B. Monr.* 138; *Bank of Gallipolis v. Trimble*, 6 *B. Monr.* 599; *Robertson v. Hoy*, 12 *Smed. & M.* 566; *Underhill v. State Bank*, 6 *Ark.* (1 *Engl.*) 185; *Ferguson v. State Bank*, 8 *Id.* 416.

As to Dissolution generally, see DISSOLUTION.

42. Power to sue in United States courts. A corporation created by and doing business in a particular State, is to be deemed, to all intents and purposes, as a person, (although an artificial person,) an inhabitant of the same State, and capable of being treated as a citizen of that State as much as a natural person. It is, substantially, and within the meaning of section 11 of the act of Congress of Sept. 24, 1789, (1 U. S. Stat. at L. 78),—which gives the United States circuit court jurisdiction of suits between a citizen of the State where the suit is brought and a citizen of another State—a citizen of the State which created it, and where its business is done. *U. S. Supreme Ct.* 1844, *Louisville & C. R. R. Co. v. Letson*, 2 *How.* 497.

43. The jurisdiction of the circuit courts of the United States, where a corporation is a party, re-examined and held to attach, where the averment on the record shows that a citizen of one State sues a corporation created by the legislature of another State. *U. S. Supreme Ct.* 1853, *Marshal v. Baltimore & Ohio R. R. Co.* 16 *How.* 314.

44. A suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body;* and no

* Earlier decisions went upon the ground of looking to the actual citizenship of the individuals composing the corporation. Consult *Hope Ins. Co. v. Boardman*, 5 *Cranch*, 57; *Bank of United States v. Deveaux*, 5 *Cranch*, 61; *Society for Propagation of the Gospel v. Town of New Haven*, 8 *Wheat* 464; *Bank of Augusta v. Earle*, 18 *Pet.* 519; *Commercial & R. R. Bank v. Elcomb*, 14 *Pet.* 60; *Irvine v. Lowry*, *Id.* 298; *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.* 15 *How.* 283; *Flanders v. Aetna Ins. Co.* 3 *Mass.* 158; *Bank of Cumberland v. Willis*, 3 *Summ.* 472; *Kirkpatrick v. White*, 4 *Wash. C. Ct.* 595.

Thus where the stockholders of an Indiana railroad company, being residents of other States than Indiana, filed a bill against the company and the city collector of taxes, to restrain the collection of taxes levied upon the property of the company,—*Held*, that although the company could not, in

avermment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. *U. S. Supreme Ct.* 1861, *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286; *Pa. Supreme Ct.* 1865, *County of Allegheny v. Cleveland & Pittsburgh R. R. Co.* 51 *Pa. St.* 228.

45. Therefore, a suit brought against a corporation created by the concurrent legislation of two States, is, in legal contemplation, a suit in which citizens of each State are joined as defendants, and if the plaintiff is a citizen of either of these States, the suit cannot be maintained in the courts of the United States. *Pa. Supreme Ct.* 1865, *County of Allegheny v. Cleveland & Pittsburgh R. R. Co.* 51 *Pa. St.* 228.

46. Two corporations, existing under the laws of adjoining States, although composed of the same corporators, cannot be joined in suits as one and the same plaintiff, in a court of the United States, against a citizen of either of the States which chartered them. *U. S. Supreme Ct.* 1861, *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286.

47. — or State law. Where the local law of the State authorizes foreign attachments against corporations, a foreign corporation is liable to a suit *in personam* in the admiralty, indirectly through its attachable property within the district, so as to compel the appearance of the corporation to answer the suit, or, at all events, to subject the property attached to the final judgment and decree of the court. *U. S. Circ. Ct. (R. I.)* 1841, *Clarke v. N. J. Steam Navigation Co.* 1 *Story C. Ct.* 581; 4 *Law Rep.* 184.

48. — under particular charters. A charter which authorizes a corporation to sue and be sued in courts of record, "or any other place whatsoever," is not understood to enlarge the jurisdiction of any particular court, but merely to give a capacity to the corporation to appear in a court, which would have cognizance of the cause if brought

by individuals. It does not enable the corporation to sue in the circuit court in a case which it otherwise could not bring in that court. *U. S. Supreme Ct.* 1809, *Bank of United States v. Deveaux*, 5 *Cranch*, 61.

49. The charter of the bank of the United States provided that the bank might sue and be sued in all State courts having competent jurisdiction, and in any circuit court of the United States. *Held*,

1. That these words were sufficient to give general power to sue in any circuit court. [Distinguishing 5 *Cranch*, 85.]

2. That this provision, so construed, was not unconstitutional. *U. S. Supreme Ct.* 1824, *Osborn v. United States Bank*, 9 *Wheat.* 738, 816. Followed, *United States Bank v. Planters' Bank*, *Id.* 904. Compare *Magill v. Parsons*, 4 *Conn.* 317.

50. A bank chartered with power to sue and be sued "in any circuit court of the United States," can maintain a suit against a corporation established by an act of the legislature of the State within which the plaintiff corporation carries on business. *U. S. Circ. Ct. (Pa.)* 1821, *Bank of the United States v. Northumberland Bank*, 4 *Wash. C. Ct.* 108.

51. — or when a State is a member. The fact that a State is an owner of stock in a banking corporation suing in a circuit court, does not prevent the circuit court from entertaining jurisdiction of the action. *U. S. Supreme Ct.* 1824, *United States Bank v. Planters' Bank*, 9 *Wheat.* 904; 1844, *Louisville & C. R. Co. v. Letson*, 2 *How.* 497.

52. The agents of a corporation may be sued in the circuit court of New Jersey, although the corporation may not be suable there. The privilege of a principal is not communicated to the agent. [9 *Wheat.* 743.] *U. S. Circ. Ct. (N. J.)* 1830, *Bonaparte v. Camden & Amboy R. R. Co.* 1 *Baldw.* 205, 216.

As to Removing causes affecting corporations from State to federal courts, see *infra*, 69.

II. PRINCIPLES OF PROCEDURE.

53. Service of process. In a suit against a corporation, or a proceeding affecting its corporate property, the shareholders have no right to be served with notice individually. *N. H. Superior Ct.* 1839, *Peirce v. Somersworth*, 10 *N. H.* 369.

54. On whom it may be made. Upon the

its corporate name, bring a suit in the circuit court against the collector, because the business of the company was transacted in the State of which he was a citizen, yet the stockholders, being citizens of other States, might claim in that court to have their stock protected against an illegal taxation, and make the corporation a defendant, and enjoin it from paying over the tax; and that the corporation having been made a party defendant, the same relief might be given to it as if it had been made the complainant. *U. S. Circ. Ct. (Ind.)* 1853, *Paine v. Wright*, 6 *McLean*, 395.

other hand, service upon an individual member is not in general sufficient to charge the corporation; but the individual served may plead the want of notice to the corporation. *Conn. Supreme Ct.* 1809, *Rand v. Proprietors of Locks*, 3 *Day*, 441. And see *Willamette &c. Co. v. Williams*, 1 *Oreg.* 112.

55. Under a statute providing that process against a corporation might be served on the president or head of the corporation, or secretary, cashier, or managing agent thereof,—*Held*, that a service upon one of the proprietors of a corporation was bad, it not having appeared that he was one of the officers specified. *Cal. Supreme Ct.* 1858, *O'Brien v. Shaw &c. Canal Co.* 10 *Cal.* 343.

56. President competent to receive service. *Chamberlin v. Mammoth Mining Co.* 20 *Mo.* 96.

57. Secretary competent. *Gillig v. Independent Gold & Silver Mining Co.* 1 *Nev.* 247; *McCall v. Byram Manufacturing Co.* 6 *Conn.* 428.

58. Directors competent.* See *Boyd v. Chesapeake & Ohio Canal Co.* 17 *Md.* 195.

59. Managing agent. What officers or agents are recognized as being within the term "managing agent," in a statute directing service of process against a corporation, to be made upon their managing agent,—see *Doty v. Michigan Central R. R. Co.* 8 *Abb. Pr.* 427; *Carr v. Commercial Bank of Racine*, 19 *Wis.* 272; *Parke v. Commonwealth Ins. Co.* 44 *Pa. St.* 422; *Bain v. Globe Ins. Co.* 9 *How. Pr.* 448; *Donadi v. N. Y. State Mutual Ins. Co.* 2 *E. D. Smith*, 519; *Flynn v. Hudson River R. R. Co.* 6 *How. Pr.* 308; 10 *N. Y. Leg. Obs.* 158; *Bank of Commerce v. Rutland & Washington R. R. Co.* 10 *How. Pr.* 1; *American Express Co. v. Johnson*, 17 *Ohio St.* 641.

60. A managing agent must be an agent whose agency extends to all the transactions of a corporation—one engaged in the management of the corporation, in distinction from the management of a particular branch or department of its business. *N. Y. Supreme Ct. Sp. T.* 1850, *Brewster v. Michigan Central R. R. Co.* 5 *How. Pr.* 183.

61. The captain of a steamboat belonging to a foreign corporation, who is served with process while transacting its business on the

waters of the State, is not a "managing agent" of such corporation, within the meaning of a statute allowing the service of process on the "managing agent" of a corporation." The statute refers to such agents as have a general supervision over the affairs of the corporation. *Wis. Supreme Ct.* 1862, *Upper Mississippi Trans. Co. v. Whittaker*, 16 *Wis.* 220.

62. Conductor for railroad company competent. *New Albany & Salem R. R. Co. v. Grooms*, 9 *Ind.* 243; *Same v. Tilton*, 12 *Ind.* 3; *Same v. Powell*, 13 *Ind.* 373; *Ohio &c. R. R. Co. v. Quier*, 16 *Ind.* 440.

63. Officers *de facto* competent. *Berrian v. Methodist Society*, 4 *Abb. Pr.* 424; *McCall v. Byram Manuf. Co.* 6 *Conn.* 428.

64. Appearance. Although a corporation can appear only by attorney, and under the authority of the corporation, the appearance of any member of the bar in a cause has always been received as evidence of his authority; and no additional evidence is required. There is no distinction in this particular between a natural person and a corporation; nor does there appear any reason for such distinction. A corporation, it is true, can appear only by attorney, while a natural person may appear for himself. But when he waives this privilege, and elects to appear by attorney, the same evidence is to be required that the individual professing to represent him has authority to do so, which would be required if he were incapable of appearing in person. The practice of permitting appearance without producing a warrant of attorney, is as applicable to appearance for a corporation, as for a natural person. *U. S. Supreme Ct.* 1824, *Osborn v. Bank of United States*, 9 *Wheat.* 738.

65. That authority to appear in a suit against a corporation can only be communicated by the corporate seal,—see *Cape Sable Co.'s Case*, 3 *Bland*, 606.

66. What appearance on behalf of a foreign corporation is sufficient to give jurisdiction notwithstanding defects in the service of process,—see *Murray v. Vanderbilt*, 39 *Barb.* 140.

67. Judgment may be rendered against a corporation upon an indictment, upon default of appearance, after due notice to appear. *N. H. Supreme Ct.* 1855, *Boston &c. R. R. v. State*, 32 *N. H.* 215.

68. Procedure generally. A corporation being a party to an action in court, may law-

* Where defendant, a religious corporation, had no presiding officer or treasurer, and the secretary had left the State, service of the summons on a trustee was declared sufficient, by special rule. *N. Y. Supreme Ct.* 1837, *Tom v. Methodist Episcopal Church*, 19 *Wend.* 24.

fully take any step that an individual might take under like circumstances, to bring it to final judgment; and a trial by arbitrators, appointed by the court with the consent of both parties, is proper. *U. S. Supreme Ct.* 1847, *Alexandria Canal Co. v. Swann*, 5 *How.* 88. And see *Osborn v. Bank of United States*, 9 *Wheat.* 788.

69. Removal of cause to federal courts. Upon the right of a corporation defendant in a State court, to have the cause removed to a court of the United States, in certain cases,—see Act of Congress of Sept. 24, 1789, § 12, 1 *U. S. Stat at L.* 79; Act of July 27, 1866, 14 *Id.* 806; as amended by act of March 2, 1867, *Id.* 558; Act of July 27, 1868, § 2, 15 *Id.* 227; *Barney v. Globe Bank*, 2 *Am. Law Reg. N. S.* 221; *Sayles v. N. W. Ins. Co.* 2 *Curt. C. Ct.* 213; *Stevens v. Phoenix Ins.* 24 *How. Pr.* 517; *Bliven v. N. E. Screw Co.* 3 *Blatchf.* 111; *Treadway v. Chicago &c. Railway Co.* 21 *Iowa*, 351; *Fisk v. Chicago &c. R. R. Co.* 4 *Abb. Pr.* 453.

70. Pleading, generally. That corporations are subject to the same rules of pleading as private persons,—see *Hunt v. City of San Francisco*, 11 *Cal.* 250.

71. The rule that a person cannot be both plaintiff and defendant to the same action, does not apply to actions by corporations. A corporation may sue a member of its own body, although the names of defendants appear on the record as plaintiffs. *Miss. Ct. of Errors*, 1841, *Connell v. Woodard*, 5 *How.* 665.

72. That it is not necessary to repeat the full name of the corporation at every recurrence in the declaration; reference in a clear manner to the name already given, being sufficient,—see *Trustees of Anti-Pædobaptist Society v. Mulford*, 3 *Halst.* 182.

73. Averring incorporation, in action by corporation. In New York, when plaintiffs sue in a name which is appropriate to a corporate body, it is not a necessary averment in the complaint, that plaintiffs are a body corporate. In general, it is unnecessary to aver what is not required to be proved. *N. Y. Superior Ct. Sp. T.* 1853, *Union Mutual Ins. Co. v. Osgood*, 1 *Duer*, 707; 13 *N. Y. Leg. Obs.* 85; 1855, *Metropolitan Bank v. Lord*, 4 *Duer*, 680; 1 *Abb. Pr.* 185; *N. Y. Supreme Ct.* 1856, *Bank of Waterville v. Beltsar*, 13 *How. Pr.* 270.*

74. A corporation plaintiff may declare by its name of incorporation, and without setting forth the act of incorporation, even if it be a private law. *N. Y. Supreme Ct.* 1799, *U. S. Bank v. Haskins*, 1 *Johns. Cas.* 182; 1817, *Dutchess Cotton Manufactory v. Davis*, 14 *Johns.* 288.

75. A corporation when suing, need not aver or prove its corporate existence, unless it be expressly averred that it is not a corporation. *N. Y. Supreme Ct.* 1859, *La Fayette Ins. Co. v. Rogers*, 80 *Barb.* 491.

76. In an action brought by an assignee of a corporation, as well as where the corporation is plaintiff, upon an agreement with the corporation, no specific allegation of the incorporation is necessary in the complaint; a statement of the name of the corporation, and of the making of the agreement between them, and of what the corporation did in fulfilment of the agreement, includes the idea of the legal existence of the company; and the fact of incorporation is mere evidence in support of it, not essential to be particularly stated in the pleading. *N. Y. Supreme Ct.* 1858, *Kennedy v. Cotton*, 28 *Barb.* 59.

77. In an action against a corporation created under the laws of New York, it is not necessary for the plaintiff suing in the courts of that State, to set out the act of incorporation in the complaint. And where defendants are alleged to be a corporation doing business within this State, the court will not intend, as a matter of law, that it is a foreign corporation. *N. Y. Supreme Ct. Chambers*, 1855, *Acome v. American Mineral Co.* 11 *How. Pr.* 24.

78. In an action by a domestic corporation, it is not necessary that the complaint should set forth the mode of plaintiff's incorporation, or recite the title and date of the act under which the plaintiff was incorporated. *N. Y. Supreme Ct. Sp. T.* 1859, *Shoe & Leather Bank v. Brown*, 9 *Abb. Pr.* 218; 18 *How. Pr.* 808.

79. Otherwise as to a foreign corporation plaintiff. See *Connecticut Bank v. Smith*, 9 *Abb. Pr.* 168.

80. In Pennsylvania, in a suit by a corporation, the declaration need not make profert of the charter. The want of a charter may be pleaded in abatement, and, perhaps, in

Bank of Havana v. Wickham, 7 *Abb. Pr.* 134; 16 *How. Pr.* 97; 20 *N. Y.* 855; where the contrary was held in reference to banking associations.

* Disapproving *Johnson v. Kempe*, 11 *How. Pr.* 186; and

bar; but the defendant, by pleading the general issue and going to trial, waives the objection. *Pa. Supreme Ct.* 1843, *Zion Church v. St. Peter's Church*, 5 *Watts & S.* 215.

81. In Ohio, where a corporation sue, they need not set forth, by averment in the declaration, how they were incorporated; but upon the general issue being pleaded, they must prove that they are a corporation. *Ohio Supreme Ct.* 1843, *Lewis v. Bank of Kentucky*, 12 *Ohio*, 132.

82. In Indiana, a corporation may sue in its corporate name, without being obliged to aver in its complaint how it became a corporation, nor that it is such; and a default, or answer in denial of the cause of action, admits the capacity of the plaintiff to sue. *Ind. Supreme Ct.* 1861, *Heaston v. Cincinnati & Fort Wayne R. R. Co.* 16 *Ind.* 275.

83. In an action by a corporation, the plaintiffs need not aver that they are a corporation. *Ind. Supreme Ct.* 1836, *Harris v. Muskingum Manuf. Co.* 4 *Blackf.* 267; 1839, *Richardson v. St. Joseph Iron Co.* 5 *Id.* 146; *N. J. Supreme Ct.* 1840, *Bennington Iron Co. v. Rutherford*, 3 *Harr.* 105, 158.

84. Where the name imports such a corporation as is authorized by law, a *prima facie* right to sue is shown without setting out the manner of organization. *Williams v. Franklin Township Academical Association*, 26 *Ind.* 310.

85. If a suit is brought in the corporate name of a township, which is declared by statute a body politic, it is not necessary to allege in the declaration that the township has been incorporated. *Ill. Supreme Ct.* 1853, *Morris v. Trustees of Schools*, 15 *Ill.* 266.

86. An averment that the plaintiff was, and still is, a body corporate, &c., is sufficient to show corporate existence in an action to recover subscriptions of stock to a railway company, especially where the declaration is demurred to. *Ill. Supreme Ct.* 1859, *Spangler v. Indiana &c. R. R. Co.* 31 *Ill.* 276.

87. Where a corporation is created by special statute, such existence need not in general be shown by further averment. But when not so created, it must be made out according to the facts. *Mich. Supreme Ct.* 1867, *People v. De Mill*, 15 *Mich.* 164.

88. In an action by a corporation, averments of its corporate existence, under an act of incorporation, are unnecessary. This

is a matter of proof on the part of the plaintiff, when denied by the defendant. *Wis. Supreme Ct.* 1862, *Chickerming Lodge &c. v. McDonald*, 16 *Wis.* 112.

89. The complaint in a suit brought in a corporate name, need not aver the plaintiff to be a corporation. And this rule is not altered by a statute dispensing with proof of incorporation, except where defendant denies it. *Wis. Supreme Ct.* 1860, *Central Bank of Wisconsin v. Knowlton*, 12 *Wis.* 624.

90. That in California, legal capacity of a corporation to sue is established by an allegation, in the complaint, of its incorporation, under the laws of the State,—see *California Steam Navigation Co. v. Wright*, 6 *Cal.* 258.

91. In an action by a bank, duly incorporated, brought in the State where it is located, proof of its incorporation is not required. *Va. Ct. of Appeals*, 1852, *Hays v. Northwestern Bank of Virginia*, 9 *Gratt.* 127.

92. In an action by a corporation, it is not necessary to aver in the declaration the legal existence of the corporation,—if this fact is intended to be questioned, it must be done by plea. *So held*, where the charter of the corporation was a public act of which the court was bound to take judicial notice. *Ark. Supreme Ct.* 1859, *Mississippi &c. R. R. Co. v. Gaster*, 20 *Ark.* 455.

93. In an action by a corporation, it is sufficient to allege generally that the plaintiff is a body corporate, without specially alleging a compliance with any requisite in the organization, although proof of such matter may be necessary. *Ala. Supreme Ct.* 1843, *Selma & Tennessee Railroad v. Tipton*, 5 *Ala. N. S.* 787.

94. That the mere fact, that, in a contract with the company, the defendant in an action subsequently brought on such contract by the company, has designated it by a name appropriate to a corporate body, does not admit its corporate legal existence in such action, unless it be distinctly stated in the contract that the company is an incorporated company,—see *Holloway v. Memphis &c. R. R. Co.* 23 *Tex.* 465.

95. In an action to recover subscriptions to the stock of a corporation, a declaration, stating the incorporation of the plaintiffs, and alleging a contract to pay the installments on a subscription for shares, until the whole should be paid, according to the terms and provisions of the charter of the company, is

insufficient. As the promises to pay set forth are not absolute, but refer to the charter, which is a private act, the latter should be set out in the declaration.* *N. J. Supreme Ct. 1862, Perdicaris v. Trenton City Bridge Co. 5 Dutch. 367.*

96. — In action by foreign corporation. A foreign corporation, suing, need not state in the complaint the act of incorporation or charter at large, or even refer by title to the act or grant, or show the date of its passage. *N. Y. Superior Ct. 1851, Holyoke Bank v. Haskins, 4 Sandf. 675.*

97. The complaint of a foreign corporation must aver the fact of its incorporation, except in the case where the defendants are estopped from denying the incorporation; as by having contracted with the corporation by their corporate name. It is only where the incorporation is created by a general law of the State or country in which the action is commenced, that it is unnecessary for plaintiffs, suing in an artificial name, to allege at least that they are incorporated. *N. Y. Supreme Ct. Sp. T. 1859, Connecticut Bank v. Smith, 17 How. Pr. 487; 9 Abb. Pr. 168.*

98. Corporate power. The power of a foreign corporation to make the contract which is sought to be enforced, must be set forth in the bill. An allegation that it was incorporated with various powers and duties, will not let in proof of a power to loan money and take security on land; and setting forth a statute enacted after the transaction in question, is not enough. *A. V. Chan. Ct. 1845, Bard v. Chamberlain, 8 Sandf. Ch. 81.*

99. An action may be supported by a foreign corporation in their corporate name and capacity; and in pleading, it is not necessary that the proper names of the persons composing the corporation should be set forth, or the manner of incorporation be shown; although on the general issue being pleaded, the corporation must prove that by the law of the foreign country they were effectually created a corporation. *H. of Lords, 1730, Henriques v. Dutch West India Co. 2 Ld. Raym. 1532; 2 Stra. 807.*

100. — In action against corporation. A corporation may be declared against by the

name by which it is known, without alleging it to be chartered or incorporated; if the description impliedly amounts to an allegation that the defendants are a corporate body. *C. P. 1849, Woolf v. City Steamboat Co. 7 C. B. 103; 6 Dowl. & L. 606. Compare Mellor v. Spateman, 1 Saund. 840.*

101. A plea setting forth that A. and others, his associates, were created and declared a body corporate, &c., by the name of, &c., without alleging organization,—*Held*, sufficient. *N. Y. Supreme Ct. 1838, Beekman v. Traver, 20 Wend. 67.*

102. A complaint against a corporation need not allege its incorporation. *N. Y. Superior Ct. Sp. T. 1860, Lighte v. Everett Fire Ins. Co. 5 Bosw. 716.*

103. Misnomer. In a suit by or against a corporation, it should be correctly named; and if there is a variance between the real name and the name given in an obligation or other instrument, on which the suit is founded, the declaration should contain proper averments of identity. *N. J. Supreme Ct. 1806, Inhabitants of Woolwick v. Forest, 1 Penning. 115.*

104. Misnomer of a corporation is only matter of abatement; and when they appear in the name by which they are sued, and the cause is referred, it is too late to call in question their corporate being before the referees. *Vt. Supreme Ct. 1842, Stone v. Berkshire Cong. Society, 14 Vt. 86.*

105. A corporation defendant cannot take advantage of a misnomer, in arrest of judgment, but must plead it in abatement. *Mass. Supreme Ct. 1809, Gilbert v. Nantucket Bank, 5 Mass. 97.*

106. If the undertaking be to the corporation, whether a right or wrong name be used,—whether the corporate name or that of some of its officers, it should be declared on and treated as a promise to the corporation. Thus, where a promissory note was made payable "to the cashier of the Commercial Bank, or his order," and the consideration proceeded from the bank,—*Held*, that an action on the note was maintainable in the name of the bank as the promisee. *Mass. Supreme Ct. 1839, Commercial Bank v. French, 21 Pick. 486.*

107. That the general issue admits incorporation. In an action brought by a corporation, it is not necessary for the plaintiffs, under the general issue, to prove their cor-

* By suing a body of men claiming to be a corporation, by its corporate name, the plaintiff admits that they are a corporation. *N. Y. Supreme Ct. 1855, People v. Ravenswood Turnpike &c. Co. 20 Barb. 518.*

porate character.* *Vt. Supreme Ct.* 1855,

* For cases sustaining the contrary rule to that indicated in the text; viz. that under the general issue the capacity of a corporation plaintiff or defendant is drawn in question,—see *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 *Dougl. (Mich.)* 457; *State v. Mayor &c. of Savannah*, 18 *M. Charlt.* 250; *Bank of Marietta v. Pindall*, 2 *Rand.* 465; *Taylor v. Bank of Alexandria*, 5 *Leigh*, 471; *Jackson v. Bank of Marietta*, 9 *Id.* 240; *Agnew v. Bank of Gettysburg*, 2 *Har. & G.* 478; *Rees v. Conococheague Bank*, 5 *Rand.* 826; *Tar River Nav. Co. v. Neal*, 8 *Harv.* 520; *Buncombe Turnpike Co. v. Carson*, 1 *Dev. & R.* 306; *Hargrave v. Bank of Illinois*, 1 *Bress.* 84; *Jones v. Bank of Illinois*, *Id.* 86; *Carmichael v. Trustees of School Lands*, 8 *How. (Mo.)* 84; *Pa. Supreme Ct.* 1840, *Wolf v. Goddard*, 9 *Watts*, 544; *Aldermen &c. v. Finley*, 10 *Ark. (5 Engl.)* 428; *Clarke v. Bank of Mississippi*, *Id.* 516.

The rule of the earlier New York cases was that under the general issue a corporation plaintiff must prove its corporate character. *N. Y. Supreme Ct.* 1811, *Jackson v. Plumb*, 8 *Johns.* 378; 1817, *Bill v. Fourth Great Western Turnpike Co.* 14 *Id.* 416; 1833, *Bank of Auburn v. Weed*, 19 *Id.* 300; 1834, *Bank of Utica v. Smalley*, 2 *Cov.* 770; 8 *Id.* 898; 1834, *Trustees of Vernon v. Hills*, 6 *Id.* 23; 1838, *Wood v. Jefferson County Bank*, 9 *Id.* 194; 1836, *U. S. Bank v. Stearns*, 15 *Wend.* 814; *Ct. of Errors*, 1831, *Williams v. Bank of Michigan*. 7 *Wend.* 540.

This rule was asserted in cases in which the corporation was plaintiff, and bound to prove the fact of incorporation, in the first instance, to maintain the action. The rule was changed as to suits brought by a corporation, by 2 *N. Y. Rev. Stat.* 458, § 3—which provided that in such suits it should not be necessary to prove, on the trial, the existence of the plaintiff corporation, unless the defendant should have pleaded in abatement or in bar that the plaintiff was not a corporation.

By *N. Y. Laws of 1864*, 1006, ch. 422, the provisions of 2 *N. Y. Rev. Stat.* 458, § 3,—to the effect that domestic corporations plaintiff need not prove their incorporation, unless it be denied by defendant's plea, were amended so as to apply equally to actions brought against domestic corporations.

A foreign corporation, suing in the New York courts, and not alleging corporate existence, is bound to prove it upon the trial, if the defendant does not admit it in his answer. The statute dispensing with such proof, unless *nul t'el* corporation was pleaded (2 *N. Y. Rev. Stat.* 457, 458, § 3), only applies to corporations created by or under any statute of the State. *N. Y. Supreme Ct.* 1851, *Waterville Manufacturing Co. v. Bryan*, 14 *Barb.* 182; 8 *P.* in *Ohio*, *Ohio Supreme Ct.* 1848, *Lewis v. Bank of Kentucky*, 12 *Ohio*, 182.

Corporations are sometimes created *ipso facto, et eo instanti*, by the mere passage of a statute; but more frequently the statute declares and points out the mode in which the legal body may thereafter be brought into existence. It is to corporations of the latter class, and to actions in which the plea of *nul t'el* corporation may be pleaded, that the New York statute applies, which declares that, "in suits brought by a corporation created by or under any statute of this State, it shall not be necessary to prove, on the trial of the cause, the existence of such corporation, unless the defendant shall have pleaded in abatement or in bar, that the plaintiffs are not a corporation" (2 *Rev. Stat.* 458, § 3); but this statute is wholly inapplicable where the claim to corporate character rests on a statute which as matter of law, confers no such character. *N. Y. Supreme Ct.* 1844, *Proprietors &c. of Southold v. Horton*, 6 *Hill*, 501.

A statute that an allegation of incorporation shall be taken as true, if not expressly denied, does not apply to an allegation that the corporation who did the injury sued for, were, before suit, consolidated with the corporation defendant. *Iowa Supreme Ct.* 1867, *Koons v. Chicago & North Western Railway Co.* 23 *Iowa*, 493.

Insurance Co. v. Peck, 28 *Vt.* 93; *Ala. Supreme Ct.* 1840, *Prince v. Commercial Bank of Columbus*, 1 *Ala. N. S.* 241; *Ark. Supreme Ct.* 1842, *McKiel v. Real Estate Bank*, 4 *Ark.* 592.

108. It is the better view that a plea of the general issue, to a declaration by a corporation pleading as such, admits the plaintiff's corporate capacity to sue. *Me. Supreme Ct.* 1839, *Penobscot Boom Corporation v. Lawson*, 16 *Me.* 224; 1854, *Roxbury v. Huston*, 37 *Me.* 42; 1857, *Orono v. Wedgewood*, 44 *Me.* 49; *Ill. Supreme Ct.* 1848, *McIntyre v. Preston*, 5 *Gilm.* 48; *Ark. Supreme Ct.* 1859, *Mississippi R. R. Co. v. Cross*, 20 *Ark.* 443.

109. If, in a suit by a corporation, the defendant plead the general issue, &c., it is an admission of the capacity of the plaintiff to sue in a corporate character; and they need not prove it. *Mass. Supreme Ct.* 1804, *Proprietors of Monumoi Great Beach v. Rogers*, 1 *Mass.* 159; *N. H. Superior Ct.* 1833, *School District No. 1, in Orange v. Blaisdell*, 6 *N. H.* 197; 1834, *Proprietors of Concord v. McIntire*, *Id.* 527; *Ky. Ct. of Appeals*, 1828, *Taylor v. Bank of Illinois*, 7 *Monr.* 576; *Ohio Supreme Ct.* 1831, *Methodist Episcopal Church of Cincinnati v. Wood*, 5 *Ohio*, 286; *Md. Ct. of Appeals*, 1823, *Whittington v. Farmers' Bank &c.* 5 *Har. & J.* 489; *U. S. Supreme Ct.* 1828, *Conard v. Atlantic Ins. Co.* 1 *Pet.* 386, 450; 1830, *Soc. for Propagation of the Gospel v. Pawlet*, 4 *Id.* 480, 500.

110. A defendant, sued by a corporation, and pleading the general issue, admits the plaintiff's capacity to sue, and cannot at the same time plead *nul t'el* corporation. *Ind. Supreme Ct.* 1860, *Jones v. Cincinnati Type Foundry Co.* 14 *Ind.* 89; 1861, *Carpenter v. Mercantile Bank*, 17 *Id.* 253.

111. In an action by a corporation, a plea of the general issue admits that the plaintiff is a corporation; and therefore an objection that the company was not properly organized is not tenable. *Ind. Supreme Ct.* 1851, *Railback v. Liberty & Abington Turnpike Co.* 2 *Cart.* 656. See, also, *Penobscot &c. R. R. Co. v. Dunn*, 39 *Me.* 587.

112. If a defendant, sued by a corporation, interposes only a general denial in his answer to the declaration, this operates as an admission of the plaintiff's corporate capacity to sue.* *Ind. Supreme Ct.* 1861, *Harri-*

*The provision of 2 *N. Y. Rev. Stat.* 453, § 2,—which declares that in suits brought by a corporation, it shall not be necessary to prove on the trial the existence of such corpo-

son v. Martinsville &c. Co. 16 *Ind.* 505; 1862, Commissioners v. Bright, 18 *Ind.* 93.

118. Where the defendant pleads to the merits, in a suit by a corporation, he admits the plaintiffs to be a corporation capable of sustaining the suit.* *N. H. Superior Ct.* 1851, School District v. Bragdon, 13 *N. H.* (3 *Post.*) 507; *Conn. Supreme Ct.* 1858, West Winsted Savings Bank v. Ford, 27 *Conn.* 282.

114. Pleading specially to the merits admits the capacity of a corporation plaintiff to sue. *Pa. Supreme Ct.* 1833, Lehigh Bridge Co. v. Lehigh Coal & Nav. Co. 4 *Rauhe*, 9.

115. A plea of non-assumpsit in an action against a corporation, admits the incorporation, but nothing more. *Ill. Supreme Ct.* 1863, Gay v. Keys, 30 *Ill.* 413.

116. Exceptions to the rule. In general, a plea of the general issue admits the incorporation of the plaintiff. The cases relied on by some decisions in support of a general rule to the contrary, are exceptional cases in which the plaintiff was a foreign corporation. *N. H. Superior Ct.* 1833, School District v. Blaisdell, 6 *N. H.* 197.

117. In an action brought by a corporation, a plea of the general issue, is, in general, an admission that the plaintiffs are a corporation capable of sustaining the action; and the cases in which foreign corporations are required to produce their charters, are exceptions to the general rule. *N. H. Superior Ct.* 1838, School District No. 1 in Orange v. Blaisdell, 6 *N. H.* 197.

118. Qualifications. The admission of the plaintiff's incorporation implied from the general issue, only relates to the corporate power of suing and being sued at the time of

ration, unless the defendant shall have pleaded in abatement, or in bar, that the plaintiff is not a corporation—was enacted to relieve plaintiffs from preparing, in every case of an action by a corporation where the general issue was pleaded, to prove their charter. If defendant desired to litigate that question, he was required to plead the fact expressly. The Code has not abolished that provision. Taking §§ 140 and 421 together, it will be seen that the prior practice and forms of pleadings are abolished only in a qualified manner; and there is no inconsistency or repugnancy in applying the provision referred to from the Revised Statutes to actions under the Code. There are the same reasons of convenience, for it now as under the former system, and it does not conflict with the Code. *N. Y. Ct. of Appeals*, 1855, Bank of Genesee v. Patchin Bank, 18 *N. Y.* (3 *Kern.*) 809.

* If a party, by his answer in chancery, admits the existence of a corporation by a particular name, he cannot be heard to deny, in said suit that admission. *Tenn. Supreme Ct.* 1858, Lillard v. Porter, 2 *Head*, 177.

commencing the suit. *Me. Supreme Ct.* 1854, Freeman v. Machias Water Power &c. Co. 38 *Me.* 343.

119. If, in an action *ex contractu*, brought by a foreign corporation, the defendant pleads the general issue, though this admits the capacity in which the plaintiff sues, it does not admit the power of the plaintiff to make the contract declared on, proof of which is still necessary to enable the plaintiff to recover. [Reviewing conflicting authorities.] *Conn. Supreme Ct.* 1841, Phenix Bank v. Curtis,* 14 *Conn.* 437.

120. In an action on the case brought by an incorporated steamboat company to recover damages for injuries done to their boat, it is not necessary, since it is an incident to all such corporations to hold property, for the plaintiffs on the general issue to prove their power to hold the property in question, especially against a mere wrong doer, claiming no title in himself and setting up none in others. *Conn. Supreme Ct.* 1844, New Haven Steamboat &c. Co. v. Vanderbilt, 16 *Conn.* 420.

121. It may be important, under the general issue, to prove the charter, in order to show the capacity of the corporation or the effect of its contract. *Ky. Ct. of Appeals*, 1828, Taylor v. Bank of Illinois, 7 *Monr.* 576.

122. The plea of the general issue does not admit that the corporation has performed its part of a condition, essential to make the contract on which it is sued binding on it. *Me. Supreme Ct.* 1855, Oldtown &c. R. R. Co. v. Veazie, 39 *Me.* 571; Penobscot &c. R. R. Co. v. Dunn, *Id.* 587.

123. Where the charter is a public act, which courts are bound to notice *ex officio*, it is not necessary, under the general issue, to give it in evidence to prove the corporation. *Md. Ct. of Appeals*, 1823, Whittington v. Farmers' Bank, 5 *Har. & G.* 489, as explained in Agnew v. Bank of Gettysburg, 3 *Har. & G.* 478.

124. Where plaintiffs sue as a corporation, in Massachusetts, and the defendant, on pleading the general issue, gives notice, conformably to the rule of court, that he shall deny their corporate existence, they must prove it, or they cannot maintain their ac-

* Compare New Haven Steamboat &c. Co. v. Vanderbilt, 16 *Id.* 420, where this case is explained as not an authority for requiring a domestic corporation plaintiffs to prove their power to hold property.

tion. *Mass. Supreme Ct.* 1841, First Universalist Soc. in Newburyport v. Currier, 8 *Metc.* 417.

125. Necessity of special plea. If the defendant would deny the existence of a corporation plaintiff, he must do it by plea in abatement, as pleading to the merits admits the competency of the plaintiffs to sue in that capacity.* [1 *Mass.* 159, 488; 3 *Pick.* 232.] *Me. Supreme Ct.* 1835, Trustees &c. in Dutton v. Kendrick, 12 *Me.* (3 *Fairf.*) 881; 1840, Savage Manuf. Co. v. Armstrong, 17 *Me.* 34; 1849, Putnam Free School v. Fisher, 30 *Me.* 523; S. P. *Pa. Supreme Ct.* 1859, Rheem v. Naugatuck Wheel Co. 33 *Pa. St.* 358; *N. Y. Supreme Ct.* 1863, Park Bank v. Tilton, 15 *Abb. Pr.* 384.

126. The non-existence of a body apparently contracted with in a corporate name, and which sues as a corporation, must be set up by a special plea or answer,—a general denial admits it. Such special plea or answer is in the nature of a plea in abatement—dilatory, and is inconsistent with the general denial. *Ind. Supreme Ct.* 1860, Jones v. Cincinnati Type Foundry Co. 14 *Ind.* 89; Hardy v. Merriweather, *Id.* 203; Hubbard v. Chappel, *Id.* 601.

127. A defendant corporation in a book account action, to deny its alleged corporate existence, must raise the question by plea, before judgment to account is rendered. *Vt. Supreme Ct.* 1864, Hunneman v. Fire District No. 1 in Jamaica, 37 *Vt.* 40.

128. In an action by a corporation created under a statute requiring the courts to take judicial notice of its existence, a denial of its incorporation does not put the plaintiff to proof thereof at the trial. *Ind. Supreme Ct.* 1860, Anderson v. Kerns Draining Co. 14 *Ind.* 199.

129. *Nul tiel* corporation. When a plea of *nul tiel* corporation is good, and when it may be stricken out as amounting to the general issue,—see Wert v. Crawfordsville & Alamo Turnpike Co. 19 *Ind.* 242.

130. That *nul tiel* corporation is a good plea in bar to an action by an alleged corporation,—see Mahony v. State Bank, 4 *Ark. (Pike)* 620; Hoereth v. Franklin Mill Co. 30 *Ill.* 151.

* Where the case is presented upon an agreed statement of facts, without pleadings, the rule that a plea in abatement is necessary, is inapplicable. *Me. Supreme Ct.* 1849, South Bay Meadow Dam Co. v. Gray, 30 *Me.* 547.

131. An answer by a corporation, in the process of garnishment, can be made only under the common seal of the corporation, by authority of its executive officer. *Ala. Supreme Ct.* 1848, Planters' & Merchants' Bank of Mobile v. Leavens, 4 *Ala. N. S.* 753.

132. A court of equity may regard the statement of an answer made by a corporation, a defendant in the suit, the answer having been put in, not upon oath, but under the common seal of the corporation. *U. S. Circ. Ct. (N. J.)* 1826, Haight v. Proprietors of Morris Aqueduct, 4 *Wash. C. Ct.* 601.

133. The answer of a corporation, in order to dissolve an injunction, must be sworn to by the proper officer; and the mere affixing the corporate seal is not sufficient. An answer of a corporation, under its corporate seal, without oath, has the same force, as evidence, as the answer of an individual, not under oath, would have in like cases, and no greater. *Md. Ct. of Appeals*, 1859, Bouldin v. Mayor &c. of Baltimore, 15 *Md.* 18.

134. The answer of a corporation aggregate should be under seal, but not under oath. If a sworn answer is desired, some managing officer should be made a party, who can answer under oath. *Ill. Supreme Ct.* 1859, Supervisors &c. v. Mississippi & Wabash R. R. Co. 21 *Ill.* 338. But compare Oliver v. Chicago & Aurora R. R. Co. 17 *Ill.* 587.

135. Enjoining corporations. In the absence of statute provisions, a court of equity has no authority over corporations, for the purpose of restraining their operations or winding up their concerns; although it may compel the officers to account for a breach of trust, exercising jurisdiction over them personally, and not over the corporation. *Cal. Supreme Ct.* 1860, Neall v. Hill, 16 *Cal.* 145.

136. A public company exceeding its powers cannot be restrained by injunction at the suit of a co-rival company, which does not allege that it has sustained some private injury by such excess, though the conduct complained of may be injurious to the public interests. *Chancery*, 1862, Stockport District Waterworks Co. v. Mayor &c. of Manchester, 9 *Jur. N. S.* 266; 11 *Week. Rep.* 156.

137. A statute conferring a franchise to build a bridge and take tolls, provided that it should not be lawful for any other person to erect any other bridge or keep any ferry at the same place; and that any other person who should do so should pay to the donee

of the franchise, his heirs, &c., treble tolls, "to be recovered in any suit or action of debt before any justice or justices of the peace having cognizance of the same." *Held*, that upon a violation of the provision by a corporation, the donee was not restricted to an action of debt before a justice, as the offender being a corporation, no action could (under existing laws) be maintained against it in a justice's court. Parties in possession of an exclusive right granted by statute are entitled to an injunction to restrain infringement, although the statute imposes forfeitures. *N. Y. A. V. Chan. Ct.* 1846, *Thompson v. N. Y. & Harlem R. R. Co.* 3 *Sandf. Ch.* 625.

138. The act of the State, having authority, in granting a right upon conditions which have been complied with, is equivalent to a determination at law, and the right need not be established by a trial at law, before applying for an injunction. *Mo. Supreme Ct.* 1849, *Moor v. Veazie*, 31 *Mo.* 360.

139. Equity will not enjoin a turnpike company from taking the complainant's land for their road, where the only question involved is the constitutionality of the act incorporating the company, but will leave the party to his remedy at law. *N. J. Chancery*, 1850, *Troth v. Troth*, 4 *Halst. Ch.* 237.

140. — to restrain interference with streams. Upon an application for an injunction to prevent a bleaching company from polluting a stream which was used by the complainant for domestic purposes,—*Held*, that the facts, that the company were notified, before establishing their mill, that the complainant would permit no pollution of the stream, and that he opposed the incorporation of the company, on the ground that the stream would be injured for his use by the establishment of the works, and that consequently a proviso was inserted in the company's charter, forbidding them to injure the water on the complainant's land, did not affect the legal rights of the parties; but they constituted a strong claim for the exercise of the extraordinary power of a court of chancery to prevent the nuisance. *N. J. Chancery*, 1862, *Holsman v. Boiling Spring Bleaching Co.* 14 *N. J. Eq.* (1 *McCart.*) 835.

141. A contract was entered into between a canal company and the plaintiff, the owner of paper mills, as to the mode of enjoyment of the waters by which both were supplied. The company did acts in violation of the

contract. *Held*, that it was no answer, upon a bill for a perpetual injunction, to say, that the acts proposed would not be injurious, or even to prove that they were beneficial to the plaintiffs; and the court, although no evidence was given of any actual damage done, made a decree for a perpetual injunction. *Rolls Ct.* 1852, *Dickenson v. Grand Junction Canal Co.* 19 *Eng. L. & Eq.* 287; 15 *Beav.* 260.

142. Enjoining directors. An injunction against the directors of a corporation, who are charged with issuing illegal stock in excess of the actual capital, should not extend beyond the transaction in question, and enjoin dealings in the genuine stock, unless special necessity for such interference be shown. *N. Y. Supreme Ct. Sp. T.* 1863, *Fisk v. Chicago, Rock Island &c. R. R. Co.* 4 *Abb. Pr. N. S.* 378.

Consult INJUNCTIONS.

143. Satisfaction of judgment. The property of a corporation may be seized and sold under execution, for the payment of its debts, as in the case of an individual; and a corporation is bound to provide for its just debts, whether the payment is made by sale of property for that purpose, or with money from its vaults. *Md. Ct. of Appeals*, 1834, *Maryland v. Bank of Maryland*, 6 *Gill & J.* 205. Compare *Fox v. Reed*, 8 *Grant, Cas.* 81.

144. After having recovered judgment against a company the creditors' remedy to enforce payment is, by execution, not by *mandamus*. *Q. B.* 1841, *Regina v. Victoria Park Co.* 1 *Q. B.* 289.

145. A railroad company has an estate in the land, and not a mere easement; and the estate is subject to sale under execution. Such a condition results not only from the express provisions of the charter, but from the necessity of the case; and it is not the franchise which is sold, but the property and estate of the corporation. *N. C. Supreme Ct.* 1844, *State v. Rives*, 5 *Ired.* 297.

146. Where the statute of a State provided, that the State should subscribe for half the stock, in all incorporated railway and turnpike companies, and have a lien upon the property of the company, to the extent of the money advanced by the State, as a corporator, to secure the payment of the other half of the stock, by individual subscribers,—*Held*, that the property of such corporation was not liable on *fi. fa.* for its

debts, till the lien of the State was extinguished, by the payment of the stock. *Tenn. Supreme Ct.* 1844, *State v. Lagrange & Memphis Railroad*, 4 *Humph.* 488.

147. Money in the possession of a station agent of a railroad company, received from the sale of tickets and the collection of freight, cannot be attached in his hands by trustee process, in a suit against the company by one of its creditors. *Ma. Supreme Ct.* 1868, *Pettingil v. Androscooggin R. R. Co.* 51 *Ma.* 370.

148. Taxes due to a municipal corporation cannot be seized under execution by a creditor of the corporation. *La. Supreme Ct.* 1846, *Egerton v. Third Municipality of New Orleans*, 1 *La. Ann.* 435.

149. Where the assets of a corporation are, by its charter, expressly "pledged in the first instance for the payment of their banking operations," a billholder who has exhausted judgment and execution against the corporation, may file a bill in equity against a debtor of the corporation to have the debt applied to his demand. *Ga. Supreme Ct.* 1866, *Van Dyke v. Besser*, 85 *Ga.* 173.

150. Where a member of a corporation, whose members by the terms of its charter were liable as general partners, having a claim against the corporation, recovered judgment at law, for the balance due him after the effects of the corporation had been exhausted, against several sureties on an injunction bond given by the corporation upon a bill filed to restrain him from litigation,—*Held*, that he, as a member of the corporation when the debt was contracted, was bound to contribute with the other members towards the payment of said balance, and towards indemnifying those sureties who were not members of the corporation. *S. C. Ct. of Appeals*, 1866, *Farrow v. Bivings*, 18 *Rich. Eq.* 25.

See INDIVIDUAL LIABILITY.

151. Under the Mass. statute of 1851, c. 815, § 1,—merely requiring a summons to be left with a stockholder of a corporation, before his property can be taken on execution against the corporation, it is not necessary to make any change in the writ or declaration, from the form before adopted in a suit against such corporation, although it may be desirable to adopt some change. *Mass. Supreme Ct.* 1852, *Holyoke Bank v. Goodman*

Paper Manufacturing Co. 9 *Cush.* 576. Compare, however, *Farnum v. Ballardvale Machine Shop*, 12 *Id.* 507.

TAXES.

[This chapter treats of what taxes may be levied by the sovereign power upon corporations, in respect of their corporate property; and also, of what taxes may be levied upon individuals in respect to stock in corporations, or securities issued by them, so far as these taxes depend upon the nature of the property taxed, or the peculiar rights or features of corporations. The law of remedies for the enforcement or collection of taxes should be sought for in works on the law of *Remedies*. And the power granted to a corporation to impose taxes upon individuals for the benefit of the corporation, is under the title of the particular kind or class, particularly MUNICIPAL CORPORATIONS.]

I. THE POWER TO TAX.

II. PRINCIPLES OF ASSESSMENT.

III. EXEMPTIONS.

IV. STOCK. SECURITIES.

I. THE POWER TO TAX.

1. What is a "tax." An assessment for a local improvement is not a tax within a charter authorizing a municipal corporation to sell lands "for taxes of any description." [11 *Johns.* 77; 3 *Wend.* 263.] *N. Y. Supreme Ct.* 1848, *Sharp v. Spier*, 4 *Hill*, 76; *Sharp v. Johnson*, *Id.* 92.

2. The Legislature have power to cause the owners of real property in a particular locality to be assessed for the expenses of a public improvement,—*e. g.* to assess property adjacent to a street, for the expense of removing a steam railway and substituting a horse railway. This is not taking private property for public use, but is an act of taxation. [4 *Comst.* 419; 19 *N. Y.* 116.] *N. Y. Supreme Ct.* 1862, *People v. Lawrence*, 86 *Barb.* 177.

3. An assessment upon adjoining land-owners by a municipal corporation, of the expense of grading and improving a street, is not a taking of private property for public use without due compensation, but is in the nature of a tax. *N. Y. Ct. of Appeals*, 1867, *Howell v. City of Buffalo*, 37 *N. Y.* 267.

4. An assessment for a local improvement cannot be laid on a lot or its owner, when the lot has received only an injury by the work for which the assessment was levied. Such an assessment would not be in the nature of a tax, as it is not equal as to

all persons, nor would it be a taking of private property for just compensation if the assessment exceeded the benefit conferred. *Cal. Supreme Ct.* 1865, *Creighton v. Manson*, 27 *Cal.* 613.

5. Taxes may be laid on corporations. The legislature of a State has the power to tax the real property of the citizens for the purpose of raising additional revenue, to be applied towards the payment of interest, and the extinguishment of the debts of the State, created by internal improvements; and every owner, whether a corporation or not, of real estate, is bound to pay such part of the State tax as is assessed on such estate for such uses. *Pa. Supreme Ct.* 1847, *Shitz v. Berks County*, 6 *Pa. St.* 80.

6. The franchise of a bank or other corporation may be taxed by the State which granted it. *N. Y. Ct. of Appeals*, 1867, *Monroe Savings Bank v. City of Rochester*, 37 *N. Y.* 365.

7. That the taxing power is incident to the State's sovereignty, which does not lose it by giving a charter which is silent upon the subject,—see *Bank of Pennsylvania v. Commonwealth*, 19 *Pa. St.* 144.

8. The mere fact of incorporation does not exempt the body incorporated from taxation. And a corporation may be taxed in its business and property, with as much propriety, at least, as may an individual, unless there is something in the act by which it is constituted, which exempts it from this burden. But where the charter of a bank provides that the State shall be entitled to receive a certain percentage on all dividends made by the bank, and does not reserve any further power to levy an additional tax, this provision is to be understood to be a contract limiting the amount of tax upon the dividends, and a law which purports to tax banks generally, without specifying such bank particularly, cannot be extended by construction to operate upon this bank, but must be so construed as to exclude it; especially, where the general law of the State relating to other corporations, expressly reserves power to levy additional taxes. *Ohio Supreme Ct.* 1885, *State of Ohio v. Commercial Bank of Cincinnati*, 7 *Ham.* 125. Compare *Gordon v. The Appeal Tax Court*, 8 *How. U. S.* 183.

9. The legislature of Massachusetts may, under the provisions of the constitution of the State relative to the imposition of taxes

and excises, constitutionally impose a tax on the capital stock, &c., of a bank previously incorporated by it, unless the right has been expressly relinquished. *Mass. Supreme Ct.* 1815, *Portland Bank v. Apthorp*, 12 *Mass.* 252.

10. A tax on the dividends arising from stock in the United States Bank, owned by citizens of a State, by whose authority the tax is assessed, is constitutional. Such a case does not involve a direct and necessary conflict of powers, but one that is merely consequential and casual, if the imposition is, in good faith, a tax, and not a penalty under the guise of a tax. *S. C. Ct. of Appeals*, 1831, *State v. Collector*, 2 *Bailey*, 654.

11. That a general tax law for city purposes, applicable alike to all the banks of a great city, is not an act of injustice to corporations,—see *Iron City Bank v. City of Pittsburgh*, 37 *Pa. St.* 340.

12. Double taxes not allowable. Corporate property taxed in the hands of stockholders, not liable to taxation in hands of corporation. *State of Missouri v. Hannibal & St. Joseph R. R. Co.* 37 *Mo.* 265.

13. The stock of a banking corporation is the representative of its whole property; and when a tax has been laid on the stock in the hands of the shareholders, the real and personal estate of the corporation becomes exempt from taxation. To tax both the real and personal property, and the capital stock, would amount to a double tax which is illegal and unjust. *Md. Ct. of Appeals*, 1847, *Gordon v. Mayor &c. of Baltimore*, 5 *Gill*, 281. And see *McCullough v. Maryland*, 4 *Wheat.* 316.

14. The power may be delegated. The power to levy a tax for local purposes may be delegated by the legislature to a municipal corporation. It is no objection to an act delegating such power, that it requires the assent of three-fifths of the tax payers to be obtained before the tax is levied; and the fact that a railroad, to aid in the construction of which the tax is imposed, extends beyond the limits of the city or even of the State, does not render it less local, or in any way affect the validity of the statute or of the tax. *Ala. Supreme Ct.* 1854, *Stein v. Mayor &c. of Mobile*, 24 *Ala. N. S.* 591. And see *City of Carondelet v. Picot*, 38 *Mo.* 125.

15. The creation of corporations for municipal purposes is within the constitutional

power of the legislature; and the power to create a municipal corporation carries with it the right to fix and subsequently to change the boundaries by extension or contraction; also to provide such corporation with a local government, and to clothe it with the power of taxation for local purposes, with or without the consent of those who may be affected thereby. *Iowa Supreme Ct. 1864, Langworthy v. City of Dubuque, 16 Iowa, 271.*

16. Its extent. While the enlargement of the boundaries of a municipal corporation, whereby the property of individuals is brought within the corporate limits without their consent, and subjected to taxation for town purposes, may not be an infringement of the constitution by taking private property for public use; it may so operate by an unreasonable extension of the corporate limits, in taking in lands and territory not needed for buildings and population, and taxing the same for the benefit of the territory which is thus needed and occupied. In such cases, the courts will not interfere with the exercise of the power to extend the corporate limits, but they will restrain municipal taxation, whenever practicable, in cases in which it is shown that the proprietor of the property taxed cannot be benefited in a municipal point of view. *Iowa Supreme Ct. 1864, Langworthy v. City of Dubuque, 16 Iowa, 271; Fulton v. City of Davenport, 17 Iowa, 404.*

17. A municipal corporation has authority to tax the depot grounds, buildings, and road-bed of a railroad corporation situated within its limits. *Iowa Supreme Ct. 1864, City of Davenport v. Mississippi & Missouri R. R. Co. 16 Iowa, 348; Dubuque & Sioux City R. R. Co. v. City of Dubuque, 17 Iowa, 120.*

18. A municipal corporation has no power to levy taxes for municipal purposes upon the rolling stock of a railroad corporation, which has its principal place of business and a portion of its road within the corporate limits. *Id.*

19. The power given to a municipal corporation "to assess, levy and collect taxes on such real and personal estate as they may designate," does not embrace money, debts, and choses in action belonging to the inhabitants of the city. [14 B. Monr. 648; 2 Metc. (Ky.) 228.] *Ky. Ct. of Appeals, 1866, City of Louisville v. Henning, 1 Bush, 381.*

20. Power given to a municipal corporation to levy and collect a tax does not imply power to sell the land for non-payment. And if the tax be declared by law a lien on the land, although the corporation might enforce it in equity, if they assume to sell for non-payment, the purchaser cannot enforce the lien. The power is not one which can be delegated by assignment either express or implied. *Iowa Supreme Ct. 1867, McInerny v. Reed, 23 Iowa, 410.*

21. The power to levy special assessments, distinguished from the power to levy general taxes for corporation purposes. *City of Fairfield v. Ratcliff, 20 Iowa, 396.*

Consult MUNICIPAL CORPORATIONS.

22. Corporations embraced in tax laws. The word "persons," in tax laws, presumptively includes corporations. *Ky. Ct. of Appeals, 1866, Louisville & Nashville R. R. Co. v. Commonwealth, 1 Bush, 250.*

23. A statute providing for the taxation of all personal property of the inhabitants of the State,—*Held*, to embrace corporations; as well such as hold for charitable trusts, as for the benefit of the members. *Me. Supreme Ct. 1854, Inhabitants of Baldwin v. Trustees of Ministerial Fund, 37 Me. 369.*

24. An act which subjects to taxation "all (non-resident) persons and associations doing business in the State," is comprehensive enough in its language to embrace foreign insurance companies. *N. Y. Ct. of Appeals, 1864, British Commercial Life Ins. Co. v. Commissioners of Taxes of N. Y. 1 Keyes, 308.*

25. A bank, as to its capital stock, is not an "inhabitant" of any county, and therefore the capital is not to be taxed for county purposes, under the Ga. statute of 1821, authorizing the inferior courts of the State to levy taxes for county purposes upon the inhabitants of such counties. *Ga. Supreme Ct. 1859, Cherokee Ins. & Banking Co. v. Justices of Whitfield Co. 28 Ga. 121.*

26. A tax upon railroad corporations does not apply to a State which owns and manages a railroad, applying its income to revenue purposes. A State is not a "corporation," within the tax laws. *Ga. Supreme Ct. 1866, State v. Atkins, 35 Ga. 315.*

II. PRINCIPLES OF ASSESSMENT

27. Place of assessment. Personal property is taxable to the owner in the place

where he resides, and land, always in the place where it is situated. In the case of corporations which deal in money and securities, like banks, the stockholders are the beneficial owners of all the corporate property, and are taxed for it in the places where they reside; consequently the personal property of such corporations is not liable to another tax, assessed on the corporation in the town, where it is established and has its principal place of business. *N. H. Supreme Ct. 1866, Nashua Savings Bank v. City of Nashua*, 46 *N. H.* 389.

28. Hence, if a savings bank own stock in another corporation, the bank is not taxable for the stock in the place where the bank is situated. *Ib.*

29. A statutory requirement that the annual report of a corporation shall be filed in "the place where the business of the corporation is carried on," refers, not to the locality where the operations of the company may be carried on at the time, but to the place designated in the certificate of incorporation. *N. Y. Superior Ct. 1865, McHarg v. Eastman*, 4 *Rob.* 635.

30. The place named in the certificate of incorporation, of a manufacturing corporation organized under the general act, as the place where the operations of the company are to be carried on, and where its manufactory is situated, determines the location of the corporation in respect to its liability to taxation. It makes no difference that a treasurer's office is kept, and the financial operations of the company are chiefly managed at another place. *N. Y. Ct. of Appeals, 1860, Oswego Starch Factory v. Dolloway*, 21 *N. Y.* 449.

31. A general act for the incorporation of companies to navigate the lakes and rivers, (*N. Y. Laws of 1854, ch. 232*), required the certificate of incorporation to designate the place in which "the principal office for managing the business" of the company is to be situated. The plaintiffs were a corporation, organized under that statute, and their certificate stated the principal office to be in the village of T.; but nearly all their business was transacted in the city of Buffalo, where they had an office employing many more agents, and where a much larger portion of their moneys was actually received and disbursed, and where their principal officers resided during the business season. *Held*, that the certificate was, nevertheless, conclusive,

and the company was to be taxed, not in Buffalo, but in the village of T. The object of such a provision is to produce certainty in the matter of location, and it does not require that the principal business be done at the principal office. Nor is it any objection that the designation was made for the very purpose of avoiding taxation in the place where the principal business was to be done. *N. Y. Ct. of Appeals, 1859, Western Transportation Co. v. Scheu*, 19 *N. Y.* 408.

32. Where it appeared that a railroad company had its principal office in a particular city, where its financial and other affairs were managed, and its transfer and account books were kept; that the meetings of the directors were held there; that the machine shops, in which the rolling stock was repaired, were there situated; that the rolling stock, when not in actual use, was kept there; that the clerk and treasurer resided there; and that the president, though resident elsewhere, was usually there attending to the business of the company,—*Held*, that the corporation must be considered, for the purposes of taxation, as having its residence or domicile in such city, and that its rolling stock, though in daily use upon the road, and absent from the city the greater part of the time, should be deemed to belong there, and was liable to taxation by the municipal authorities. [10 *Wend.* 186; 17 *How. U. S.* 596; 14 *Ill.* 163; 19 *Ill.* 160; 12 *Cal.* 134.] *Va. Ct. of Appeals, 1867, Orange & Alexandria R. R. Co. v. City Council of Alexandria*, 17 *Gratt.* 176.

Compare PLACE OF BUSINESS.

33. Stocks owned by a foreign insurance company, doing business through agents in the State of New York, and deposited, as required by law, with the comptroller of the State, at the Capitol, are properly to be assessed for taxes, at the place where the company have their principal office or place of business within the State. *N. Y. Ct. of Appeals, 1864, British Commercial Life Ins. Co. v. Commissioners of Taxes*, 18 *Abb. Pr.* 118; 28 *How. Pr.* 41; 31 *N. Y.* 32.

34. Bank stock belonging to a corporation having no local limits, but required by its charter to keep its office in the town of H. is not taxable in the town of H. within the meaning of the statute of Connecticut, providing for the collection of taxes. *Conn. Su-*

preme Ct. 1819, *Hartford Fire Ins. Co. v. Inhabitants of Town of Hartford*, 8 *Conn.* 15.

35. The residence of an individual banker,* doing business under the general banking law, is, for the purposes of the taxation of his banking capital, in the town or ward specified as the location of his banking office, in the certificate required by the statute; and such certificate not being in evidence, the actual location of his banking house is to be assumed to be that mentioned in the certificate. *N. Y. Supreme Ct.* 1864, *Metcalf v. Messenger*, 46 *Barb.* 325.

36. Assessment upon capital stock. That a statute imposing a tax upon the "stock" of a corporation, means upon its tangible property, and not upon its shares,—see *Auditor &c. v. New Albany &c. R. R. Co.* 11 *Ind.* 570.

37. A statute declaring money or stock corporations, deriving any income or profit from their capital, liable to taxation upon their capital,—*Held*, to mean not net profits but any income, even if less than the expenses. *N. Y. Supreme Ct.* 1886, *People v. Supervisors of N. Y.* 18 *Wend.* 605.

38. Under the New Jersey supplement to the tax laws, approved March 28, 1862 (*Laws of 1862*, p. 844, § 8),—which provides that private corporations shall be assessed and taxed at the full amount of their capital stock paid in,—private corporations are to be assessed on the full amount of their capital stock paid in, without deduction for losses, and not according to the market value of the stock at the time of the assessment. *N. J. Ct. of Errors*, 1864, *Rudderow v. State*, 31 *N. J. Law*, (2 *Vroom*), 512.

39. A general law of Massachusetts required corporations organized in that State to pay to the State treasurer, a tax upon the excess of the market value of all their capital stock over the value of their real estate and machinery taxable in the city or town where they were situated. *Held*, that this tax was legal, and the fact that a portion of the personal property of the corporation was in bonds of the United States, which were

exempt from taxation, and that a portion of the stockholders resided out of the State, would not exempt the corporation from liability to pay the full amount of the tax imposed. *Mass. Supreme Ct.* 1866, *Commonwealth v. Hamilton Manuf. Co.* 12 *Allen*, 298.

40. In assessing taxes upon the capital stock of a corporation, the stock is to be assessed at its actual value, whether this is above or below the nominal par value. This rule applies equally, whether or not the corporation is possessed of a reserved fund. *So held*, where a corporation had no reserved fund, but its stock was shown to be worth a premium of seventy per cent. by reason of its ability to realize large annual profits. *N. Y. Ct. of Appeals*, 1860, *Oswego Starch Factory v. Dolloway*, 21 *N. Y.* 449.

41. Surplus. In a case where a surplus exists, which must be included in the amount of the assessment, its amount should be deducted from the sum at which the stock would be estimated if the surplus was considered as embraced in the valuation. *Id.*

42. Assets invested. Although stocks of the United States are not taxable, a domestic corporation, whose capital stock is taxable under the statutes of the State of New York, is not exempted from paying tax on a part of such capital, because it has invested such part in United States stocks. It is the corporate stock, and not the investment, which is taxed. *N. Y. Supreme Ct.* 1860, *People v. Commissioners of Taxes*, 32 *Barb.* 509; 20 *How. Pr.* 182.

43. A foreign corporation, doing business in New York, is liable to taxation on money invested by them in securities (other than United States stocks) which are deposited with the comptroller of the State, as a condition of their being allowed to do business as an insurance company there, as prescribed by the act of 1853 (*N. Y. Laws of 1853*, 893, ch. 463, § 15); for it is money invested in their business, within the meaning of the act of 1855 (*N. Y. Laws of 1855*, 44, ch. 87, § 1). *N. Y. Ct. of Appeals*, 1864, *British Commercial Life Insurance Co. v. Commissioners of Taxes*, 18 *Abb. Pr.* 118; 28 *How. Pr.* 41; 81 *N. Y.* 32.

44. Dividends. A bank chartered under an act, which prescribes the payment of a certain tax on dividends declared, is subject to a subsequent general law which increases the rate of taxation, although its charter had

* An individual banker, doing business under the general banking laws of New York, who has assumed a special name by which his business as banker is characterized and known, may be assessed by that name, and the warrant for the collection of the tax, issued against such name, may be levied upon the money or property used in the business of such banker. *N. Y. Supreme Ct.* 1858, *Patchin v. Ritter*, 27 *Barb.* 34.

not then expired; and such statute is constitutional.* *Pa. Supreme Ct.* 1849, *Commonwealth v. Easton Bank*, 10 *Pa. St.* 442.

45. Where the capital of a corporation is increased out of its profits, and the increase added to the stock of the shareholders, under whatever form, such increase is liable to tax as dividends. *Pa. Supreme Ct.* 1867, *Lehigh Crane Iron Co. v. Commonwealth*, 55 *Pa. St.* 448.

46. The profits of a banking corporation, when separated from the general stock and applied to the payment of the capital stock of the bank belonging to the stockholders, are a dividend, and become subject to a tax imposed upon profits. *Ohio Supreme Ct.* 1841, *State v. Farmers' Bank of Canton*, 11 *Ohio*, 94.

47. Where a railroad company were required by charter to pay to a municipal corporation a tax on the excess of dividends above a certain per cent. *per annum*.—*Held*, that the basis on which the estimate of tax was to be made, was the capital actually paid, and not the cost of the road, nor its authorized capital. *Pa. Supreme Ct.* 1866, *Second &c. Railway Co. v. City of Philadelphia*, 51 *Pa. St.* 465.

48. The charter of a railway company provided that six per cent. on the dividends declared by the company should be paid to a municipal corporation, whenever such dividends should exceed six per cent. *per annum*. *Held*, that the rate of dividends should be estimated on the amount of capital actually paid in, as distinguished from the authorized capital, and that the payment to the city should be calculated on the whole dividend, not merely on the excess over six per cent. *Pa. Supreme Ct.* 1866, *Philadelphia v. Philadelphia &c. Railway Co.* 52 *Pa. St.* 177.

49. A supplemental act provided that such part of the charter as related to taxes on dividends, should be so construed as to apply to the authorized capital of the corporation. *Held*, that this provision was prospective in its intention, and did not reach the sums actually due to the city before its passage. *Id.*

* In Massachusetts, domestic corporations cannot be required by statute, to reserve and pay into the treasury of the State, a certain portion of all dividends declared by them on shares of non-resident owners. *Mass. Supreme Ct.* 1825, *Oliver v. Washington Mills*, 11 *Allen*, 283.

50. Collateral securities. A corporation cannot legally be taxed for stocks pledged to it as collateral security for a debt; for, although the corporation has a special property in the shares pledged, the debtor is nevertheless the owner. *Mass. Supreme Ct.* 1845, *Waltham Bank v. Inhabitants of Waltham*, 10 *Metc.* 384.

51. Assessment of banks generally. Under the Rhode Island tax law of 1855, banks of discount, deposit, and circulation, though taxable for their real estate, are not liable to be taxed for their personal property; all their property of this latter character being deemed to be represented by the shares of their capital stock, which are required by the act to be taxed to their stockholders in the towns where they reside; and there being nothing in the act to warrant double taxation of it. *R. I. Supreme Ct.* 1857, *American Bank v. Mumford*, 4 *R. I.* 478; *Providence Institution for Savings v. Gardiner*, *Id.* 484.

52. A clause in the charter of a bank provided that a "tax of one per cent. *per annum*" should be levied on all stock holden in the bank, except on stock holden by the State," which should be "paid to the treasurer of the State by the president or cashier of the bank," &c. *Held*, that the tax was payable out of the common funds of the bank, instead of the shares of the profits belonging to the holders of the stock, or their separate estates. *N. C. Supreme Ct.* 1835, *Attorney General v. Bank of Newbern*, 1 *Dev. & Bat. Eq.* 216; *Attorney General v. Bank of Cape Fear*, *Id.* 227.

53. Under the New Jersey act of Nov. 2, 1810, providing for the taxation of bank stock, although the capital of the bank may have been diminished by losses, yet the tax must be paid on the whole amount of the capital stock subscribed and paid in; and neither the treasurer nor the court can look into the losses of the bank and make allowances proportioned to the tax to be paid. But where the legislature reduces the shares of the stock to two-fifths, it is in effect declaring, that the capital is reduced two-fifths, and the bank is only subject to pay tax upon the remaining three-fifths. *N. J. Supreme Ct.* 1822, *Gordon v. New Brunswick Bank*, 1 *Halst.* 100.

54. Under the Ohio tax law of April 13, 1852, banks or bankers are not entitled to

deduct from the gross amount of their moneys and credits, including those appertaining to their business, the amount of deposits held by them for depositors, unless specially made. *Ohio Supreme Ct.* 1858, *Ellis v. Linck*, 3 *Ohio St.* 66.

55. Under the Ohio statute of 1852, all the assets of a bank, including specie and balances in other banks, must, if employed in any way whereby the bank obtains or reserves a per cent. premium, or profit, or a consideration, be averaged for taxation. But specie unemployed, not on hand for sale, and from which the bank derives no profit, &c. and balances due from other banks, on which no interest, profit or consideration is reserved or received, need not be returned. *Ohio Supreme Ct.* 1856, *Stark Bank v. McGregor*, 6 *Ohio St.* 45.

56. The real estate of a bank including its banking house, is liable to taxation in the town where such estate lies. *Mass. Supreme Ct.* 1848, *Tremont Bank v. City of Boston*, 1 *Cush.* 142.

57. So far as the capital of a bank consists of bonds of the United States, it is not subject to taxation under the laws of a State. *Ind. Supreme Ct.* 1864, *Whitney v. City of Madison*, 23 *Ind.* 331. And see *People v. Bradley*, 39 *Ill.* 130.

58. That, on settlement of affairs of an insolvent bank, in Massachusetts, a tax due the State from the bank may be set off against a loan due the bank from the State,—see *Commonwealth v. Phoenix Bank*, 11 *Metc.* 129.

59. What deposits by public officers can be so set off,—see *Id.*

60. — of national banks. "Nothing in this act" (the act to provide a national currency, &c.) "shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes, imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. Provided further, that the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located. Provided also, that nothing in this act shall exempt the real estate of associations, from either State, county or municipal taxes, to the same extent, according to its value, as

other real estate is taxed." Act of Congress of June 3, 1864, § 41; 14 *U. S. Stat. at L.* 112.

61. A State has power to tax shares in the national banks therein located, subject to the limitations, that such tax shall not exceed the rate imposed upon other "moneyed capital" in the hands of individuals, or that imposed upon shares in the State banks, as provided in the Act of Congress of June 3, 1864. *Ohio Supreme Ct.* 1866, *Frazer v. Siebern*, 16 *Ohio St.* 614; 6 *Am. Law Reg. N. S.* 475.

62. But such a tax is valid only when laid in strict conformity to the provisions of the laws of Congress upon the subject. *Id.*; *S. P. N. J. Supreme Ct.* 1866, *State v. Haight*, 81 *N. J. Law* (3 *Vroom*,) 399; *State v. Hart*, *Id.* 434; *Pa. Supreme Ct.* 1867, *Markoe v. Hartmanft*, 6 *Am. Law Reg. N. S.* 487; *Ind. Supreme Ct.* 1867, *Wright v. Stilz*, 6 *Am. Law Reg. N. S.* 471.

63. The New York statute of March 9, 1865,—which enacts that shares in national banking associations shall be liable to taxation in the place where such associations are located, and not elsewhere, but which does not provide that the assessment so levied shall not exceed the rate imposed upon the shares of banks organized under the authority of the State, is inconsistent with the National Currency Act of June 3, 1864, and is void; no tax having been laid, under the legislation of the State, on shares in its banks. It is otherwise with the capital of such banks. *U. S. Supreme Ct.* 1865, *Van Allen v. The Assessors*, 3 *Wall.* 573. See also, *People of New York v. Commissioners of Taxes*, 2 *Black*, 620; *Hubbard v. Board of Supervisors of Johnson County*, 23 *Iowa*, 130; *City of Pittsburgh v. First National Bank of Pittsburgh*, 55 *Pa. St.* 45.

64. The statute of Ohio of April 2, 1865, taxing shares in national banks, imposes a higher rate of taxation on such shares than on the shares of banks authorized by the State, and is therefore unconstitutional.* *Ohio Supreme Ct.* 1866, *Frazer v. Siebern*, 16 *Ohio St.* 614; 6 *Am. Law Reg. N. S.* 475.

65. A State law directing the cashiers of all banks, national or State, to collect annually

* Where such tax upon shares in national banks exceeds the rate of that imposed upon the banks of the State, its collection will be enjoined only upon payment of a sum that shall be a *pro rata* equivalent for the tax on State banks. *Frazer v. Siebern*, 6 *Ohio St.* 614; 6 *Am. Law Reg. N. S.* 475.

from every stockholder a tax of one per cent. on the par value of the stock held by him, and pay the same into the State treasury, does not conform, in the mode of taxation, with the requirements of the National Bank Act of June, 1864, and is therefore void. *Pa. Supreme Ct.* 1867, *Markoe v. Hartranft*, 6 *Am. Law Reg. N. S.* 487.

66. The shares of banking associations, organized under the Act of Congress of June 8, 1864,—providing for a national currency, are liable to taxation, in the hands of shareholders, by the States, subject to the limitations provided in the act, without regard to the fact that a portion or the whole of the capital of such corporations, is invested in national securities, declared by the statutes creating them to be “exempt from taxation by or under State authority.” *U. S. Supreme Ct.* 1865, *Van Allen v. The Assessors*, 8 *Wall.* 578.

67. So far as the shares of stock of a national bank represent the value of its capital tinvested in national securities, such shares are not protected by constitutional barriers against taxation by the local government, and such taxation is to be entirely regulated by the laws of the State imposing it. But to the extent in which United States securities stand as the capital or property of such bank, the shares of stock owned by private persons can be taxed, by State authority, only with the sanction of Congress, and in the mode prescribed by that body. *N. J. Supreme Ct.* 1866, *State v. Haight*, 81 *N. J. Law* (2 *Vroom*,) 399; *State v. Hart*, *Id.* 434.

68. The shares in national banks subjected to State taxation, are to be understood as the individual property or choses of the stockholders, as contradistinguished from aliquot parts of the capital stock of the association; and, as such, may be listed at their full value, without deduction for the franchise, or for investments of the capital or funds of the bank in untaxable bonds, or in real estate. *Ohio Supreme Ct.* 1866, *Frazer v. Siebern*, 16 *Ohio St.* 614; 6 *Am. Law Reg. N. S.* 475.

69. The necessary equivalent tax upon shares in State banks, need not be assessed directly upon shares therein, but may be assessed upon the capital and property of the banks, provided that it be a full equivalent. The limitation as to other “moneyed capital” refers to the percentage of tax to be levied. *Id.*

70. The word “place” in section 41, of the Act of Congress of June 8, 1864,—prescribing that all the shares in national banks held by individuals or corporations, may be included in the valuation of the personal property of such persons or corporations, in the assessments made by the State authorities, at the place where such banks are located, and not elsewhere, at the same rate as other property is taxed,—refers to municipal localities, and applies to the smallest district possessed of the power of taxation, in which the banking house may be located. *N. J. Supreme Ct.* 1866, *State v. Haight*, 81 *N. J. Law* (2 *Vroom*,) 399; *State v. Hart*, *Id.* 434.

71. Under section 41 of the Act of Congress of June 8, 1864, all taxes assessed by virtue of State law on the shares of such banks, must be applied to the use and benefit of the city and town in which the same are located, although shares in such banks are owned in some other city or town. *Me. Supreme Ct.* 1867, Opinion of Justices of Supreme Court, 53 *Me.* 594.

72. Under the general law of Indiana for the incorporation of cities, the shares of national banks cannot be taxed for municipal purposes. *Ind. Supreme Ct.* 1866, *Craft v. Tuttle*, 27 *Ind.* 332; *S. P.* 1867, *Wright v. Stiltz*, 6 *Am. Law Reg. N. S.* 471.

73. Payment of tax, made by national bank in excess of what is actually due, may be refunded—how. Joint Resolution, March 2, 1867, 14 *U. S. Stat. at L.* 572.

74. Bridge companies. In estimating the value of a toll bridge owned by an incorporated company, for the purpose of assessment, the franchises of the company or the profit derived from the tolls are not to be considered. The bridge should be estimated at a full and fair value, without reference to the extent of travel upon it; and in this estimate may also be considered, the value of the land occupied by the abutments, its location, and other relative circumstances which regulate the value of land generally. *N. J. Supreme Ct.* 1865, *State v. Metz*, 81 *N. J. Law* (2 *Vroom*,) 378.

75. The property of a bridge corporation, chartered by Pennsylvania and New Jersey, is taxable under the laws of Pennsylvania. *Pa. Supreme Ct.* 1848, *Easton Bridge v. Northampton County*, 9 *Pa. St.* 415.

76. Canal companies. The toll houses and offices of a canal company, are such a necessary incident of the corporation and its

functions, that they cannot be assessed and taxed, as separate real estate. *Pa. Supreme Ct. 1845, Lehigh Coal & Nav. Co. v. Northampton County*, 8 *Watts & S.* 834.

77. A toll house erected by an incorporated canal company, although occupied not merely as the collector's office but also as his family residence, forms, notwithstanding the fact of its being his residence, a constituent part of the canal property; and, as such, can not be assessed. *Pa. Supreme Ct. 1849, Schuylkill Nav. Co. v. Commissioners of Berks County*, 11 *Pa. St.* 202.

78. Under the English statute, anything may be taken into consideration, as connected with the occupation of land, which adds to its value, and the rate may be calculated according to that increased value. Thus a rate expressed to be upon the tenement, land, landing-place and premises, and barges connected therewith, of a floating landing is valid, although the barges alone would not be taxable. *Q. B. 1852, Regina v. Leith*, 1 *Ell. & B.* 121; 10 *Eng. L. & Eq.* 870; 21 *Law J. N. S. Q. B.* 119; 16 *Jur.* 122.

79. A navigation company, in order to be subjected to the payment of rates or taxes, must be occupiers of the land assessed, as by locks; they cannot be rated for land in which they have an easement merely, *i. e.*—the bed of a river used for their purposes. [12 *East*, 346.] *K. B. 1829, Rex v. Mersey & Irwell Nav. Co.* 9 *Barn. & C.* 95; *Rex v. Thomas*, *Id.* 114.

80. A statute empowered a navigation company to take toll from vessels passing through their canal, and expressly exempted such toll from the payment of all taxes, rates, &c. *Held*, that the land occupied by the canal, there being no other profits of the company, was exempt from levies for poor rates. *K. B. 1818, Rex v. Calder & C. Navigation Co.* 1 *Barn. & Ald.* 263.

81. Colleges. Under a statute exempting the real property of literary, &c., institutions, occupied by them, or their officers, for the purposes thereof, a house occupied by a professor in a college, under a lease from the college to him, is not exempt. *Mass. Supreme Ct. 1849, Pierce v. Cambridge*, 2 *Cush.* 611.

82. Ferry companies. Boats owned by a ferry company created by the laws of Illinois, which run between the Illinois and Missouri shores, are subject to taxation in the latter State for municipal purposes, if the company

has an office for the transaction of business within the limits of a municipal corporation in that State. *Mo. Supreme Ct. 1867, City of St. Louis v. Wiggins Ferry Co.* 40 *Mo.* 580.

83. Gas companies. An incorporated gas company, whose capital is taxable, cannot, under the laws of Pennsylvania, be taxed for its works as real estate, for State and county purposes; but the dwelling houses erected by them for the residence and accommodation of their workmen, are liable to taxation. *Pa. Supreme Ct. 1858, West Chester Gas Co. v. County of Chester*, 30 *Pa. St.* 232.

84. Insurance companies. Where a mutual insurance company is authorized to accumulate from its profits a fund which shall continue liable for its losses during the term of its existence, and to issue certificates to its members, setting forth their interest therein, the accumulation becomes capital, and the certificates do not represent a debt, but the interest of the members in the capital; and the company is liable to taxation upon the capital so accumulated. *N. Y. Ct. of Appeals, 1858, Sun Mutual Ins. Co. v. Mayor &c. of N. Y.* 8 *N. Y. (4 Seld.)* 241. And see *Mutual Ins. Co. v. Jenkins*, 2 *Lia. Law Mag.* 705.

85. Premium notes taken in advance, by a mutual insurance company incorporated under the New York act of 1849, (the general act for incorporating insurance companies), are part of its capital on which the tax is to be assessed. *N. Y. Superior Ct. Sp. T. 1854, N. Y. City Ins. Co. v. Mayor &c. of N. Y.* 12 *N. Y. Leg. Obs.* 280.

86. Mutual fire insurance companies in Massachusetts are not liable to taxation for personal estate invested in their corporate names and held by them for the purposes of their incorporation. *Mass. Supreme Ct. 1851, Worcester Mut. Fire Ins. Co. v. Worcester*, 7 *Cush.* 600.

87. A joint stock association,—*Held*, to be a corporation within the meaning of laws relating to taxation, and, as such, liable to be taxed on its capital. *N. Y. Supreme Ct. Sp. T. 1858, Sandford v. Supervisors of N. Y.* 15 *How. Pr.* 172.

88. Manufacturing companies. In Massachusetts, a manufacturing corporation is taxable for its real estate in the town in which it is situated, notwithstanding the individual

corporators are liable to be taxed for their several shares of stock as personal estate in the towns where they reside; but it is not liable to be assessed for its personal estate in and about the manufactory. *Mass. Supreme Ct. 1813, Salem Iron Factory Co. v. Inhabitants of Danvers, 10 Mass. 514.*

89. The real estate of a manufacturing corporation is liable to be assessed for the support of public worship in the parish where it is situated, although the members belong to a different religious society. *Mass. Supreme Ct. 1820, Amesbury Nail Factory Co. v. Weed, 17 Mass. 53; 1831, Goodell Manuf. Co. v. Trask, 11 Pick. 513.*

90. But the personal stock in manufacturing corporations is not liable to be assessed in the towns where their manufactories are established. Each individual stockholder is only liable to be taxed for his shares and personal property in such corporation, in the town where he lives, and the same is not taxable to the corporation. *Mass. Supreme Ct. 1813, Salem Iron Factory Co. v. Inhabitants of Danvers, 10 Mass. 514; 1821, Amesbury Woolen &c. Manuf. Co. v. Inhabitants of Amesbury, 17 Mass. 461.*

91. Manufacturing corporations in Massachusetts, are not taxable for their personal property, except for their machinery. Such property is to be assessed to the owners of shares in the stock of such corporations. *Mass. Supreme Ct. 1842, Boston &c. Glass Co. v. City of Boston, 4 Metc. 181.*

92. The poll tax of minors who are in the service of a manufacturing corporation, and receiving salaries, cannot legally be assessed to such corporation. See *Boston &c. Glass Co. v. City of Boston, 4 Metc. 181.*

93. In Massachusetts, shares of the capital stock of a foreign manufacturing corporation, if owned by the citizens of the State, are taxable for their full value, without a deduction of the value of the real estate and machinery belonging to such corporation, to a taxation of which the corporation is subject at the place where it is established. *Mass. Supreme Ct. 1866, Dwight v. Mayor &c. of City of Boston, 12 Allen, 316.* And see *Blackstone Manuf. Co. v. Inhabitants of Blackstone, 13 Gray, 488.*

94. Rules applicable to taxation of water power and mill power in Massachusetts. *City of Lowell v. County Commissioners of Middlesex, 6 Allen, 181.*

95. In New Hampshire, property in a manufacturing corporation is liable to be taxed in the town where it is situated; and a taxation of the stock in such companies to the owners of the shares is illegal. *N. H. Superior Ct. 1838, Smith v. Burley, 9 N. H. 433.*

96. The merchandise of a manufacturing corporation in Maine, employed in trade in a store, is not taxable to the corporation, in the town where the store is situated, but to the individual holders of the stock. *Me. Supreme Ct. 1827, Gardiner Cotton &c. Factory v. Inhabitants of Gardiner, 5 Me. (3 Greenl.) 138.*

97. Railroad companies. The act of incorporation of a railroad company, among other things, authorized them "to procure, purchase, and hold in fee simple, improve and use for all purposes of business, to be transacted on or by means of said railroad, lands, or other real estate, and to manage and dispose thereof as they may see fit;" and provided that the capital stock be divided into shares, to be holden and considered as personal estate. *Held*, that the real estate owned and used by the company, either as a railroad or as a depot, was not subject to taxation, otherwise than as personal estate; each shareholder being taxable for the amount of his interest therein, in the town where he resided, and not elsewhere; and, that to allow the inhabitants of the towns through which the road might pass, to tax it, would be subjecting it to a double taxation. *Me. Supreme Ct. 1842, Bangor & Piscataquis R. R. Co. v. Harris, 21 Me. 533.* Compare *Sangamon & Morgan Railway v. County of Morgan, 14 Ill. 163; Maus v. Logansport &c. R. R. Co. 27 Ill. 77.*

98. An act incorporating a marine railway authorized the company to hold personal and real estate, and required the whole property to be divided into shares, and that such shares should be considered in all respects as personal estate. *Held*, that the real estate belonging to the corporation, should, under the revised statutes of Maine, be taxed as real estate; the above provision of the charter being intended to qualify and define the interest of the stockholders. *Me. Supreme Ct. 1854, Cumberland Marine Railway v. City of Portland, 37 Me. 444.*

99. The rails, sleepers, bridges, &c., of a railroad corporation, together with their easement in land, within the located limits of

the road, are, in Rhode Island, taxable as real estate, in the towns in which they are situated; the tax act of that State expressly providing that "no property whatsoever, of any description, not ceded or belonging to the United States or to the State, except as aforesaid, shall, on any pretence whatever, be deemed to be exempted from taxes; any law or act, public or private, to the contrary notwithstanding. *R. I. Supreme Ct.* 1853, *Providence & Worcester R. R. Co. v. Wright*, 2 *R. I.* 459.

100. Under the Pennsylvania statute, such property of a railroad as is indispensable to the construction and use of a railroad, is alone exempt from taxation; but property which is only indispensable to the making of profits is taxable. Thus, water stations and depots are exempt from taxation; the latter, including offices, oil houses, car houses, &c.; but otherwise with warehouses, coal lots, coal shutes, machine shops, wood yards, &c. *Pa. Supreme Ct.* 1847, *Railroad v. Berks County*, 6 *Pa. St.* 70.

101. A supplement to the charter of a railroad company provided that the corporation should pay annually a certain tax, to be estimated on the cost of the road as shown by the preceding annual report of such cost. The report included, as required by law, the cost of the road and equipments. *Held*, that the road and its appendages were liable to taxation, but that its equipments, cars, boats, engines and other personal property, were exempt. *N. J. Supreme Ct.* 1859, *State Treasurer v. Somerville & Easton R. R. Co.* 4 *Dutch.* 21.

102. A railroad corporation were authorized to lay out their road, not exceeding five rods in width. *Held*, that they were not liable to be taxed for the land so used to lay out their road, nor for buildings and structures thereon erected by them, if such buildings and structures were reasonably incident to the support of the road, or to its proper and convenient use for the carriage of passengers and property, such as houses for the reception of passengers, engine houses, car houses, and depots for the convenient reception, preservation, and delivery, of merchandise carried on the road. *Mass. Supreme Ct.* 1842, *Inhabitants of Worcester v. Western R. R. Corp.* 4 *Met.* 564.

103. The assessors are to estimate and assess that section of a railroad in their town

"at its full and true value." That value is simply the value of the land, and of the erection and fixtures thereon, irrespective of the consideration whether the road is well or ill managed, or whether it is profitable to the stockholders or otherwise. *N. Y. Supreme Ct.* 1851, *Albany & Schenectady R. R. Co. v. Osborn*, 12 *Barb.* 223. Followed, *Sp. T.* 1853, *Albany & West Stockbridge R. R. Co. v. Town of Canaan*, 16 *Id.* 244; *S. P. Md. Ct. of Appeals*, 1841, *Tax Cases*, 12 *Gill & J.* 117.

104. In assessing railroad property, the inquiry should be, "what is it worth for the purposes for which it is constructed;" and the net profits may be considered, but anticipations of future increase of value should be considered with great caution, if at all. *Ill. Supreme Ct.* 1861, *Illinois v. Illinois Central R. R. Co.* 27 *Ill.* 64.

105. A requirement in the charter of a railroad corporation, that the company should pay into the State treasury a certain sum annually, from its income.—*Held*, to have reference to the net income of each year; and where, in any year, the net income is not sufficient to pay the sum, the company are not obliged to make up the deficiency from the excess of other years. *Matter of the Western Railway*, 5 *Met.* 596.

106. The Act of Congress (13 *U. S. Stat. at L.* 276, 485), which authorized railroad companies to add the revenue tax to their fares,—empowered city railroads to make such increase. *N. Y. Superior Ct. Sp. T.* 1866, *Money Penny v. Sixth Av. R. R. Co.* 4 *Abb. Pr. N. S.* 357.

107. Proper mode of assessment of a railroad company, making their profits partly as carriers and partly by tolls received. *Queen v. Grand Junction Railway*, 4 *Q. B.* 18.

108. A statute of New Jersey, passed March 28, 1862, provided that foreign corporations regularly doing business in that State, consisting of the transportation of goods, *in transitu*, from State to State, and passengers, should pay to the State a certain tax upon the business so transacted, to be graduated by the weight of the goods and the number of passengers transported. *Held*, that the statute was in violation of that provision of the constitution which conferred upon Congress the regulation of commerce between the States, and therefore illegal. *N. J. Ct. of Errors*, 1864, *Erie Railway Co. v. State*, 31 *N. J. Law* (2 *Vroom*.) 581.

109. Savings banks may be taxed under the constitution of Massachusetts. *Mass. Supreme Ct.* 1862, *Commonwealth v. People's &c. Savings Bank*, 5 *Allen*, 428.

110. Under the Pennsylvania act of April 22, 1846, investments in mortgages and loans, made by a corporation created to receive deposits, on which interest was allowed to the depositors,—*Held*, taxable for State and county purposes. *Pa. Supreme Ct.* 1848, *Philadelphia Saving Fund Society v. Yard*, 9 *Pa. St.* 359; *S. P. Fire Insurance Co. v. Northampton County*, *Id.* 413; *Easton Bridge v. Northampton County*, *Id.* 415.

111. In Massachusetts, savings banks are not taxable for bank stock in which they have invested money received on deposit, because they pay interest to their depositors. *Mass. Supreme Ct.* 1852, *Worcester County Institution for Savings v. City of Worcester*, 10 *Cush.* 128.

112. Under the statutes of Massachusetts (*Sta.* 1862, ch. 224, and 1863, ch. 164), providing for the assessment of taxes upon institutions of savings, and the mode of collecting the same, a tax may be laid upon a savings bank, although a portion of its funds is invested in United States securities. *Mass. Supreme Ct.* 1866, *Commonwealth v. Provident Institution for Savings*, 12 *Allen*, 312.

113. A tax levied upon a savings bank under the Connecticut act of 1862, providing that savings banks shall pay to the State treasurer "a sum equal to three-fourths of one per cent. on the total amount of deposits in such institution on the first day of July in each year,"—*Held*, to be a tax upon the corporation as such, and not upon its property; and, therefore, that the bank was not entitled to a deduction from the amount of the same, by reason of its ownership of United States bonds purchased by its deposits. *Conn. Supreme Ct.* 1864, *Coite v. Society for Savings*, 32 *Conn.* 173.

114. Real estate belonging to a savings bank is taxable to the bank in the town or place where the real estate is situated. *N. H. Supreme Ct.* 1866, *Nashua Savings Bank v. City of Nashua*, 46 *N. H.* 389.

115. Steamship companies. A steamship company, incorporated under the laws of New York, for the transportation of passengers and freight between New York and Brazil, whose capital is invested in vessels

employed for that purpose, and whose office is located in the city of New York, is not exempted from State taxation on its capital, under the constitution of the United States, on the ground that the whole amount is invested in steamships engaged in foreign commerce and in carrying the mails under a contract with the United States. Such an assessment in no way interferes with the power of Congress to regulate commerce, either with foreign countries or between the States. *N. Y. Supreme Ct.* 1866, *People v. Commissioners of Taxes of N. Y.* 48 *Barb.* 157.

For the taxes imposed upon various corporations by the Internal revenue laws of the United States, the acts of Congress upon that subject should be consulted.

III. EXEMPTIONS.

116. Their validity. A provision in the charter of a private corporation, exempting its property from taxation, is valid, and binding upon the State.* *Ill. Supreme Ct.* 1843, *State Bank of Illinois v. People*, 4 *Scam.* 303. And see *Bank v. New Albany*, 11 *Ind.* 139.

117. Where an annual tax on the capital of a bank is, by its charter, to be deducted from its dividends "in lieu of all other taxes and assessments on the stock in said bank," no tax can be imposed upon the capital or any part of it, by a city corporation, even upon property situated within its limits. *Ind. Supreme Ct.* 1851, *State Bank v. City of Madison*, 3 *Ind.* 43.

118. Where the act of incorporation of a bank required payment from the corporation to the State, of a tax of twenty-five cents per annum, on each share of the stock,—*Held*, that this was a contract between the State and the stockholders, which exempted the stock from any further taxation. *Ky. Ct. of Appeals*, 1838, *Johnson v. Commonwealth*, 7 *Dana*, 388. And see *Jefferson Branch Bank v. Skelly*, 1 *Black*, 436.

119. An act of incorporation of a railroad company provided for certain exemptions of the property of the company from taxation, for municipal purposes. *Held*, that the statute created a contract between the State and the company, which could not be changed or annulled without the consent of both com-

* That corporations are entitled to the same exemptions of property from taxation as individuals,—see *People v. Commissioners of Taxes*, 23 *N. Y.* 192.

tracting parties. * *Ill. Supreme Ct.* 1863, *Neustadt v. Illinois Central R. R. Co.* 81 *Ill.* 484.

120. A provision in the charter of an incorporated insurance company, establishing a fixed bonus in commutation of all other taxes on its capital stock and property, is not obnoxious to any constitutional objection. *Ala. Supreme Ct.* 1857, *Daughdrill v. Alabama Life Ins. & Trust Co.* 81 *Ala. N. S.* 91.

121. — denied. The legislature of a State have not power to bind future legislatures by a permanent surrender of the right to tax a corporation. *N. H. Superior Ct.* 1889, *Brewster v. Hough*, 10 *N. H.* 138; *Ohio Supreme Ct.* 1853, *Debolt v. Ohio Life Ins. & Trust Co.* 1 *Ohio St.* 563.

122. No corporate body in Pennsylvania, with banking or discounting privileges, can obtain exemption from the imposition of taxes according to legislative discretion. *Pa. Supreme Ct.* 1860, *Iron City Bank v. City of Pittsburgh*, 87 *Pa. St.* 340.

123. When implied. The bank of Tennessee is a public corporation, acting upon the funds and credit of the State, and no portion of its stock is private. It was chartered for the benefit of the State, and though in its charter there is no express provision exempting the property of the bank from taxation, yet such exemption is necessarily implied. *Tenn. Supreme Ct.* 1851, *Mayor &c. of Nashville v. Bank of Tennessee*, 1 *Swan*, 209.

124. A gas light company, which is incorporated with no authority to take private property not already appropriated to public use, and upon which no public duty is imposed, but which is empowered to make and distribute gas for their own profit only, is not a quasi public corporation within the principle exempting from taxation such corporations, in the city or town where they are situated. *Mass. Supreme Ct.* 1866, *Commonwealth v. Lowell Gas Light Co.* 12 *Allen*, 75.

125. The charter of a railroad company subjected the corporation to a specified tax upon the cost of the road, as soon as the net

proceeds should equal seven per cent. in lieu of all other taxes. The charter, by its terms, was made liable to alteration or repeal by the legislature. A general tax law, passed subsequent to the incorporation of the company, subjected to taxation the real estate of all private corporations, except those, which, by virtue of irrevocable contracts in their charters or other contracts with the State, were expressly exempted from taxation, and repealed all acts, inconsistent with its provisions. *Held*, that the provisions of the charter of the corporation relative to taxation were thereby repealed, and that an assessment upon the real estate of the company could be rightfully made under the general law. *N. J. Ct. of Errors*, 1864, *State v. Miller*, 81 *N. J. Law* (2 *Vroom*), 521; *S. P.* 1865, *State v. Mayor &c. of Jersey City*, *Id.* 575.

126. Interpretation of statutory exemptions. Where an exemption from taxation is claimed by a corporation, of property which clearly falls within the descriptive words of the act which imposes the tax, the exemption must be a plain one. But when it is doubtful, whether the property in question falls within the description used by the law, it is proper to resort to other statutes relating to the subject, in order to ascertain the intention of the legislature. *Mo. Supreme Ct.* 1860, *Hannibal & St. Joseph R. R. Co. v. Shacklett*, 30 *Mo.* 550.

127. Instances. Where a corporation was made liable to a specific tax whenever their net profits should reach a certain point, and was exempted from all other taxes,—*Held*, that this was a present exemption from all other modes of taxation, except that specified; and that that one only attached, when the condition occurred. *N. J. Supreme Ct.* 1852, *State v. Minton*, 8 *Zabr.* 529.

128. The charter of a railroad corporation provided for the payment of a certain tax by the company, and then enacted "that no further or other tax or impost shall be levied or assessed upon said company." *Held*, that this provision exempted the company generally from all taxes for county, or other purposes than those stated in the charter, and did not merely exempt the franchises and privileges of the corporation. *N. J. Supreme Ct.* 1889, *State v. Berry*, 2 *Harr.* 80; *S. P.* 1840, *Camden & Amboy R. R. Co. v. Hillegas*, 8 *Id.* 11; *Camden & Amboy R. R. Co. v. Commissioners of Appeal*, *Id.* 71.

* Where a railroad company was incorporated, subject to the provisions of a statute which allowed the legislature to amend, &c. charters, with a provision that it should not be taxed until its dividends amounted to 6 per cent. per annum,—*Held*, that after a subsequent act subjecting all corporations to a tax on each 1 per cent. of dividend, the company was taxable on a dividend of less than 6 per cent. per annum, and that the obligation of the original contract was not impaired thereby. *Pa. Supreme Ct.* 1867, *Commonwealth v. Fayette County R. R. Co.* 55 *Pa. St.* 452.

129. Where a statute provided that the shares of the capital stock of a certain railroad corporation should be exempt from taxation, "except that portion of the permanent and fixed works of the company, within the State," and that the tax levied upon that section should not exceed the rate of any general tax imposed at the same time, upon real and personal property throughout the State,—*Held*, that such portion of the fixed works of the company, as was within the State, remained subject to general taxation, for State and county taxes. *Md. Ct. of Appeals*, 1844, *Philadelphia &c. R. R. Co. v. Bayless*, 2 *Gill*, 355.

130. Section 25 of the Virginia act of March 18, 1856,—providing for the payment by railroad companies of a specified tax for the support of the State government, upon passengers transported by them, in lieu of all other taxes upon their lands and property, does not extend to exempt such corporations, although complying with the statute, from taxation by a city government. *Va. Ct. of Appeals*, 1867, *Orange & Alexandria R. R. Co. v. City Council of Alexandria*, 17 *Gratt.* 176.

131. Under the Connecticut statute of 1859,—which provides that the real estate of any ecclesiastical, or otherwise public or charitable institution conveyed by lease or other conveyance, from which such institution does not receive an annual rent, or where such conveyance is intended to be perpetual, shall not be exempt from taxation,—*Held*, that the land of an ecclesiastical society leased for a term of 999 years, for a gross sum paid at the time, the lessee covenanting to keep up the buildings on the premises, was liable to taxation. *Conn. Supreme Ct.* 1863, *Brainard v. Town of Colchester*, 81 *Conn.* 407.

132. The gas pipes and meters used by a gas light company in distributing and measuring the gas, constitute the "machinery" of the corporations, within the meaning of a statute (*Mass. St.* 1864, ch. 208) requiring corporations to pay taxes upon the excess of the market value of the capital stock over the value of their real estate and machinery, in the place where they are situated. *Mass. Supreme Ct.* 1866, *Commonwealth v. Lowell Gas Light Co.* 12 *Allen*, 75.

133. That a bank is not excused from State taxation because its personal property,

exclusive of United States securities, is less than the aggregate of its debts,—see *People v. Board of Education of Lockport*, 46 *Barb.* 588; *People v. Board of Education of Lockport*, *Id.* 598.

134. An insurance company is not exempt from a tax imposed on corporations "doing business," on the ground that they have discontinued issuing new policies, and are only engaged in collecting premiums and paying losses on old policies, for this is "doing business" within the meaning of the tax-laws. *N. Y. Com. Pl. Sp. T.* 1868, *Smyth v. International Life Assurance Co. of London*, 4 *Abb. Pr. N. S.* 11.

135. A street railroad company is not taxable for horses or other personal property, used in, and necessary for, the prosecution of its business. *Mass. Supreme Ct.* 1864, *Middlesex R. R. Co. v. City of Charlestown*, 8 *Allen*, 330.

136. Capital stock. A statute exempting the capital stock of a railroad company, exempts all property of the company necessary to carry on the business. *Ga. Supreme Ct.* 1853, *Rome R. R. Co. v. Mayor &c. of Rome*, 14 *Ga.* 275; *S. P. Md. Ct. of Appeals*, 1848, *Mayor &c. of Baltimore v. Baltimore & Ohio R. R. Co.* 6 *Gill*, 288.

137. Where the charter of a railroad and banking company exempted their "stock" from taxation beyond a limited amount,—*Held*, that a tax levied by a municipal corporation upon a portion of their property, real and personal, there used for banking purposes, was illegal. The word stock includes all the property of the corporation. *Ga. Supreme Ct.* 1858, *City Council of Augusta v. Georgia R. R. & Banking Co.* 26 *Ga.* 651.

138. Under a statutory provision subjecting to taxation, "all property owned by incorporated companies over and above their capital stock," the road bed, machinery, depots and other property of a railroad company used by the corporation in operating its road, are exempt from taxation as a part of the capital stock of such company. *Mo. Supreme Ct.* 1860, *Hannibal & St. Joseph R. R. Co. v. Shacklett*, 30 *Mo.* 550.

139. The charter of a railroad company provided that its capital stock should be exempt from taxation until the tolls collected by the company should be sufficient to afford a dividend of six per cent. per annum on the capital stock. Its capital was subsequently,

at different times, enlarged by the creation of common and preferred stock. Upon the latter, dividends were first to be paid, and it was provided that the holders of the old stock might, upon complying with certain terms, surrender their stock in exchange for the new. Under this provision nearly the whole of the old stock was absorbed and turned into the preferred. *Held*, that the capital stock, in the form of the increased portions, and in the shape of preferred stock, was exempt from taxation under the original exemption; that the tolls to be collected by the company as a condition precedent to the payment of taxes, should be declared upon the existing capital, composed of increased and preferred stock; and that the dividend, prescribed in the charter, was intended to refer to the net profits of the road upon such capital stock. *Conn. Supreme Ct. 1861, State v. Norwich & Worcester R. R. Co. 80 Conn. 290.*

140. Where the capital stock of a bank is exempted from taxation by its charter, its banking house is equally exempt with every other part of its capital. The "capital" of a bank embraces all its property. *Conn. Supreme Ct. 1862, Town of New Haven v. City Bank of New Haven. 81 Conn. 106.*

141. If a bank has, in violation of its charter, erected a building not needed for banking purposes, the building is not, for that reason, liable to taxation as the property of the bank, when it otherwise would not be, but the bank is liable to be proceeded against by the State, for the violation of its charter. *Id.*

142. Property not held for the corporate purpose. An exemption in the charter of an incorporated society, of the lands and real estate of the corporation, from certain taxes,—*Held*, to extend only to such real estate as was owned for the purpose of their incorporation. *N. J. Supreme Ct. 1854, State v. Flavell, 4 Zab. 370.*

143. A general clause in a railroad charter, exempting a corporation's property from taxation, covers appendages necessary for the purposes of the incorporation, and not those which may be convenient for increasing the advantages and profits of the corporation. *N. J. Ct. of Errors, 1856, State v. Newark, 2 Dutch. 519.*

144. Though the charter of a corporation makes them taxable at a specified rate

upon their capital stock, with a provision that no further tax shall be levied, the company are, nevertheless, taxable upon real property not used or occupied for the necessary purposes of the company. If they choose to invest capital in such property, they cannot complain if it is twice taxed. [3 Zab. 429.] *N. J. Supreme Ct. 1855, State v. City of Newark, 1 Dutch. 815.*

145. A corporation organized for "the establishment of a library," and whose property is exempted by law from taxation, cannot avail themselves of such exemption, in respect to a building erected by them and leased for various uses, excepting so far as used for the purposes of the library. *N. J. Supreme Ct. 1859, State v. City of Elizabeth, 4 Dutch. 108.*

146. A provision in the charter of a corporation which enacts, after reserving certain imposts, "that no other tax or impost shall be levied or assessed on the said company," exempts from taxation all property held by them necessary to effect the purposes of their incorporation. Other property, which is convenient, but not absolutely necessary, is liable to taxation. *N. J. Supreme Ct. 1852, State v. Commissioners of Mansfield, 3 Zab. 510.*

147. Therefore, under a charter of a railroad company which reserved certain imposts, and provided that no other tax or impost should be levied or assessed upon the company. *Held*, that the exemption applied only to property which was necessary to effect the purposes of the organization; and, consequently, that land purchased for the erection of houses for servants was rightfully assessed. *N. J. Supreme Ct. 1852, State v. Commissioners of Mansfield, 3 Zab. 510.*

148. The charter of a railroad company provided for the payment of certain taxes to the State, and then enacted that no further or other tax or impost should be levied or assessed upon the company. *Held*, that the tax stipulated by the act of incorporation, to be paid yearly, was a commutation for all taxes on such property as might necessarily be held for purposes reasonably incident to the enjoyment of the franchise; and that the charter exempted the company and its property held, for such purposes, from all other taxes, whether assessed for State, or for city, or township purposes. *N. J. Ct. of Errors, 1845, Gardner v. State, 1 Zab. 557.*

149. The charter of a railroad company enacted that the stock, property, and effects of the company, should be exempt from taxation. *Held*, that reference was had, so far as real estate was concerned, to that which the company were authorized to take by proceedings *in invitum*, and did not extend to other land, which they might obtain by grant, and which might or might not be a source of profit, or a matter of convenience. *Vt. Supreme Ct.* 1856, Vermont Central R. Co. v. Town of Burlington, 28 *Vt.* 193.

150. It is only such property as is appurtenant and indispensable to the construction and operation of a railroad, as water stations and depots, and probably offices, and oil houses, and car and engine houses, and all such erections as may fairly be regarded as necessary to the convenient use of the road, that can be exempt from taxation, as forming a part of the incorporeal estate of the corporation. But those erections, which are only indispensable to the making of profits, such as warehouses, coal lots, coal shutes, machine shops, and wood yards, forming no part of the road, are liable to taxation. *Pa. Supreme Ct.* 1847, Railroad v. Berks County, 6 *Pa. St.* 70; 2 *Am. Railw. Cas.* 306.

151. The legislature granted a charter to a corporation authorizing them to carry on the manufacture of nails, and of cotton and woolen cloths, and the business necessarily connected therewith, and provided that all buildings, machinery and capital employed in carrying on said factory, not exceeding a certain sum, should be exempted from taxation for a certain time. *Held*, that a store of goods, such as are usually sold in the country, owned by said corporation, was not within the exemption, and was liable to taxation, notwithstanding the whole property owned by the corporation, including said store of goods, did not amount to the sum specified. *N. H. Superior Ct.* 1834, Souhegan Nail & Co. Factory v. M'Conihe, 7 *N. H.* 309.

152. After acquired property. An act of incorporation of a railroad company provided that the stock, fixtures and property of the road, should be exempt from taxation for twenty years, and that the privileges and benefits of the act should be extended to all railroad charters theretofore or thereafter granted. *Held*, that this provision operated as a repeal *pro tanto* of the power of taxation

granted to municipal corporations, and applied not only to property held by a railroad at the date of the passage of the act, but to such as might be subsequently acquired within the period limited, for the purpose of the railroad, whether obtained by purchase from another railroad in a legal and valid manner, or by other modes. *Miss. Ct. of Errors*, 1860, Southern R. R. Co. v. Mayor & Co. of Jackson, 38 *Miss.* 384.

153. Such provision applies to railroads completed and in operation, at the passage of the act, and, as regards such roads, the exemption for twenty years commences with the passage of the act. *Id.*

154. Effect of lease. By the colonial act of Massachusetts, of 1650, all lands and tenements or revenues of Harvard College, not exceeding the value of £500 per annum, were exempted from taxation. *Held*, under this act, that the lands first acquired by the college, before their annual income amounted to that sum, would never be taxable so long as they were owned by the college; and that they were equally exempt from taxation in the hands of a lessee, as if in the immediate possession of the college. *Mass. Supreme Ct.* 1828, Hardy v. Inhabitants of Waltham, 7 *Pick.* 108.

155. — or sale. That property exempted from taxation in favor of a religious corporation, loses the benefit of such exemption when it is sold,—see *Town of New Haven v. Sheffield*, 30 *Conn.* 160.

IV. STOCKS. SECURITIES.

156. Corporation shares are taxable. The shares of stock held by a stockholder, resident in Pennsylvania, in corporations, both foreign and domestic, are taxable to him personally for county and State purposes.* *Pa. Supreme Ct.* 1865, Whitesell v. County of Northampton, 49 *Pa. St.* 526. See also, *Lycoming County v. Gamble*, 47 *Pa. St.* 106.

157. Under the Pennsylvania act of April

* Stock of an incorporated company in New Jersey, standing in the name of and owned by non-resident stockholders, is not taxable to the bank as capital stock. *N. J. Supreme Ct.* 1867, *State v. Thomas*, 2 *Dutch.* 161.

Where a bank charter expired a few days before the semi-annual tax on its capital stock became due, but the bank was empowered to close its concerns in its corporate capacity within a certain time, and, before the tax became due, half the capital stock was divided,—*Held*, that the corporation was liable for the tax on its whole stock, which became due first after the charter was determined. *Ma. Supreme Ct.* 1841, *State v. Waldo Bank*, 20 *Ma.* 470.

29, 1844, § 32,—providing that all shares or stock in any bank, institution or company, now or hereafter incorporated in pursuance of any law of the State, or of any other State or government shall be taxed,—stock of national banks is taxable for State purposes in the hands of the stockholders. The words "other government" include the United States. *Pa. Supreme Ct.* 1867, *Mintzer v. County of Montgomery*, 54 *Pa. St.* 139.

158. A stockholder in a national bank, whose capital is invested principally in United States securities, may be taxed by the laws of the State, only for such proportion of the amount of his shares as is not made up of the value of said bonds. *N. J. Supreme Ct.* 1866, *State v. Hart*, 31 *N. J. Law*, (2 *Vroom*), 484.

159. At what place. In Indiana, shares of an insurance company are taxable where the owner is domiciled. *Ind. Supreme Ct.* 1859, *City of Evansville v. Hall*, 14 *Ind.* 27. And see *Conwell v. Connersville*, 15 *Ind.* 150.

160. Bank stock owned by a savings society, (there being no clause of exemption in its charter,)—*Held*, liable to taxation in the place where the office of the society was established. *Conn. Supreme Ct.* 1849, *Savings Bank of New London v. New London*, 20 *Conn.* 111.

161. Valuation. That the stock of an incorporated company is to be valued, for taxation in the hands of stockholders, at its fair market value, not at its nominal or par value, —see *State v. Tunis*, 3 *Zabr.* 546.

162. The shares of stock of joint stock corporations in Maryland are liable to be assessed, for purposes of municipal taxation, at their cash value, at the time of the assessment; and in such assessment the shareholders, and not the corporations, are deemed to be the taxable owners of the stock. *Md. Ct. of Appeals*, 1865, *Firemen's Ins. Co. v. Mayor &c. of Baltimore*, 23 *Md.* 296.

163. Who is deemed owner. An individual who subscribes for shares in a bank, and pays part of the amount of the capital, and conveys his shares to the bank to secure the residue, is liable to be taxed for the amount thus paid in, as the owner of bank stock. *N. H. Superior Ct.* 1834, *Tucker v. Aiken*, 7 *N. H.* 113.

164. Shares in foreign corporations. The interest which a stockholder has in the stock

of a corporation is personal, and controlled by the law of his domicile. Therefore, capital stock owned by citizens of a State in extra territorial corporations, is taxable for State and county purposes, where its owners reside. *Pa. Supreme Ct.* 1865, *McKeen v. County of Northampton*, 49 *Pa. St.* 519.

165. Under a Massachusetts statute (*St.* 1880, ch. 151), subjecting to taxation "shares or property in any incorporated company for a bridge, or a turnpike road,"—*Held*, that a citizen of the State was liable to be taxed for his turnpike shares, though in a turnpike lying within the limits of another State. *Mass. Supreme Ct.* 1835, *Inhabitants of Great Barrington v. County Commissioners of Berkshire*, 16 *Pick.* 572.

166. Residents of New Jersey are liable to be taxed on the value of stock owned by them in corporations out of the State. *N. J. Supreme Ct.* 1852, *State v. Branin*, 3 *Zabr.* 484.

167. Double tax. The stock of incorporated banks, although the bank pays a tax on its capital, may be taxed in the hands of stockholders, if authorized by the legislature, although it is a second tax on the same property. *Id.*

168. The court will not by construction of an ambiguous statute, sustain a tax upon shareholders of a corporation in respect to their shares, when the corporation are already taxed upon their capital, for this would be a double taxation, unjust and unconstitutional. *N. H. Superior Ct.* 1838, *Smith v. Burley*, 9 *N. H.* 423. And see *Boston Water Power Co. v. City of Boston*, 9 *Met.* 199.

169. If a railroad corporation is situated in another State, and the road and all property of the road are taxed in that State to the corporation on the same valuation, and at the same rate as the property of individuals, a stockholder, residing in this State, is not liable to be taxed here for his stock in the road. *N. H. Supreme Ct.* 1859, *Smith v. Town of Exeter*, 37 *N. H.* 356.

170. Where a private individual becomes the lessee of the works of a company, he is liable to taxation upon its property, in the place of his residence, notwithstanding he is also liable to be taxed, in the same place, for the stock he owns in the same company. *Ala. Supreme Ct.* 1864, *Stein v. Mayor &c. of Mobile*, 24 *Ala. N. S.* 591.

171. Exemptions. The stock of an in-

corporated company, which is, by its charter, exempt from taxation, in the hands of individual stockholders, cannot be taxed. [8 How. 133.] *N. J. Supreme Ct.* 1852, *State v. Branin*, 3 *Zabr.* 484.

172. Under a statute providing that the stock of corporations should be taxed in the hands of the stockholders, and that so much of the property of corporations, as was in the hands of stockholders, should be exempt from taxation,—*Held*, that the real estate and surplus funds of a bank were not liable to taxation, as both belonged to the stockholders and were represented by stock in their hands. *N. J. Supreme Ct.* 1852, *State v. Tunis*, 3 *Zabr.* 546.

173. A statute of Maryland, which ceded to the United States the site of a naval academy, exempted all the personal property of the officers and agents of the general government, residing within the limits of the ceded territory, from "all taxes and assessments," which might be "at any time" imposed by the State. *Held*, that by this section, personal property, consisting of stock of a municipal corporation, owned by such officers or agents, living in said limits, was exempt from taxation. *Md. Ct. of Appeals*, 1852, *Chauvenet v. Commissioners of Anne Arundel County*, 3 *Md.* 259.

174. The bonds of an incorporated company, which, by its charter, are exempt from taxation, are not, in the hands of individual stockholders, creditors of the corporation, exempt from taxation, whether such bondholders are also stockholders or not. *N. J. Supreme Ct.* 1852, *State v. Branin*, 3 *Zabr.* 484.

175. Coupon bonds of a railroad company are taxable in Pennsylvania, under a statute providing for the taxation of bonds and certificates of loans of railroad corporations. Corporation loans, though in some sense mere debts, are like moneys at interest, taxable as property. *Pa. Supreme Ct.* 1866, *Maltby v. Reading & Columbia R. R. Co.* 52 *Pa. St.* 140.

176. The tax laws of Pennsylvania, which impose taxes upon corporation loans as property found in the State, and appoint the debtor corporation the collector of the same for the benefit of the State government, are constitutional and valid. *Id.*

As to City taxes, see MUNICIPAL CORPORATIONS

TELEGRAPH COMPANIES.

1. Construction of line. Under the statutes of Massachusetts authorizing telegraph companies to construct lines of electric telegraph along highways and across the waters of the State, but forbidding them to incommode the public use of such highways, or to interrupt the navigation of said waters,—which provide that the mayor and aldermen or selectmen of the places through which the lines are to pass shall specify to the company the location and kind of posts, &c.—*Held*, that the determination of the mayor and aldermen of the places in which the poles of such companies might stand was conclusive upon the rightfulness of their erection within the limits of a highway, so that they could not lawfully be removed by the city or town, or any of its officers, or treated in any manner as a public nuisance. *Mass. Supreme Ct.* 1867, *Commonwealth v. City of Boston*, 97 *Mass.* 555. And see *Young v. Inhabitants of Yarmouth*, 9 *Gray*, 886.

2. The provisions and privileges of said statutes,—*Held*, not to extend to telegraph companies incorporated under the laws of other States. *Id.*

3. The charter of a telegraph company,—which enacted that the company might lay their pipes, &c. under any highways, &c. but that nothing contained in the provisions should give them power to dig under any railway or canal, provided that it should be lawful for the company to carry their wires directly across any railway or canal,—*Held*, that the company had no right to dig under and directly across a railway at the place where it crossed a common highway. *Each.* 1854, *Southeastern Railw. Co. v. European &c. Telegraph Co.* 24 *Eng. L. & Eq.* 513; 22 *Law J. N. S. Each.* 113; 9 *Each.* 363; 2 *Com. Law.* 467.

See EMINENT DOMAIN.

4. Whether common carriers. Telegraph companies are common carriers, and liable as such. *Cal. Supreme Ct.* 1859, *Parks v. Alta California Telegraph Co.* 13 *Cal.* 422.

5. Thus, where one telegraphed to his agent, to attach for a debt, but the message was negligently delayed so that other creditors got the first attachments, and he lost his debt, the company were held liable for the amount of the debt. *Id.*

6. A telegraph company is a bailee; it cannot be considered a common carrier, since

it contracts not in obedience to any common law obligation, but in accordance with certain rules and regulations authorized by statutory law. *Md. Ct. of Appeals*, 1862, *Birney v. New York & Washington Telegraph Co.* 18 *Md.* 841. And see *Breese v. United States Telegraph Co.* 45 *Barb.* 274; 81 *How. Pr.* 86.

7. Telegraph companies, in the absence of statutory provisions, are not common carriers. Their obligations and liabilities are, therefore, not to be measured by the rules regulating that class of persons, but must be fixed by considerations growing out of the nature of the business in which they are engaged. They do not become insurers against all errors in the transmission or delivery of messages, except so far as by their rules and regulations, or by contract or otherwise, they choose to assume that position, or hold themselves out as such to the public. Telegraph companies, like common carriers, it is true, exercise a public employment, by which they are bound to send messages for those who apply and are ready to pay the usual charges, as the latter are bound to transport goods for those who seek their services upon similar terms. But beyond this, as relative to the actual transportation of goods in the one case, and the transmission of ideas in the other, there is, in the nature of things and the different agencies employed, very little substantial resemblance. Any analogy must be more fanciful than real, and likely to lead to error and injustice. *Mich. Supreme Ct.* 1867, *Western Union Telegraph Co. v. Carew*, 15 *Mich.* 525.

8. Liability for error in despatch. The obligations of telegraph companies, though they are not insurers of the safe delivery of what is intrusted to them, like those of common carriers, spring from the public nature of their employment, and the contract under which the particular duty is assumed; and one of the plainest of their obligations is to transmit the very message prescribed. Hence, if they negligently or wilfully violate their duty by omitting to dispatch over their wires an exact copy of the message delivered for transmission, they will be responsible to the party to whom the erroneous message is addressed, in an action on the case. *Pa. Supreme Ct.* 1860, *New York & Washington Printing Telegraph Co. v. Dryburg*, 85 *Pa. St.* 298.

9. Although a telegraph company be con-

sidered only as the agent of the sender of a message, they are liable to third persons, as wrong doers, for any misfeasance in the execution of the duties confided to them; and they will not be relieved from such liability for damages sustained by the negligent transmission of an erroneous message, by the fact that the sender did not pay for its being repeated back, in accordance with a rule of the company, whereby they limited their responsibility to the correct transmission of messages that should be repeated back. Especially, where the mistake consisted in transmitting a different message from the one ordered. *Id.*

10. A telegraph company may be held liable for errors in the transmission of a dispatch directing the sale or purchase of stocks, if the message was given in terms intelligible to the correspondent, though not clearly intelligible to others. *N. Y. Com. Pl.* 1865, *Rittenhouse v. Independent Line of Telegraph*, 1 *Daly*, 474.

11. The printed heading to the paper on which a telegraphic message was written and delivered to the company for transmission, contained a direction to send the message "subject to the above printed conditions and agreement," among which was a stipulation that the company were not to be liable for any error or delay beyond the amount paid for transmission, unless the message were repeated and an additional compensation paid. The message written under this heading was signed by the writer. *Held*, that this constituted a contract binding upon the writer, and that, there being no repetition of the message requested or paid for, the company were not liable in damages for an error in the transmission. It makes no difference in such a case, that the writer of the message did not read the conditions under which he wrote and subscribed his message. [17 *Com. B.* 8, 84, *E. C. L.*; 1 *Metc. Ky. R.* 164; *Sess. L.* of 1848, ch. 265, § 11.] *N. Y. Com. Pl.* 1866, *Bryant v. American Telegraph Co.* 1 *Daly*, 575; *S. P. Mich. Supreme Ct.* 1867, *Western Union Telegraph Co. v. Carew*, 15 *Mich.* 525.

12. — for delay in transmission. A telegraph company, to whose operator a telegraphic despatch is delivered for transmission, from the tenor of which, and statements made by the writer to the operator, it appears that the object is to have an attachment

issued, and that promptness is of great importance, are liable to the writer for the loss of his debt caused by a delay in the delivery of the message, by which the attachment was not levied in time. *N. Y. Com Pl.* 1866, *Bryant v. American Telegraph Co.* 1 *Daly*, 575.

13. —for omission to send. An agent of a telegraph company received a message for transmission, for which the stipulated price was paid, but forgot and neglected to dispatch the same over the wires. *Held*, that the company, having contracted to perform a service within the sphere of its business, for compensation, was liable for any loss or injury resulting from its neglect, and could not claim an exemption contained in its printed notices, from liability for the non-transmission and non-delivery of unrepeatable messages. *Md. Ct. of Appeals*, 1862, *Birney v. New York & Washington Telegraph Co.* 18 *Md.* 341.

14. Plaintiff, by an instrument under the corporate seal, agreed with the Electric Telegraph Company to transmit all his dispatches and such other messages as he could collect or influence, through their telegraph, for a commission on the amount received by the company for their charge for the transmission, the maximum to be 500% per annum, and the minimum 300%. During the existence of this agreement, the chairman of the company entered into a parol agreement with the plaintiff to pay him at the increased rate of 50% per cent. in consideration of the plaintiff's further services in collecting public intelligence and forwarding it by the company's telegraph. These additional services were found to be beneficial to the company. And this agreement was entered upon the minutes of the company, and the plaintiff had received 300% for services in pursuance of it. The deed of settlement provided that all contracts, where the consideration exceeded 50% should be signed by three directors. *Held*, that the parol agreement, whether *ultra vires* or not, having been acted upon and ratified by the company, was binding upon them; and also, that such agreement was no violation of the provision of the charter, that the telegraph should be open to all persons alike, without favor or preference. *Q. B.* 1856, *Reuter v. Electric Telegraph Co.* 37 *Eng. L. & Eq.* 189; 6 *EU. & E.* 341.

15. Measure of damages. A telegraph

company received from the plaintiff a message informing the person to whom it was addressed, where he could get a certain sum of money, which message was, by the negligence of the company, delayed until it was too late for the money to be used as the plaintiff intended, whereby he had lost a valuable contract, and was compelled by the terms of his agreement, to pay damages. The company was not informed of any particular use for which the money was intended. *Held*, that the plaintiff could not recover from the company any thing more than the amount paid for the message, and interest on the money therein mentioned, during the time it was delayed. *N. Y. Supreme Ct.* 1860, *Landsberger v. Magnetic Telegraph Co.* 32 *Barb.* 530.

16. An order to purchase 500 bales of cotton, sent by telegraph, was altered so as to read 2500. Upon the discovery of the mistake, the telegraph company notified the factors thereof. *Held*, 1. That if the company was liable at all, they would have been liable for the loss on an immediate resale of the surplus already purchased, with all charges, and factors' commissions thereon, and, therefore, that the factors, the plaintiffs' agents, were not to accept an offer to pay, which did not include those commissions. 2. That it was the duty of the plaintiffs, as soon as they knew of the mistake, to notify the defendants that they would be held responsible for the cotton purchased beyond the amount ordered, and that unless they received and paid for the same, it would be sold for their account and they be charged with the loss, if any there was by the transaction. *Va. Ct. of Appeals*, 1859, *Washington & New Orleans Telegraph Co. v. Hobson*, 15 *Gratt.* 122.

17. When the plaintiffs had notice of the mistake, part of the cotton had been loaded and part was under contract of affreightment. *Held*, that the loss to be paid, if at all, by the company, was the difference between the cost and charges, and what it would have sold for, part shipped and part contracted for; and that, on failure of the company to take the cotton off their hands at once, if the plaintiffs sent the cotton to Liverpool, with the intent to appropriate the profits, if any, and hold the company liable for loss, if any, they could not recover even for the loss estimated as above stated at

the port of shipment; sending the cotton on with intent to take the profits, being a waiver of any claim against the company. *Ib.*

18. On the other hand, if the plaintiffs looked upon it as a pledge, and sent it on intending only to satisfy the claim which they might have had at the moment of discovering the mistake, and to account to the company for the profits, they did not thereby waive any claim, and it was a question for the jury to say what was the plaintiffs' intent in sending it on. *Ib.*

19. Where the dispatch directed a sale at the board of brokers, and by reason of the error it had to be repeated, in consequence of which it was received too late to be fulfilled at the board, and the stock was purchased on the street at a loss,—*Held*, that the defendants, having placed it beyond the power of the plaintiffs' brokers to make the purchase in the particular manner indicated, could not avail themselves of the fact that the purchase was made in the mode adopted. *N. Y. Com. Pl.* 1865, *Rittenhouse v. Independent Line of Telegraph*, 1 *Daly*, 474.

20. Stock purchased in consequence of such mistake should not be sold without notice to the company, if the plaintiffs desire to hold them responsible for any loss resulting from the sale. *Ib.*

21. Liability for connecting line. A company,—*Held*, liable for a loss on a purchase resulting from an error committed on a connecting line. *De Rutte v. New York & C. Telegraph Co.* 1 *Daly*, 547.

22. In an action against a telegraph company, in California, to recover a penalty of \$500, prescribed by a statute of that State, for a failure to transmit a telegraphic message, it appeared that the plaintiff contracted with the State Telegraph Company for the transmission of a message to Jackson, and that this company, whose line terminated at Sacramento, took the message to the office of the defendant there, and asked to have it forwarded, tendering a price which the defendants refused. *Held*, that the plaintiff could not maintain his action, under the statute, for the refusal. *Cal. Supreme Ct.* 1860, *Thurn v. Alta Telegraph Co.* 15 *Cal.* 472.

23. Liability for negligence in construction. A telegraph company who erect their poles by the side of the road, and allow their

wires to hang so low that the public travel is thereby impeded, will be liable for any damage occasioned thereby to any person, who is using due care in the exercise of his right to travel over any part of the road laid out as a highway. *Me. Supreme Ct.* 1859, *Dickey v. Maine Telegraph Co.* 46 *Me.* 483.

TOWNS.

MUNICIPAL CORPORATIONS.

TRANSFERS.

As to transfers of corporate property, see ASSIGNMENTS; DEEDS; GRANTS; PROPERTY. As to transfer of Stock, see STOCK.

TREASURER.

1. His duty. It is the duty of a treasurer to keep the moneys of his principal distinct from his own, unless it is otherwise agreed; and to pay any balance due on demand. *N. Y. Supreme Ct.* 1857, *Second Avenue R. R. Co. v. Coleman*, 24 *Barb.* 300.

For the powers, duties, and liabilities of treasurers of corporations, in common with other officers, see OFFICERS.

2. His powers.* The official authority of a treasurer of a corporation to collect and pay debts, does not involve the power to sell and assign its securities—*e. g.* a mortgage belonging to it—without authority from the trustees. *N. Y. Supreme Ct.* 1830, *Jackson v. Campbell*, 5 *Wend.* 572.

3. That evidence that a person who indorses a promissory note made payable to a corporation, as "treasurer" of such corporation, is the secretary and general pecuniary manager of their business, not sufficient to show that such transfer is valid,—see *Knight v. Lang*, 4 *E. D. Smith*, 381; 2 *Abb. Pr.* 227.

* Where an agent of a corporation, who was authorized to sign "all notes and business paper," gave accommodation notes in the company's name,—*Held*, that the corporation were liable upon them to a bona fide holder thereof, who took them for value before maturity, notwithstanding the want of authority of the agent to give them for the purposes in question. *Mass. Supreme Ct.* 1867, *Bird v. Daggett*, 97 *Mass.* 404.

The functions of a note teller do not extend to the erasure of the name of one of several makers of a note, simply upon his request. *Ill. Supreme Ct.* 1866, *Marina Bank of Chicago v. Ferry*, 40 *Ill.* 255.

4. The treasurer of a corporation, whose charter provides for the management of the property and affairs of the company by directors, has not, by virtue of his office, any authority to pay the debts of the corporation, or set off the debts due from, by those due to, the company; and a note, given on an arrangement, made with the treasurer, of debts and credits is void, and cannot be enforced. *Me. Supreme Ct.* 1853, *Brown v. Weymouth*, 36 *Me.* 414.

5. The treasurer of a corporation cannot maintain a suit against the company, upon a claim against it, which he has purchased. Such a purchase is an extinguishment of the corporate debt. *Pa. Supreme Ct.* 1853, *Hill v. Frazier*, 22 *Pa. St.* 320.

6. The assuming of a debt against a third person is not within the ordinary powers of the treasurer of the corporation. It is not in the usual course of business, and some special authority so to do must be shown. *Vt. Supreme Ct.* 1861, *Stark Bank v. U. S. Pottery Co.* 34 *Vt.* 144.

7. The treasurer of an incorporated institution for savings has no authority, as such, and without being specially authorized thereunto, to execute a release in the name of the corporation. *Mass. Supreme Ct.* 1850, *Dedham Institution for Savings v. Slack*, 6 *Cush.* 408; *S. P.* 1856, *E. Carver Company v. Manufacturers' Ins. Co.* 6 *Gray*, 214.

8. The treasurer of a manufacturing corporation has authority by virtue of his office, to release a claim for a loss under a policy of insurance issued by him in behalf of the corporation. [6 *Cush.* 408.] *Mass. Supreme Ct.* 1856, *E. Carver Co. v. Manufacturers' Ins. Co.* 6 *Gray*, 214.

9. His liability. A treasurer of a corporation, acting in his own behalf and not by the authority of the company, will be personally liable, notwithstanding he signed his name as treasurer, and might have expected that the company would adopt and ratify his doings. *Me. Supreme Ct.* 1856, *Haynes v. Hunnewell*, 42 *Me.* 276.

10. The treasurer of a corporation is not liable, in his individual capacity, to a stockholder, for refusing to pay him a dividend, although there were funds in the hands of the treasurer sufficient for the payment thereof at the time of his refusal; the remedy of the stockholder in such a case being against the corporation. *Mass. Supreme Ct.* 1839,

French v. Fuller, 23 *Pick.* 108; *S. P.* *Weston v. Gibbs*, *Id.* 205.

11. The treasurer of a corporation, who holds money to pay a dividend which has been declared, and who refuses to pay the dividend upon certain shares, upon the ground that he is himself the owner of the shares, is liable personally to an action of assumpsit for money had and received, brought in the name of the real owner of the shares, to recover the amount of such dividend. *Vt. Supreme Ct.* 1848, *Williams v. Fullerton*, 20 *Vt.* 346.

12. Where the treasurer of a corporation obtains permission to borrow the funds in his hands, upon giving his note with a mortgage; and he gives his note for them without the mortgage, he is not exonerated from liability as treasurer, for the amount. *Me. Supreme Ct.* 1850, *Bluehill Academy v. Ellis*, 32 *Me.* 260.

TRUSTEES.

As to Trustees of corporations, see BOARD; DIRECTORS; OFFICERS.

As to Corporations acting as trustees, see DEVISES; TRUSTS.

TRUSTS.

1. Between corporation and members. An action cannot be maintained against a corporation by one of its stockholders, to compel it to declare and pay a dividend, from funds on hand. A corporation stands in no fiduciary relation to its stockholders. The directors, not the corporate body, are the trustees, and should be parties to any action for the enforcement of the trust. *N. Y. Supreme Ct. Sp. T.* 1867, *Karnes v. Rochester & Genesee Valley R. R. Co.* 4 *Abb. Pr. N. S.* 107. Compare *N. Y. & New Haven R. R. Co. v. Schuyler*, 17 *N. Y.* 592; 7 *Abb. Pr.* 41; *Verplanck v. Mercantile Ins. Co.* 1 *Edw.* 84.

2. — or creditors. When money is deposited in a bank, to be drawn at the pleasure of the depositor, the bank is not liable to an action without a previous demand. The request is parcel of the contract, and must be proved. But where the bank has suspended payment, and closed its doors, and refuses to admit its creditors, a demand would be unavailing, and the bank, by its acts, has

waived the necessity of a demand. *Mass. Supreme Ct.* 1844, *Watson v. Phoenix Bank*, 8 *Metc.* 217.

8. The drawing of drafts, by a creditor, upon the comptroller of a city, and presentment to him, is sufficient to charge the city with notice of such claims, and is equivalent to such an assignment as to constitute the city trustees of the parties interested. *N. Y. Ct. of Appeals*, 1864, *Hall v. City of Buffalo*, 1 *Keyes*, 193.

4. A municipal corporation, having raised a certain sum by taxation, under authority given by the legislature, to pay an amount due a creditor, is not a trustee or agent of such creditor so as to sustain his action for the money received. *N. Y. Superior Ct.* 1867, *Berrian v. Mayor &c. of New York*, 4 *Robt.* 538.

5. The fact that money has been paid to a municipal corporation in a case where it had no legal capacity or power to receive it, will not sustain an action to recover back the money, unless it has been appropriated by the corporation to municipal purposes, and the appropriation was by a valid ordinance. What is "a valid ordinance" considered. *Cal. Supreme Ct.* 1867, *Herzo v. City of San Francisco*, 83 *Cal.* 134.

6. Resulting trust in favor of corporation. Where real estate is purchased, and in fact paid for, with the funds of an incorporated company, a resulting trust is created in favor of the corporation, although the deed therefor is made absolute to a third party, and purports upon its face to be given for his own use and benefit. And a party so taking the title, becomes a trustee for the creditors and stockholders of the corporation; and the trust will be enforced for their benefit at the instance of the receiver. *N. J. Chancery*, 1863, *Stratton v. Dialogue*, 16 *N. J. Eq.* (1 *O. E. Green.*) 70.

7. Where certain subscribers to the stock of a manufacturing company put in property at a valuation and received the stock of the company therefor, and disposed of it as their own, and the company took possession of the property and used it, but, by negligence, no conveyance of the property by deed was made to them,—*Held*, that when the consideration for the property was received, its former owners became trustees of the company and held the title for the company; that any subsequent conveyance by them to

a grantee with notice would be void against the company, and a judgment creditor is in no better situation than such a grantee would be. *N. J. Chancery*, 1853, *New England Manuf. Co. v. Vandyke*, 1 *Stockt.* 498.

8. Power of corporations to take property in trust. Where a corporation has the legal capacity to take real or personal estate, it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that if the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, it cannot be compelled to execute them. But this will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but will simply make it necessary for a new trustee to be substituted, by the proper court having equity jurisdiction, to enforce and perfect the object of the trust. *U. S. Supreme Ct.* 1844, *Vidal v. Girard*, 2 *How.* 127.

9. An aggregate corporation created for pious and charitable objects, may take and hold property as trustee for pious uses. *Mass. Supreme Ct.* 1815, *Trustees of Phillips Academy v. King*, 12 *Mass.* 546.

10. A corporation may be the trustee of a charity, provided the trust be not repugnant to, or inconsistent with, the proper purposes for which the corporation was created; and if the corporation is incompetent to hold as a trustee, the devise or grant will not be thereby rendered void, but equity will appoint a new trustee to carry out the objects of the charity. *N. H. Supreme Ct.* 1857, *Chapin v. School District No. 2 in Winchester*, 35 *N. H.* 445.

11. A corporation cannot be seized of land in trust for purposes foreign to its institution. *N. Y. Supreme Ct.* 1811, *Jackson v. Hartwell*, 8 *Johns.* 422; *N. H. Superior Ct.* 1844, *Trustees &c. of Methodist Seminary v. Peaslee*, 15 *N. H.* 317.

12. Thus where a corporation was empowered "to establish an institution in the town of N. for the instruction of youth,—*Held*, that the corporation could not be a trustee, to hold funds and pay over the income thereof for the support of missionaries. *N. H. Superior Ct.* 1844, *Trustees &c. of Methodist Seminary v. Peaslee*, 15 *N. H.* 317. Compare *Robertson v. Bullions*, 11 *N. Y.* (1 *Kern.*) 243.

13. A corporation chartered for the purpose of receiving and holding in trust prop-

erty committed to them by bequest, &c., in trust for an unincorporated association, with power to execute any trusts confided in them by such association, may take a fund bequeathed to them to be expended under the direction and for the appropriate uses of a committee of such association. *N. Y. Ct. of Appeals*, 1867, *Harris v. American Bible Society*, 4 *Abb. Pr. N. S.* 421. Compare *Sherwood v. American Bible Society*, 1 *Keyes*, 561.

14. A bequest of property to trustees, to be by them paid over to the executive committee of the American Peace Society, to be expended in the cause of peace, is sufficiently definite; and the trust so created will be enforced although said society is still unincorporated. *Ms. Supreme Ct.* 1858, *Tappan v. Deblois*, 45 *Ms.* 122.

15. Although a corporation cannot act as trustee in relation to any matter in which it has no interest, it may accept property partly for its own use and partly for the use of others; and, as a necessary incident, may execute that part of the trust which relates to the others. *N. Y. Chancery*, 1828, *Matter of Howe*, 1 *Paige*, 214.

16. Effect of acceptance. A corporation, which has once expressly accepted a donation upon the trusts and for the purposes for which it was given, cannot afterwards renounce it, but are compellable to hold and apply it to the public and charitable purposes to which it was destined. *Mass. Supreme Ct.* 1832, *American Academy of Arts and Sciences v. Harvard College*, 12 *Gray*, 582.

17. A testatrix by her will gave all her real and personal estate, after payment of debts, &c., to a town for the purpose of establishing, for the use and benefit of its inhabitants, a free public library, and, if the funds should prove sufficient, a free public reading room, to be under the control of trustees to be chosen from time to time by the inhabitants, which trustees were directed to sell certain portions of the real estate and empowered to convey the same with a view to the establishment of the said buildings. It was also provided that the town should forever pay all the incidental expenses of managing and insuring the library and building. The town at first voted to accept the provisions named in the will, and choose trustees accordingly; but afterwards reconsidered this vote, and voted to decline to ac-

cept the same. *Held*, that the will gave the estate to the town in fee; that the trustees were vested with a power, coupled with a trust, which entitled them to apply to the court for instructions relative to the proper discharge of their duty; that the trusts created by the will were charitable trusts, although a burden was annexed to the acceptance thereof by the town; that the town had power to accept the trusts and could not subsequently renounce the same, and that the trust would not be defeated by a failure on the part of the town to pay the expenses enjoined by the will. *Mass. Supreme Ct.* 1865, *Drury v. Inhabitants of Natick*, 10 *Allen*, 169.

18. Identifying corporation intended. A testator bequeathed certain property to "the missions and schools of the Episcopal church about to be established at or near Port Cresson," upon the western coast of Africa. The evidence showed that this mission was established by, and depended for support, on the "domestic and foreign missionary society of the Protestant Episcopal church of the United States." *Held*, that the devise might be construed into a bequest to this last named association. *Pa. Supreme Ct.* 1858, *Domestic and Foreign Missionary Society's Appeal*, 30 *Pa. St.* 425.

Consult BEQUESTS; DEVISES.

19. Substitution. Where a legacy in trust is left to an association incapable of taking, the court will appoint a substituted trustee. *Mass. Supreme Ct.* 1861, *Bliss v. American Bible Society*, 2 *Allen*, 334.

20. Where, by act of the legislature, a municipal corporation holding certain lands in trust for charitable purposes, in which all the inhabitants of the original town were interested, was abolished,—*Held*, that the beneficial interest of those inhabitants remained unimpaired, and that a court of chancery should, on the petition of such inhabitants, appoint a new trustee. *Vt. Supreme Ct.* 1856, *Town of Montpelier v. Town of East Montpelier*, 29 *Vt.* 12.

21. Jurisdiction of equity to enforce corporate trusts. Chancery cannot inquire into a usurpation of power by a corporation or its trustees, with a view of dissolving the corporation, or removing any of its members for acts of misfeasance or nonfeasance, but may enforce the performance of the trusts confided to corporations. *Ky. Ct. of Appeals*,

1841, *Chambers v. Baptist Education Society*, 1 *B. Monr.* 215.

22. Where the mode of application of a charitable devise is left to the discretion of the trustees, the court will not interfere to control that discretion, unless in the case of manifest incapacity to carry out the trust, or some failure or abuse. *Ky. Ct. of Appeals*, 1847, *Attorney General v. Wallace*, 7 *B. Monr.* 611. •

23. But it is proper for the court to retain the control of the case so as to enforce the execution of the trust within a reasonable time. *Id.*

24. That a court of chancery in assuming jurisdiction over corporate trusts, will guard against any perversion of the trust funds by the corporation, holding the trustees personally responsible for breaches of trust,—see *Van Houten v. First Reformed Dutch Church*, 17 *N. J. Eq.* (2 *C. E. Green.*) 126.

25. That a court of chancery will order a charitable fund to be paid to a corporation authorized by law to receive and hold it, without first prescribing a scheme for its application,—see *Attorney General v. Old South Society in Boston*, 18 *Allen*, 474.

26. The dedication of a meeting house to a religious society creates a charitable trust for the use of those who are beneficiaries, valid in equity; and a suit in chancery is the only effectual remedy to maintain the trust, and enjoin multiplied invasions of the alleged rights. *Ky. Ct. of Appeals*, 1888, *Curd v. Wallace*, 7 *Dana*, 190.

27. Where land was conveyed to a church, being dedicated to its use as a charity, and, as such, had been possessed and enjoyed by it without interruption for nearly forty years,—*Held*, that equity would protect the intended beneficiaries in continued possession and enjoyment of the land. [2 *Pet.* 566.] *Ky. Ct. of Appeals*, 1847, *Hadden v. Chorn*, 8 *B. Monr.* 70.

28. A gift of lands was made to two persons as trustees to the use of a certain religious society and their successors forever, holding the same principles. *Held*, that the gift was for a good charitable use, over which chancery has jurisdiction, and was not merely to the society then existing; but, if that ceased to exist, or to be of the same faith, then to any other society holding the same faith which might succeed them; and if, in case of such change of faith, no other society

should lay claim to the gift, the legal estate would remain in the grantees or their heirs, to be preserved by them under the subsisting trust. *R. I. Supreme Ct.* 1862, *Potter v. Thornton*, 7 *R. I.* 252.

29. A church fund arising principally from sacramental contributions, during a period of one hundred and fifty years, will not be deemed to be impressed with the character of a public charity, if only a small portion thereof was specially designated to be for the poor, and was so applied, and there is no clear evidence that the residue was treated or considered as having been devoted exclusively to such object. *Mass. Supreme Ct.* 1866, *Attorney General v. Old South Society in Boston*, 18 *Allen*, 474.

30. Where a religious society is organized as a branch or part of an established denomination, and becomes endowed with property given upon the faith of its being so, the trustees at a given time will not be permitted to employ such property in maintaining doctrine and discipline at variance with that of the denomination, even though they are sustained by a majority of the corporators. *N. Y. Supreme Ct. Sp. T.* 1848, *People v. Steele*, 2 *Barb.* 397; 6 *N. Y. Leg. Obs.* 53.

31. Chancery may interfere to control the management of the property of religious corporations, in so far as it is to be deemed held by the corporation in trust for a definite purpose, and upon the same principles as apply to trust property generally; but cannot interfere upon the mere ground of error or change of doctrine. *N. Y. Chancery*, 1832, *Baptist Church in Hartford v. Witherell*, 8 *Paige*, 296; *N. Y. V. Chan. Ct.* 1833, *Bowden v. McLeod*, 1 *Edw.* 588; *N. Y. A. V. Chan. Ct.* 1844, *Kinskern v. Lutheran Churches*, 1 *Sandf. Ch.* 489; *N. Y. Supreme Ct. Sp. T.* 1848, *People v. Steele*, 2 *Barb.* 397; 6 *N. Y. Leg. Obs.* 55. And see *Miller v. Gable*, 2 *Den.* 492; also RELIGIOUS CORPORATIONS.

32. A bill was brought to enforce a trust alleged to have been established originally for the benefit of a certain town, in its parochial capacity, for the support of the ministry, averring that the town had ceased to act in a parochial capacity, and that the plaintiffs were their successors in that capacity, and entitled to the benefit of the trust fund. No trust was shown, arising under a deed or will, or in the settlement of an estate. *Held*, that the facts did not make out a case of

trust, of which the court had jurisdiction in equity. *Mass. Supreme Ct.* 1837, First Cong. Soc. in *Raynham v. Trustees of Funds &c.* in *Raynham*, 19 *Pick.* 492.

83. Who may invoke it. A corporation which is trustee of funds for public purposes, cannot be made accountable in equity to any private individual or other corporation by way of suit, though the circumstances be such as would render it accountable to the Crown on an information. *H. of Lords*, 1845, *Skinner's Co. v. Irish Society*, 12 *Clark & F.* 425, 487.

84. In Kentucky, a bill against an eleemosynary corporation, to enforce a trust, may be filed by the attorney general, by the founder or his heirs, or by a beneficiary having an interest in the use, or any other person having a vested interest in the fund. *Ky. Ct. of Appeals*, 1841, *Chambers v. Baptist Education Society*, 1 *B. Monr.* 215.

85. If an incorporation be appointed a trustee to execute trusts under a will, which are in themselves valid, neither the heirs of the testator nor any other private person can contest the right of the corporation to act; that can only be done by the State which granted the charter. [2 How. 189.] *Miss. Ct. of Errors*, 1846, *Wade v. American Colonization Society*, 7 *Smad. & M.* 663.

86. A. B. and others conveyed a tract of land to the trustees of Lane Seminary and their successors forever. In the deed of conveyance, the grantors covenanted that in no case should any of the property revert to them, but in case the seminary should fail, or become extinct, it should go to certain religious and benevolent societies. *Held*, that the visitatorial power of all the donors became vested in the trustees, subject to the control of chancery, and that one of the donors could not maintain a bill in chancery for the purpose of inquiring into the manner in which the trustees discharged their duties, and to control them in the appointment of professors. *Ohio Supreme Ct.* 1848, *Kemper v. Trustees of Lane Seminary*, 17 *Ohio*, 293.

87. What is a breach of trust. The stockholders leased the whole property to the president, and he subsequently assigned it for the benefit of his individual creditors. *Held*, that the assignment was a breach of trust, and properly cognizable in equity. *N. Y. Supreme Ct.* 1851, *Conro v. Port Henry Iron Co.* 12 *Barb.* 27.

88. What is not. A conveyance of real estate was made to a religious society, in trust, as a perpetual fund, with directions that the rents, issues and profits thereof, should be applied, under the supervision of the official body representing the corporation, to the support of the gospel among the colored people of certain cities, and the fund was so applied. *Held*, that there was no violation of the trust, although some of the colored people and some of the religious bodies of those cities did not share in the distribution. The discretion of the trustees as to the distribution of the fund, although it may not be judiciously exercised, so long as it is honestly exercised, will not be interfered with. *Pa. Supreme Ct.* 1864, *Pulpress v. African M. E. Church*, 48 *Pa. St.* 204.

89. A subscription was raised to build a house of public worship, and the fund committed to the management of certain trustees, to purchase ground and build a house to be used by the Methodist Episcopal church half the Sabbaths in the month, and the other half by other denominations. The same trustees were authorized to sell the house, after a title was acquired, to another denomination, and vest the fund in another house for the same church exclusively, which was done. *Held*, that the trust was well performed. *Ky. Ct. of Appeals*, 1847, *Alexander v. Slavens*, 7 *B. Monr.* 351.

40. Where a devise is made for the benefit of the poor children of a town, the word "town" is not to be so construed as to confine the benefit of the devise to the limits of the town as it existed at the time of the testator's death, but it is to be extended to all present or future additions to such town. *Ohio Supreme Ct.* 1867, *McIntire v. City of Zanesville*, 17 *Ohio St.* 352.

Consult DEVICES.

41. If the officers of a religious society intermingle funds held by them upon distinct trusts, some of which are charitable, and others, although not strictly charitable, are in the nature of religious uses, and there is evidence by which the amount of each fund can be approximately ascertained, the charity will not for that reason be entitled to the whole amount; but the court will determine, with as much accuracy as possible, the amount justly belonging to each fund. *Mass. Supreme Ct.* 1866, *Attorney General v. Old South Society in Boston*, 13 *Allen*, 474.

42. Enforcing corporate trusts, *cy pres*.*

If a gift made in the lifetime of the donor to a corporation for specific charitable uses, cannot be applied in the exact mode prescribed by him, the property does not go to another corporation which he has made his residuary legatee for a similar charitable purpose; but is to be applied by the donee, under the direction of a court of equity, in such a manner as to carry out the general charitable intent of the donor. *Mass. Supreme Ct.* 1832, *American Academy of Arts and Sciences v. Harvard College*, 12 *Gray*, 582.

43. The doctrine of *cy pres* does not prevail in North Carolina; and if the intention of the testator cannot be literally fulfilled, a trust results for the heir, or next of kin. Thus, where a testator bequeathed property in trust for the support of a minister of a specified denomination, who should preach at a certain meeting house, and a majority of that congregation being of a different denomination, refused to permit the minister to officiate in their church,—*Held*, that a trust resulted, although the minority party offered to erect another church edifice near the one mentioned by the testator. *N. C. Supreme Ct.* 1828, *McAuley v. Wilson*, 1 *Dev. Eq.* 276.

44. In South Carolina, if a charitable bequest to a religious congregation fail, because the government of the denomination to which it is attached is such as to prevent its receiving the benefits intended, the court will not divert the legacy to other kindred objects. *S. C. Ct. of Errors*, 1847, *Attorney General v. Jolly*, 2 *Strobb. Eq.* 879.

45. If a society such as is described in the will did not exist at the time of the testator's death, or cannot be found when the controversy arises, a bequest must (in Alabama where the doctrine of *cy pres* as applied to charitable bequests is not recognized,) be considered and disposed of as a lapsed legacy. *Ala. Supreme Ct.* 1854, *Carter v. Balfour*, 19 *Ala. N. S.* 814.

46. A bequest to the westerly part of a town for a religious society closed with a pro-

vision, that if the settlement was not made as required, the fund should go to another religious society. *Held*, that in case of a non-fulfilment of the condition by the inhabitants of the westerly part, there would be no failure of the charity which would authorize the court, sitting in equity, to interfere, and settle the charity anew by the doctrine of *cy pres*. *N. H. Superior Ct.* 1843, *Second Congregational Society v. First Congregational Society*, 14 *N. H.* 315.

TURNPIKE COMPANIES.

[This term is employed as including all corporations organized to maintain public highways, whether called, in the decisions cited, Turnpike companies or Plankroad companies, or otherwise.]

1. What is a "turnpike company." A road on which toll gates are erected and tolls taken, is a turnpike road. *Northam Bridge & Co. v. London & Southampton Railway Co.* 6 *Mees. & W.* 428; 1 *Eng. Railw. Cas.* 658; *Regina v. East & West India Docks & C. Railway Co.* 22 *Eng. L. & Eq.* 113; 22 *Law J. N. S. Q. B.* 380; 17 *Jur.* 1181; 5 *Ell. & B.* 466.

2. The power to charter such company. The legislature have the power to authorize companies chartered to construct turnpikes,* to construct them on existing public roads, and the constructing of such turnpikes abolishes the old roads on which they are located, or which run parallel with and adjoining to them. *Tenn. Supreme Ct.* 1843, *Nolensville Turnpike Co. v. Baker*, 4 *Humph.* 315.

3. The legislature have power to grant to turnpike corporations, the right to build a road over an existing highway, and to maintain the same by tolls. *Vt. Supreme Ct.* 1839, *Panton Turnpike Co. v. Bishop*, 11 *Vt.* 198.

4. Where, by the act of incorporation of a turnpike company, a committee was appointed to locate the road, and they established it upon a pre-existing highway,—*Held*, that this was equivalent to an express grant to

* Lord Eton's statement of the rule by which a trust is enforced *cy pres*, is as follows: If a testator has manifested a general intention to give to charity, the failure of the particular mode, in which the charity is to be effectuated shall not destroy the charity; but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished. *Moggridge v. Thackwell*, 7 *Ves.* 26, 60; 3 *Bro. Ch. Cas.* 517.

* Where the charter of a municipal corporation confers on the corporate authorities power to enact necessary laws and regulations in relation to the streets, public buildings, and, in general, for the welfare of the city, but does not authorize them to construct a plankroad or bridge beyond the corporate limits, a loan of the city bonds to a plankroad company for the construction of a plankroad and bridge beyond such limits is unauthorized and void. *Ala. Supreme Ct.* 1857, *City Council of Montgomery v. Montgomery & Wetumpka Plankroad Co.* 31 *Ala. N. S.* 76.

that effect. *Vt. Supreme Ct.* 1889, *Panton Turnpike Co. v. Bishop*, 11 *Vt.* 198.

5. — to alter charter. A statute which authorizes the proprietors of a toll bridge, built many years previously under the power conferred by their charter, to build and maintain a turnpike, at their own expense, leading toward their bridge, and separated therefrom only by a public highway of less than a mile long, and to take tolls on such turnpike, does not create a new and distinct franchise, but only enlarges the franchise conferred by their charter. *Mass. Supreme Ct.* 1854, *Commonwealth v. Hancock Free Bridge Corporation*, 2 *Gray*, 58.

6. The charter of a bridge company conferred the right of collecting certain tolls for 70 years, and provided that the bridge should have a draw of a certain width, for the passage of vessels, and that the company, during the 70 years, should keep the bridge in repair, subject to the inspection of the legislature, and that the grant should not operate to injure the property or privileges of individuals. Twenty-four years afterwards, the legislature, by statute, directed the company to open the draw for the passage of any vessel on a prescribed notice, without expense to the owner thereof, under a penalty. *Held*, that this statute was warranted by the charter, and that being merely co-extensive with the power of inspection reserved by the legislature was not a violation of the rights of the company under their act of incorporation. *Conn. Supreme Ct.* 1821, *New Haven &c. Toll Bridge Co. v. Bunnel*, 4 *Conn.* 54.

7. Where an act was passed, authorizing a company to construct a turnpike and erect gates, and containing no reservation for altering the charter,—*Held*, the company having built the road and erected their gates, that a subsequent act requiring the company to remove their gates was unconstitutional. *Pa. Supreme Ct.* 1867, *Attorney General v. Germantown &c. Turnpike Road*, 55 *Pa. St.* 466.

8. How charter should be construed. The grant of the franchise of a turnpike company is to be strictly construed; nothing passes to the grantee by implication; and the grant of the franchise is not exclusive unless it is made expressly such by the grant itself. *Cal. Supreme Ct.* 1864, *Bartram v. Central Turnpike Co.* 25 *Cal.* 288.

9. Instances. The charter of a turnpike

company provided that their road should run from, &c., to the city of Hudson, but that the toll-gate should not be nearer than three miles from the termination of the road. *Held*, that "to" must be taken inclusively (this construction being confirmed by another section of the charter); and that a toll-gate erected within that city, but more than three miles from the main street, and the compact part of the city, was lawfully erected. *N. Y. Supreme Ct.* 1818, *Farmers' Turnpike Co. v. Coventry*, 10 *Johns.* 389.

10. An act incorporating a turnpike company directed the commissioners to select the shortest and best route between two specified towns. *Held*, that the intent of the legislature, as derived from the terms of said act, was, that the road should run from the limits of the corporation of one town, to the limits of the corporation of the other. *Tenn. Supreme Ct.* 1841, *Franklin & Columbia Turnp. Co. v. Campbell*, 2 *Humph.* 467.

11. Sufficiency of articles of association. An omission in an act incorporating a plank-road company, to designate and limit the amount of capital stock, or to prescribe the value of the shares, does not invalidate the act. All that is required of the company for a full enjoyment and exercise of the granted franchise is, that it shall limit its operations to the consummation of the object contemplated by the act, *Fla. Supreme Ct.* 1857, *Kirksey v. Florida &c. Plankroad Co.* 7 *Fla.* 23.

12. Articles of association of a corporation set out the purpose of the subscribers to construct a turnpike road, described the location, specified the name of the company, fixed on the amount of capital and number of shares, and promised to pay twenty-five dollars for each share subscribed for. *Held*, that they were sufficient for the formation of a company. *Ind. Supreme Ct.* 1862, *Wert v. Crawfordville & Alamo Turnpike Co.* 19 *Ind.* 242.

13. — of subscriptions for stock. Subscriptions for stock, under the New York turnpike act (1 *N. Y. Rev. Stat.* 2 ed. 581), must be absolute. Conditional subscriptions are void. *N. Y. Supreme Ct.* 1841, *Butternuts & Oxford Turnpike Co. v. North*, 1 *Hill*, 518. And see *Fort Edward &c. Plankroad Co. v. Payne*, 15 *N. Y.* 588.

14. In an action upon a subscription to stock of a plankroad company, it is not an objection to the validity of the incorporation

that the proposed road is less than five miles long. *N. Y. Ct. of Appeals*, 1856, *Eastern Plankroad Co. v. Vaughan*, 14 *N. Y. (4 Kern.)* 546.

15. Right to commence operations. A plankroad company may go into operation before the whole nominal amount of its stock is subscribed. *N. Y. Ct. of Appeals*, 1854, *Schenectady & Saratoga Plankroad Co. v. Thatcher*, 11 *N. Y. (1 Kern.)* 102; 1854, *Rensselaer & W. Plankroad Co. v. Barton*, 16 *N. Y.* 457, *note*; *N. Y. Supreme Ct.* 1849, *Hamilton & Deansville Plankroad Co. v. Rice*, 7 *Barb.* 157.

16. The charter of a turnpike company authorized the erection of a toll-gate within two miles of a certain place, when the road should be completed seven miles from the limits of the corporation. *Held*, that such company had no right to establish the gate until the terms of charter had been complied with; and, though established upon the warrant of the governor, such company had no right to exact toll. *Tenn. Supreme Ct.* 1841, *Franklin & Columbia Turnpike Co. v. Campbell*, 2 *Humph.* 467. Compare *People v. Kingston & Middletown Turnp. Co.* 23 *Wend.* 193.

17. Power to take land. Where an act of incorporation of a turnpike company limits the power of the corporation to the acquisition of such real estate as may be necessary to fulfil the objects of the corporation, and declares it shall hold real property for no other purpose, they acquire only an easement and not a fee in the land. *N. Y. Supreme Ct.* 1862, *Dunham v. Williams*, 86 *Barb.* 136. See also, *Northern Turnp. Co. v. Smith*, 15 *Barb.* 355.

18. A turnpike company, after the condemnation of land for the purposes of the corporation, own the road, but not the ground over which it passes; and their ownership of the road does not vest in them, nor take from the owner of the land, any right but such as is essential to the enjoyment of their own rights and franchises. [3 B. Monr. 517.] *Ky. Ct. of Appeals*, 1859, *Kelly v. Donahoe*, 2 *Meta.* 482.

19. Thus, although a turnpike company, having the right under their charter to make such excavations, fills and embankments, as the proper construction of the road, according to its prescribed grade and width, render necessary, may, as incidental there-

to, lawfully quarry stone and earth from points within the lines of the road, and from the lands of one person to those of another, yet, they have no such right to the quarries and soil under the space occupied by the road, for the purpose of repairing it. *Id.*

20. Though a charter provides as to lands acquired, that the company should have and hold the same to them, their successors, and assigns forever, yet title is vested only for the purposes of the road, and reverts to the original owners when the road is abandoned. *N. Y. Supreme Ct.* 1834, *Hooker v. Utica & Minden Turnpike Road Co.* 13 *Wend.* 371.

21. A landowner's agreement with an agent of a turnpike company, that he will let the corporation have his land for the turnpike for a certain sum, &c., followed by the use of the land by the corporation for the turnpike, without taking a conveyance or assessing his damages, is to be regarded not as a covenant to convey, but as a consent to an easement; and the owner may recover the price agreed, without proving a memorandum in writing, signed by himself. *Mass. Supreme Ct.* 1809, *Tucker v. Bass*, 5 *Mass.* 164.

22. The charter of a turnpike corporation authorized the company to take a strip of land, not exceeding one hundred feet in width, to erect gates and collect toll. *Held*, that they had no right to appropriate, for a toll-house, land lying without the line of the road constructed by them. *Ohio Supreme Ct.* 1842, *Kemper v. Cincinnati &c. Turnpike Co.* 11 *Ohio*, 392.

23. — to occupy highway. Authority conferred upon a plankroad company, by the legislature, to construct a plankroad between two designated points, implies no right to appropriate to that purpose, the whole of a public highway, without express words of permission. The grant is in derogation of common right, and must be strictly pursued. *Ga. Supreme Ct.* 1851, *Justices &c. v. Griffin & West Point Plankroad Co.* 9 *Ga.* 475.

24. The interest of the public in public roads, consisting of a perpetual easement, may, at the discretion of the legislature, be transferred, without any pecuniary equivalent, to a plankroad company, such plankroad still remaining a public highway, and subject to the same uses and purposes as before. In such case the corporation becomes the as-

signee of the public.* *Ohio Supreme Ct.* 1858, *Chagrin Falls &c. Plankroad Co. v. Cane*, 2 *Ohio St.* 419.

25. A plankroad company which has acquired a right to use a public highway for the location and construction of their road, have no right to exclude the public from it or interrupt the enjoyment of their right of way, while the change is making. They are bound, like town officers engaged in repairing roads, to carry on the work with as little inconvenience to the public as is reasonably practicable, and if, through their neglect, a person passing with ordinary care and prudence, suffers damage, the company are liable. *N. Y. Ct. of Appeals*, 1856, *Ireland v. Oswego &c. Plankroad Co.* 18 *N. Y.* (8 *Kern.*) 526.

26. Although the legislature may grant power to a turnpike company to take *public* property, such as a county bridge, without compensation, yet where the charter restrains it from taking "lands," without compensation, it may be compelled on taking a bridge to pay the county whose bridge it uses, compensation for the easement. *N. J. Chancery*, 1866, *Freeholders of Monmouth County v. Red Bank &c. Turnp. Co.* 18 *N. J. Eq.* (8 *C. E. Green.*) 91.

27. Damages for land taken. In the assessment of damages for land taken for a turnpike, compensation is to be given for all injury occasioned by the laying out of the road to the land through which it passes, in-

cluding not only the value of the land actually taken, but all damage arising from inconvenient division of the tract, and the necessity for additional fencing; without regard to speculative advantages or disadvantages to the owner, from the construction of the highway. *N. H. Supreme Ct.* 1857, *Petition of Mount Washington Road Co.* 35 *N. H.* 184.

28. Construction of the road. An act incorporating a turnpike company prescribed, as the commencement of the road, a point near a point designated. *Held*, that a reasonable conformity with the requisitions of the act was all that could be expected, and that a variation of a mile and a half was not unreasonable distance. *Tenn. Supreme Ct.* 1841, *Hadley v. Harpeth Turnp. Co.* 2 *Humph.* 555.

29. The charter also required that the chief engineer of the State should survey and mark the most direct and practicable route for the construction of the road, and made it the duty of the company to follow that route. The chief engineer did not actually survey and make the route, but only gave a description such as would "serve to guide the directory in its actual location." *Held*, that the directory were not bound by such designation of the engineer. *Id.*

30. If the right of way of an old highway, established by long and uninterrupted user, is granted by the county court to an incorporated company, for the purpose of constructing thereupon a plankroad, it is not within the power of the company receiving such grant, to depart from the line of the old road at such points as they may choose, and thus confer upon the owners of the soil over which the old road passes, the right to obstruct the remaining portions not appropriated by the company for the uses intended, especially, if such obstruction result in inconvenience to the public, arising out of the fact that another highway intersecting the road granted to the company is thereby obstructed. *Tenn. Supreme Ct.* 1852, *Topp v. Garrett*, 1 *Swan*, 459.

31. Where the statute prohibits directors of plankroad companies from being concerned, directly or indirectly, in any contract for the making or working of the road, or any part thereof, during the time of their directorship, a contract between such a company and two of its directors for the construction of a part of the road by such di-

* A plankroad company were incorporated with power to construct a road upon a public highway with the franchise of taking tolls thereon, no limit being fixed for its duration. Subsequently a company were incorporated to construct a horse railroad between the same *termini*, and were authorized to purchase the plankroad; and to lay rails upon their track, with the proviso that, in the former case, the plankroad should be continued, and in the latter, that, the rails should be laid so as not to obstruct public travel. Upon a bill filed by a stockholder in the plankroad company to restrain the commission of acts prejudicial to his interests, *Held*,

1. That the occupation of a part of the ancient highway on which the plankroad was constructed, by the railroad, with the consent of the plankroad company, but without the approval of an individual stockholder, was no violation of the rights of such stockholder.

2. That the sale by the plankroad company of the whole or a part of their road to the railroad company, without the personal consent of a stockholder, was not such an infringement (if any) of his rights as a court of equity would restrain by injunction.

3. That a change of the route of the plankroad by authority of the legislature, at the instance of the plankroad company, was not a fundamental change of the objects of the company, or a fundamental alteration of the structure thereof, which equity would restrain at the suit of a stockholder. *N. J. Chancery*, 1868, *Story v. Jersey City &c. Plankroad Co.* 18 *N. J. Eq.* (1 *C. E. Green.*) 18.

rectors, though acquiesced in by the stockholders, is absolutely void. The statute cannot be waived. *N. Y. Supreme Ct.* 1854, *Barton v. Port Jackson & Union Falls Plankroad Co.* 17 *Barb.* 397.

32. Its width. When a corporation, organized to build a turnpike or plankroad, is required by its charter to cause its road to be laid out of a certain width, that is a condition, which the corporation must perform, to entitle it to a continuance of its franchise. The fact that it was laid out upon an ancient highway, furnishes no excuse for the omission to make it of the required width. *N. Y. Supreme Ct. Sp. T.* 1857, *People v. Fishkill & Beekman Plankroad Co.* 27 *Barb.* 445.

33. Materials. The right of a turnpike company to quarry stone within the line of its road for the purposes of its construction, which is incidental to the power to construct such a road, does not extend to authorize them to quarry stone for the purposes of repairing the road, although the land upon which it was built may have been used by the public for more than twenty years as a highway, especially where the statutes make special provision authorizing the company to condemn quarries, &c., for materials necessary for repairs. *Ky. Ct. of Appeals*, 1859, *Kelly v. Donahoe*, 2 *Metc.* 482.

34. A privilege granted to a turnpike company, of taking gravel for "perfecting" their road,—*Held*, not to entitle the company to take gravel for "repairing" the same. *N. J. Supreme Ct.* 1837, *Whitenack v. Tunison*, 1 *Harr.* 77.

35. A charter which provides that a road "shall be bedded with stone, gravel or such other materials as may be found on the line thereof," does not authorize the use of the ordinary soil, where this is not gravel or some other hard material. The use of the word "arch" requires that the center of the bed of the road should be rounded up or be highest at the center. *N. Y. Ct. of Appeals*, 1866, *People v. Waterford & Stillwater Turnpike Co.* 2 *Keyes*, 327.

36. Official certificates to the construction of a company's road.—*Held*, not conclusive against the State in a proceeding afterwards instituted to test the sufficiency of its construction. *N. Y. Supreme Ct.* 1840, *People v. Kingston & Middletown Turnp. Co.* 23 *Wend.* 193; *Sp. T.* 1857, *People v. Fishkill & Beekman Plankroad Co.* 27 *Barb.* 445.

37. Power to erect toll gates. Under a power given by a charter to construct a road between specified points, and to appropriate land of specified width on which to construct it, and perform every act necessary thereto, and to collect toll from travelers, the company may, after having acquired the right of way, dig a well and build a toll-house within the limits of the width of land so taken, for the use of the toll-gatherer. Incident to the power to demand and receive tolls, is the authority to appoint agents; to provide tenements in which to shelter them from the weather; and to furnish and prepare for them necessary facilities for transacting that peculiar business of the company, at the place where it is required to be done. *Ohio Supreme Ct.* 1856, *Ward v. Marietta & C. Newport Turnp. Co.* 6 *Ohio St.* 15; *S. P. Pa. Supreme Ct.* 1841, *Ridge Turnp. Co. v. Stoever*, 2 *Watts & S.* 548; 6 *Id.* 378.

38. And the fact that it does not appear that the compensation awarded was intended to cover anything more than the right of way, forms no valid objection. *Ohio Supreme Ct.* 1856, *Ward v. Marietta & Newport Turnp. & C. Co.* 6 *Ohio St.* 15.

39. Toll gates on a turnpike road may be erected in the manner authorized by the charter, although so doing intersects and stops an old highway. The charter is to be considered as so far controlling the use of the old road. *N. Y. Supreme Ct.* 1803, *People v. Denslow*, 1 *Cai.* 177; 1813, *Farmers' Turnp. Co. v. Coventry*, 10 *Johns.* 389. Compare *State v. Passaic Turnp. Co.* 3 *Dutch.* 217.

40. Where a highway has been laid out to intersect a turnpike road, and terminate at the line thereof, a gate, placed laterally upon the turnpike, at the end of the highway, is not an obstruction to the highway, within the meaning of an act incorporating a turnpike company,—which prohibited the erection of gates upon such parts of the road as were then a public highway. *N. J. Supreme Ct.* 1827, *Ayres v. Turnp. Co.* 4 *Halst.* 33.

41. The fact that a post, which is at the end of a fence, extending from the gate so as to prevent carriages passing from the highway to the turnpike road, stands on the highway, can furnish no defence in an action by the turnpike company to recover tolls. *Id.*

42. A power to erect toll gates on a specified "street or road or elsewhere," being ambiguous, may be construed to mean on the

road of that name without the city limits, and on the street within the city limits; for this construction, although it abridges the grant, favors public convenience and trade. *Pa. Supreme Ct.* 1850, *Stormfeltz v. Manor Turp. Co.* 18 *Pa. St.* 555.

43. A gate so placed as to compel persons coming on a converging road to the village, to pay half toll for traveling 250 rods upon the plankroad,—*Held*, unjust to the public interest. *N. Y. Supreme Ct.* 1852, *McAllister v. Albion Plankroad Co.* 11 *Barb.* 610.

44. A gate, fixed two miles and three-quarters from the point, "near" which, it was by statute, required to be fixed,—*Held*, not near it, within the meaning of the act. *N. Y. Supreme Ct.* 1820, *Griffen v. House*, 18 *Johns.* 397. And see *People v. Collins*, 19 *Wend.* 56. Compare *People v. Denslow*, 1 *Cai.* 177.

45. — or to alter them. A turnpike corporation, having by its charter power to erect so many toll gates as may be necessary to collect the tolls, may increase the number of gates originally established by the corporation, and change their situation, from time to time, to prevent travelers from evading the payment of tolls, &c., provided the gates are not placed in any situation prohibited by the charter. *N. H. Superior Ct.* 1839, *Cheshire Turnpike v. Stevens*, 10 *N. H.* 133.

46. A turnpike company, under an act of incorporation allowing said company to erect gates and receive toll, and placing no restrictions upon their removal by the company, may, from time to time, alter the location of such gates. *Vt. Supreme Ct.* 1839, *Fowler v. Pratt*, 11 *Vt.* 369.

47. Where the charter of a turnpike company empowered them "to erect and establish a toll gate on their road, in the most convenient place, to be by them determined," and in pursuance of this authority, a gate was erected and established in a certain place, as being the most convenient spot,—*Held*, the discretion vested by the charter in the company having been exercised, that the power of removal was exhausted, and could not be revived so as to authorize the company to change and move the gate to suit their convenience. *Conn. Supreme Ct.* 1834, *State v. Norwalk & Danbury Turnp. Co.* 10 *Conn.* 157; 1887, *Hartford &c. Turnp. Soc. v. Hosmer*, 13 *Conn.* 361.

48. A statute incorporating a turnpike corporation, authorized the corporation to

erect a gate in such place as should be directed by a committee appointed by the statute; and the committee accordingly, by their report, prescribed the limits within which the gate should be erected. *Held*, that the corporation, having once established a gate in conformity with such report, could not afterwards remove it to another place at their own discretion, although within the limits prescribed; and that they could not legally demand toll at the place to which the gate was so removed. [18 *Johns.* 397.] *Mass. Supreme Ct.* 1835, *Hartford & Dedham Turp. Corp. v. Baker*, 17 *Pick.* 432.

49. Remedy for injuries to the road. If selectmen of a town lay out a highway around a turnpike gate, for the purpose of enabling those who travel along the turnpike road to avoid the payment of tolls, they are liable, in any action on the case, for the damages sustained by the turnpike corporation. *N. H. Superior Ct.* 1839, *Cheshire Turnpike v. Stevens*, 10 *N. H.* 133. And see *Matter of Flatbush Ave.* 1 *Barb.* (*N. Y.*) 286.

50. A turnpike company, incorporated in 1799, were authorized, by their charter, to erect and keep up turnpike gates on their road. In 1818, the company erected a gate, with upright posts, supporting a roof 12 feet 6 inches above the road, which, at the time the charter was granted, and the gate established, was the usual height of turnpike gates. Many years afterwards the defendant came to the gate in question with a load of clocks, the greatest height of the load being 13 feet above the road, and higher than such loads usually were. The defendant paid the toll, and the gate was opened in the usual way; but, not being able to get his load under the cross-beam and roof, the defendant forcibly removed them. In an action of trespass by the company for this injury,—*Held*, that the company had reasonably exercised their right, and that the defendant was liable. *Conn. Supreme Ct.* 1836, *Straits Turnp. Co. v. Hoadley*, 11 *Conn.* 464.

51. In an action against a turnpike corporation for damages done to merchandise through the insufficiency of a bridge, under a statute prohibiting the passage of wagons containing more than a specified weight over bridges with abutments over fifty feet apart, without the consent of the toll gatherer or agent of the turnpike corporation,—*Held*, that the assent required by the statute, must be giv-

en upon a notice to the toll gatherer, that the load exceeded in weight the specified amount. *Mass. Supreme Ct.* 1830, *Pomeroy v. Fifth Mass. Turnp. Corp.* 10 *Pick.* 35.

52. A mortgage of the income and tolls of a turnpike company does not affect its ownership; and, notwithstanding such mortgage, the company may have trespass for tearing down a toll gate. *N. Y. Supreme Ct.* 1818, *Farmers' Turnpike Co. v. Coventry*, 10 *Johns.* 389.

53. One sued for tearing down a toll gate, though he cannot set up a forfeiture of the franchise, may show that the grant has expired by its own limitation. *N. Y. Supreme Ct.* 1844, *Adams v. Beach*, 6 *Hill*, 271. And see *People v. Manhattan Co.* 9 *Wend.* 351, 382.

54. When the right to demand tolls arises. An act of the legislature created a turnpike corporation, and authorized the taking of certain toll, with a proviso, that no toll should be taken until a certain sum had been expended on the road. After the road was made, and a gate erected, another act of the legislature authorized the corporation to take certain tolls at the gate thus erected. *Held*, that by virtue of the latter statute, the corporation were authorized to take toll at the gate, whether the sum mentioned in the first act had been expended upon the road or not. *N. H. Superior Ct.* 1833, *Hinsdale Bridge v. Warren*, 6 *N. H.* 154.

55. A turnpike company, under their charter, built a plankroad a distance of fifty miles, and erected gates, taking possession of an existing highway, without purchasing it or receiving a release of it, from the road officers of the several towns through which it passed. *Held*, that the company had a right, under their charter, to take possession of the highway, without the release or consent of the supervisors and commissioners of highways of the several townships through which they built their road; and that the recording of the survey of the road, was not a condition precedent to their right to exact toll of travelers using their road. *Mich. Supreme Ct.* 1853, *Detroit & Howell Plankroad Co. v. Fisher*, 4 *Mich.* 37.

56. Where the act of incorporation of a turnpike company required the company to keep their rates of toll "exposed to view,"—*Held*, that, although it was not sufficient that such rates were written and posted up

in the toll house, but they ought to be exposed to the view of travelers passing the gate, yet, travelers were not excused from paying toll in consequence of such neglect of the company. The redress should be by public prosecution. *Vt. Supreme Ct.* 1840, *Centre Turnpike Co. v. Smith*, 13 *Vt.* 212.

57. Extent of the right. Where a company is authorized to erect gates at such places as they see fit, and to demand tolls at certain rates, for every ten miles, and in the same proportion for a shorter distance, they may demand tolls according to the distances between the gates or turnpikes on the road, and are not limited to the distance traveled by the persons from whom tolls are demanded. *N. Y. Supreme Ct.* 1803, *Stuart v. Rich*, 1 *Cai.* 182; 1840, *People v. Kingston & Middletown Turnpike Co.* 23 *Wend.* 193; 1850, *Mallory v. Austin*, 7 *Barb.* 626.

58. The toll gatherer has a right to exact payment in advance, of toll from his gate to the next, or for the distance between them which the traveler admits he is about to travel. *N. Y. Supreme Ct.* 1853, *Kenyon v. Seeley*, 14 *Barb.* 631.

59. A turnpike company,—*Held*, to have a right to demand toll of a person passing its gates, in advance of his actually traveling on the road; and, on his refusal to state how far he intended traveling thereon, to take toll to the next gate. *Mich. Supreme Ct.* 1853, *Detroit & Howell Plankroad Co. v. Fisher*, 4 *Mich.* 37.

60. Under the New York act of 1847, 226, § 35, a plankroad company may demand and receive toll at a gate, for the whole distance between it and the next gate in the direction from which the traveler has come, without reference to the fact that he may not have traveled the whole distance upon the road. [1 *Cai.* 182; 23 *Wend.* 193.] *N. Y. Supreme Ct.* 1850, *Mallory v. Austin*, 7 *Barb.* 626. To similar effect, 1852, *McAllister v. Albion Plankroad Co.* 11 *Id.* 610.

61. Tolls are not demandable of an individual for traveling on turnpike roads, between two gates, unless he either passes through a gate, or having used the road on one side of a gate, passes around it for the purpose of avoiding the payment of toll, and then travels the road again. *Ky. Ct. of Appeals*, 1841, *Lexington & Georgetown Turnpike Road Co. v. Redd*, 2 *B. Monr.* 80.

62. Where the charter of a turnpike pro-

vided that tolls should be demanded and paid at convenient toll gates,—*Held*, that tolls were demandable only at the toll gates, and that a person who did not pass a toll gate, was not liable for toll. *N. C. Supreme Ct.* 1849, *Buncombe Turnpike Co. v. Mills*, 10 *Ired. Law*, 80.

63. Description of the vehicle. Where a vehicle is within a general description of vehicles subject to a certain toll, and is also embraced by a specific description of vehicles subject to a less toll, the latter is to determine the amount of the toll. Therefore, where the toll prescribed in the charter of a turnpike company for a four-wheeled pleasure carriage was twenty-five cents, and for a wagon ten cents,—*Held*, that a vehicle which was a four-wheeled pleasure carriage and a wagon, was subject to a toll of ten cents only. *Conn. Supreme Ct.* 1840, *Middlesex Turnp. Co. v. Freeman*, 14 *Conn.* 85.

64. That a clause in a turnpike charter imposing tolls upon "coaches, chariots and other four-wheeled pleasure carriages," includes "stage coaches used for the conveyance of the mail and of passengers,"—see *Cincinnati &c. Turnp. Co. v. Neil*, 9 *Ohio (Ham.)* 11.

65. Exacting excessive tolls. A right to charge tolls for the use of its road, conferred by charter, upon a plankroad company, in general terms, without any restrictive words, does not authorize it to charge unreasonable tolls. *Ala. Supreme Ct.* 1858, *Powell v. Sammons*, 81 *Ala. N. S.* 552.

66. A payment of tolls on a public turnpike road cannot be said to be voluntary, and not compulsory, when made by the party to enable him to obtain a passage over the road for the United States mail, which he was bound to carry, and to keep his property from being taken from him by distress; and therefore, under proper exemptions, such tolls may be recovered back. *N. C. Supreme Ct.* 1844, *Newland v. Buncombe Turnp. Co.* 4 *Ired. Law*, 372.

67. That demanding and receiving more than the legal toll is a cause of forfeiture of the franchise,—see *People v. Kingston & Middleton Turnp. Co.* 23 *Wend.* 198.

68. A penalty given by law against toll gatherers for unreasonably delaying or hindering any traveler or passenger, or for taking more than lawful toll, does not apply to detentions of persons who have a right to pass, toll free. *N. Y. Supreme Ct.* 1807,

Conklin v. Elting, 2 *Johns.* 410; 1819, *Norval v. Cornell*, 16 *Id.* 78.

69. In the absence of the toll gatherer, his wife must be deemed to be his agent, and if she exacts more than lawful toll, he is liable to the penalty. [4 *Wend.* 465; 10 *Johns.* 247. See also, 4 *Barb.* 222.] *N. Y. Supreme Ct.* 1856, *Marselis v. Seaman*, 21 *Barb.* 819.

70. Exemption from tolls. Where a right to pass a turnpike gate toll free, by prescription, extended to all the inhabitants of a town through which a turnpike road passed,—*Held*, that this created no right in the town in a corporate capacity; and, (the right being denied by the turnpike company,) that the town could not be justified in demolishing the company's gate, as a public nuisance. *Vt. Supreme Ct.* 1889, *Panton Turnp. Co. v. Bishop*, 11 *Vt.* 198.

71. — by statute. A section of the charter of a turnpike company prohibited the company from demanding toll of persons passing to or from public worship, or on military duty, or with their horses, teams or cattle, to or from any grist or saw mill, or of any person living within the State, and within eight miles of the gate. *Held*, that this exemption gave all residents within eight miles, and within the State generally, whether traveling for pleasure or business, driving a team themselves or by their servants, a right to pass the gate, and also their stages and coaches; but, that the exemption was personal and not transferable. *Vt. Supreme Ct.* 1884, *Passumpsic Turnp. Co. v. Langdon*, 6 *Vt.* 546.

72. Under a statute exempting "persons going to or from religious meetings,"—*Held*, that a clergyman was exempt as well as laymen. *N. Y. Supreme Ct.* 1852, *Skinner v. Anderson*, 12 *Barb.* 648.

73. The act of incorporation of a turnpike company exempted from toll all persons traveling upon the "ordinary domestic business of family concerns" *Held*, that this provision did not extend to the case of physicians going to visit their patients. *Vt. Supreme Ct.* 1840, *Centre Turnp. Co. v. Smith*, 12 *Vt.* 212.

74. A turnpike charter provided that nothing in the act should entitle the corporation to demand toll of any person who should be passing "with his horse or carriage to or from public worship, or with his

horse, team, or cattle, or on foot, to or from any mill, or on the common and ordinary business of family concerns, within the same town." *Held*, that an individual passing to another town from that in which he resided, in order to purchase lumber for his own use, it not appearing that he went to a mill, was not within the exception. *N. H. Superior Ct. 1834, Proprietors of Second Turnpike v. Taylor, 6 N. H. 499.*

75. Under an act exempting a person going to any mill to which he usually resorts, one is exempt going to a mill in a town different from that in which he resides, if it appears that he usually went to such mill when there was no grinding in his own town. *N. Y. Supreme Ct. 1811, Chestney v. Coon, 8 Johns. 150.*

76. An exemption in going to market with the produce of a farm, and returning,—*Held*, personal, and waived by carrying other goods. *N. Y. Supreme Ct. 1810, Hearsey v. Boyd, 7 Johns. 183; 1818, Bates v. Sutherland, 15 Id. 510.*

77. Under a statute exempting any person passing to or from his common business on a farm, a person who owns two neighboring farms, is exempt in passing from one to the other, with materials for buildings. *N. Y. Supreme Ct. 1819, Newburgh & Cohocton Turnpike Co. v. Belknap, 17 Johns. 83.*

78. Under a statute which exempted from toll persons going to and from the blacksmith's shop to which they usually resort,—*Held*, that the going thither must be for the purpose of getting work done, to bring it within the exception. Going to pay for work previously done is not exempt. *N. Y. Supreme Ct. 1812, Stratton v. Herrick, 9 Johns. 356.*

79. And the purpose of getting work done must be the principal, and not the incidental object of going. *N. Y. Supreme Ct. 1812, Stratton v. Hubbel, 9 Johns. 357.*

80. — by contract. The plaintiff contracted with the defendants, a turnpike company, to repair their road in the manner specified, and to keep it in repair to the acceptance of the directors, in consideration of which the defendants agreed to permit the plaintiff to pass their gate toll-free. In an action on such contract,—*Held*, 1. That the acceptance of the road, by two or three directors, was sufficient. 2. That evidence, on the part of the defendants, that the road

was out of repair, and that the plaintiff had been informed thereof by one or more of the directors, and requested to repair it, was admissible, although it did not appear that the directors had assembled and made an adjudication on the insufficiency of the road, no formal meeting or adjudication being necessary. 3. That evidence, on the part of the plaintiff, that the gate-keeper of the defendants had permitted the plaintiff to pass toll-free for a long time after the making of the road, was admissible, the act of the gate-keeper being the act of the defendants, and tending to show an acquiescence, on the part of the defendants, in the right claimed by the plaintiff. *Conn. Supreme Ct. 1835, Wadhams v. Litchfield & Canaan Turnpike Co. 10 Conn. 416.*

81. Detainer for tolls. On the power to detain a traveler for non-payment of tolls,—see *Jordan & Skaneateles Plankroad Co. v. Morley, 23 N. Y. 552; Hopkins v. Stockton, 2 Watts & S. 168.*

82. An incorporated plankroad company, which abandons its road, leaving its gates open, and keeping no agent thereat to receive or demand toll, cannot charge a person, as on an implied contract, for his use of the road during the continuance of such abandonment. *Ala. Supreme Ct. 1858, Powell v. Sammons, 31 Ala. N. S. 552.*

83. Penalty. What acts amount to a violation of a statute providing a penalty for forcibly passing a gate of a turnpike company, without paying toll. *Bridgewater & Utica Plankroad Co. v. Robbins, 23 Barb. 662; Monterey & Co. Plankroad Co. v. Faulkner, 21 Id. 212; Hammondsport & Bath Plankroad Co. v. Brundage, 13 How. Pr. 448; Columbia Turnp. Co. v. Woodworth, 2 Cal. 97; Green Mountain Turnp. Co. v. Hemmingway, 2 Vt. 512.*

84. What acts amount to a fraudulent evasion of toll.* *Center Turnp. Co. v. Van*

* The defendant's land was bounded by a plankroad, and he moved back his fence on both sides of the toll-gate, and graded a track there, in such a way that travelers, if disposed, could evade the gate by driving around it. *Held*, that the company could not, on alleging that it was done with intent to injure and defraud them, maintain an action for injunction and damages.

1. Loss or damage arising to one person from the use which another makes of his own property, is *damnum absque injuria*, and forms no cause of action. It is only where the plaintiff has acquired an easement in the tenement of the defendant, that is, a right extending beyond his own premises, and rendering the defendant's tenement sub-

dusen, 10 *Vt.* 197; *Carrier v. Schoharie Turnp. Co.* 18 *Johns.* 56; *Dansville & Wayland Plankroad Co. v. Hull*, 27 *Barb.* 509.

85. Duty to repair. All duties imposed upon corporations aggregate, by law, and all benefits conferred at their request, raise implied promises which the law will enforce. Thus there is an implied undertaking on the part of an incorporated plankroad company, with a person traveling on their road, that the road is reasonably fit for use; and such promise, on the part of the company, constitutes the consideration for the obligation of the traveler to pay toll. Hence, if the company fail in the performance of their agreement to keep their road in sufficient repair for use, a traveler cannot be compelled to pay toll. *Miss. Ct. of Errors*, 1859, *Sims v. Yazoo & Big Black Plankroad Co.* 38 *Miss.* 23.

86. That, generally, a turnpike company are bound to keep their road in repair,*—see *Goshen Turnp. v. Sears*, 7 *Conn.* 86; *Commonwealth v. Worcester Turnp. Corp.* 3 *Pick.* 327; *Orcutt v. Kittery Point Bridge Co.* 53 *Me.* 500; *State v. Morris Turnp. Co.* 1 *South.* 165; *Ward v. Newark & Pompton Turnp. Co.* 1 *Spenc.* 323; *Board of Internal Improvement of Shelby County v. Searce*, 3 *Duv.* 576.

87. Where in pursuance of an agreement between a plankroad company and a town, a

servient to his, that the defendant's right to deal with his own is limited by the maxim *sic utere tuo ut alienum non laedas*. [1 *Vent.* 339; 1 *Lev.* 123; 13 *Mass.* 157; 13 *Wend.* 361; 3 *Barn & Ad.* 371; 3 *M. & W.* 220; 4 *Palge*, 160.]

2. The defendant could not be restrained in such dealing with his own property, on the ground that he was actuated by malice. [13 *Wend.* 361; and see 5 *Johns.* Ch. 101.]

3. An exclusive right to maintain a road is not conferred by the New York general act, and cannot be implied. A corporation is strictly confined to the privileges conferred by its charter, and can take no implied rights as against the law-making power. [11 *Pet.* 420; 11 *Leigh*, 42; 17 *Conn.* 454; 1 *Barb.* Ch. 547; 3 *Sandf.* Ch. 625, overruling 1 *Johns.* Ch. 611; 5 *Id.* 101.] And *a fortiori*, a corporation should not be permitted to encroach, by implication, upon the rights of individuals who are in no respect parties to the compact between it and the legislature. The restriction attempted to be asserted by the plaintiffs, would be an easement on the defendant's land, which had not been expressly granted, and could not be inferred. *N. Y. Ct. of Appeals*, 1854, *Anburn & Cato Plankroad Co. v. Douglass*, 9 *N. Y.* (5 *Seld.*) 444.

* That lessees of a turnpike are liable to suit by their lessors, on a covenant to keep the road in repair, without proof of the responsibility of the lessors to the State,—see *Joult v. Lewis*, 4 *Litt.* 160.

So, also, an action lies against a canal company for damages suffered by the plaintiff, in consequence of the locks not being kept in repair. *Riddle v. Proprietors of Locks &c.* 7 *Mass.* 169.

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public highway in the limits of the latter, is superseded by a plankroad constructed by the company, the latter, and not the town, becomes liable for injuries occasioned by its insufficient repair. *Vt. Supreme Ct.* 1855, *Davise v. Lamoille Co. Plankroad Co.* 27 *Vt.* 602.

88. No person is entitled to the statute remedy against a turnpike corporation for a defect in their bridges, unless he is liable to pay toll; and such liability must be alleged in the declaration, or it will be bad, even after verdict. *Mass. Supreme Ct.* 1836, *Williams v. Hingham &c. Turnp. Corp.* 4 *Pick.* 341.

89. Under a statute (*Mass. St.* of 1804, ch. 125, § 6),—which provided that a turnpike corporation should be liable to pay all damages which might happen to any person from whom toll was demandable, for any damages which should arise from defect of bridges, or want of repair of the road,—*Held*, that a turnpike corporation was liable for damage sustained by a traveler in consequence of a defect in the road, although the defect was a latent one, and the corporation used due diligence to discover defects, and keep the road in repair. *Mass. Supreme Ct.* 1836, *Yale v. Hampden & Berkshire Turnp. Corp.* 18 *Pick.* 357.

90. A turnpike company are bound to exercise ordinary care and diligence in the construction and preservation of the bridges on the road, but are not liable for accidents not occasioned by want of such care and skill. *N. Y. Supreme Ct.* 1810, *Townsend v. Susquehannah Turnp. Co.* 6 *Johns.* 90. And see *Wilson v. Susquehannah Turnp. Co.* 21 *Barb.* 68; *Turnp. Co. v. Sears*, 7 *Conn.* 86.

91. Where there is a failure on the part of a turnpike company to comply with an express requirement of the statute, either as to the width of the road, or the mode of its construction, and a person traveling over it sustains an injury in consequence of such omission, the turnpike company is liable, unless it appears that the plaintiff could have avoided the injury by the exercise of ordinary care and prudence. [6 *Cow.* 189; 23 *Wend.* 446.] But if the plaintiff's injury was not chargeable to any such omission, the action is not sustainable. *N. Y. Supreme Ct.* 1855, *Wilson v. Susquehannah Turnp. Co.* 21 *Barb.* 68.

92. Where a bridge upon a turnpike road, becomes unsafe from the gradual decay of the

timbers, and the danger is not open and visible, the owners of the road are responsible for the sufficiency of the bridge so long as they continue to take toll and keep the road open to the public, although notice is given, to those who pass, that there is danger. In order to exonerate themselves, the company must give notice that there is danger for which they will not be responsible, and refuse to take toll. *N. H. Superior Ct.* 1833, *Randall v. Proprietors of Cheshire Turnpike*, 6 *N. H.* 147.

93. A turnpike company, liable by its charter to pay all damages from neglect of a bridge, is not liable for damages sustained by one who overloads the bridge, if it be of sufficient ordinary strength. *Vt. Supreme Ct.* 1833, *Richardson v. Royalton & Woodstock Turnp. Co.* 5 *Vt.* 580.

94. Indictment for neglect to repair. Under the statutes of Massachusetts (Rev. Sta. c. 89, § 42), a corporation owning a turnpike road, and neglecting to keep it in repair, are liable to indictment, although no person liable to the payment of tolls has sustained injury by reason of such want of repair. *Mass. Supreme Ct.* 1854, *Commonwealth v. Hancock Free Bridge Corporation*, 2 *Gray*, 58.

95. — for damages caused in making repairs. A turnpike company have a lawful right to repair their road in such way as to prevent the effect of rains or freshets; but in the exercise of that right, they must not injure the owner of adjoining land. If a damage arises from their negligence in this respect, he may recover against them therefor. *N. Y. Supreme Ct.* 1820, *Boughton v. Carter*, 18 *Johns.* 405.

96. Sale of road. A decree, directing the absolute sale of a turnpike road in payment of the debts of the company,—*Held*, to be erroneous.* A court of chancery, however, may properly decree the profits of the road to be paid to the creditor, and retain the cause for the purpose of enforcing the decree from time to time. *Ky. Ct. of Appeals*, 1844, *Winchester & Lexington Turnp. Co. v. Vimont*, 5 *B. Monr.* 1.

97. — or toll house. The toll house of a

* Under the Ohio Statute of 1836, regulating turnpike companies, an execution cannot be levied upon the right of the company to take toll, unless notice has first been given, according to the provisions of the act, to some receiver of toll on the road. *Ohio Supreme Ct.* 1841, *Beymour v. Milford & Chillicothe Turnp. Co.* 10 *Ohio*, 476.

canal company is so far an integral part of the franchise and a necessary incident, that it is not liable to the levy of an execution by the creditors of the company.* *Pa. Supreme Ct.* 1845, *Susquehanna Canal Co. v. Bonham*, 9 *Watts & S.* 27.

98. Compelling repairs. A *mandamus* will not be granted at the suit of a board of county commissioners, to compel a turnpike company to repair a bridge forming a part of such company's road.† *Ohio Supreme Ct.* 1865, *State ex rel. Commissioners of Ross County v. Zanesville & Maysville Turnp. Co.* 16 *Ohio St.* 308.

99. Forfeiture for neglect to repair. That a neglect by a turnpike company to keep their road in repair may be a sufficient cause for a forfeiture of their franchise,—see *State v. Passumpsic Turnpike Co.* 3 *Vt.* 178; *State v. Royalton & Woodstock Turnpike Co.* 11 *Vt.* 431; *People v. Hillsdale & Chatham Turnpike Co.* 23 *Wend.* 254; *People v. Fishkill & Beekman Plankroad Co.* 27 *Barb. (N. Y.)* 445; *State v. Moore*, 19 *Ala. N. S.* 514.

100. Action for neglect to repair. Plankroad companies deriving a revenue from the use of their roads by travelers, are directly liable to such persons for injuries occasioned by the want of repair of their roads, without any express statutory provision imposing such liability. *Vt. Supreme Ct.* 1855, *Davis v. Lamoille County Plankroad Co.* 27 *Vt.* 602.

ULTRA VIRES.

1. General rules. When a legislative power, from which a corporation derives its

* Where a railroad company took a portion of the road of a turnpike company, making a substitute therefor, as directed by their charter,—*Held*, that this was sufficient to justify the turnpike company in using it as a portion of their road, and that their continuing to use it, as a portion of their road, keeping their gates closed and taking toll, actually repairing the same, constituted it a part of the turnpike, which they were bound to keep in a state of ordinary safety for the use of travelers, day and night, so far as this could be done by ordinary diligence. *Vt. Supreme Ct.* 1852, *Mathews v. Winocoki Turnp. Co.* 24 *Vt.* 480.

† Where the form of proceedings, to compel a turnpike corporation to keep its road in repair, was prescribed in the act of incorporation, by reference to another statute,—*Held*, that the proceedings, being in virtual compliance with the charter, were not affected by a subsequent repeal of the statute referred to; nor by an alteration, made in the form of proceedings, by a statute passed after judgment obtained in the proceedings under the old form. *Pa. Supreme Ct.* 1848, *Lackawaxen Turnp. Co. v. Commonwealth*, 9 *Pa. St.* 30.

authority to act, prescribes a particular mode in which the act shall be performed, the corporation cannot lawfully perform the act in any other manner. If not done in the manner prescribed, the act is a mere nullity and utterly void. *N. Y. Superior Ct.* 1861, *McSpedon v. Mayor &c. of N. Y.* 7 *Bosw.* 601; 20 *How. Pr.* 895. Compare *Hood v. New York & New Haven R. R. Co.* 23 *Conn.* 502.

2. Corporations, in general, are bound by their contracts when under seal as much as individuals. But where a corporation is created for particular purposes, with special powers, the contract, though under their corporate seal, and that regularly affixed, does not bind it, if it appear from the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactment, that the contract was *ultra vires*, that is, that the legislature meant that such a contract should not be made; and if it is not made out that the act prohibits the contract, it must be enforced. *Each.* 1853, *South Yorkshire &c. Co. v. Great Northern Railway Co.* 9 *Each.* 55, 84; *Q. B.* 1855, *Mayor &c. of Norwich v. Norfolk Railway Co.* 4 *Ellis & B.* 397; 80 *Eng. L. & Eq.* 120; 24 *Law J. N. S. Q. B.* 105.

3. There is a difference between exercising powers wholly foreign, and exercising legitimate powers to an improper extent. Thus a mining corporation, who buy more land than the law allows, commit a wrong which can only be inquired into by the State; and it does not thereby lose its rights as against trespassers. *Neu. Supreme Ct.* 1867, *Whitman Mining Co. v. Baker*, 8 *Neu.* 386.

4. Acts done by corporations in violation of their charters are not necessarily void. They may, by such acts, acquire title to property, and transmit it to others. *Wis. Supreme Ct.* 1863, *Farmers' & Millers' Bank of Milwaukee v. Detroit & Milwaukee R. R. Co.* 17 *Wis.* 372; *N. Y. Ct. of Appeals*, 1860, *Bissell v. Michigan Southern &c. R. R. Co.* 22 *N. Y.* 258.

5. Corporations, like natural persons, have capacity to do wrong; and when in their contracts and dealings, they break over the restraints imposed upon them, an exemption from liability cannot be claimed on the mere ground, that they have no power thus to act. *N. Y. Ct. of Appeals*, 1860, *Bissell v. Michigan Southern &c. R. R. Co.* 22 *N. Y.* 258.

6. The objection that an act was "*ultra*

vires" imports, not that the corporation could not, and did not in fact, make the unauthorized contract, but that it ought not to have made it; and, therefore, rests upon the violation of trust or duty toward the shareholders; and hence it is not to be entertained, where its allowance will do a greater wrong to innocent third parties.* *Id.*

7. Although bonds issued by a bank be illegal; yet the bank may be liable in equity for money advanced upon them. *Ark. Supreme Ct.* 1862, *Whitney v. Peay*, 24 *Ark.* 26.

8. A municipal corporation in the exercise of the power to borrow money is not sovereign, but is responsible for the acts of its agents, as a private corporation. *Va. Ct. of Appeals*, 1868, *DeVoss v. City of Richmond*, 18 *Gratt.* 388. Compare *Jones v. City of Richmond*, 18 *Gratt.* 517.

9. The principles on which the courts have acted when called upon by a minority of shareholders of a public company to set aside transactions, or prevent the performance of matters, beyond the powers and inconsistent with the objects of the company, although sanctioned by a majority of the shareholders—explained. *Gregory v. Patchett*, 10 *Jur. N. S.* 1118; 11 *Law Times, N. S.* 357; 18 *Week. Rep.* 84.

10. Instances. The defendants, a corporation, entered into an agreement to purchase plaintiff's property, there being, at the time, no legislative permission either to buy or sell such property. Subsequently, such permission was obtained, and steps taken by the defendant, under the act, to carry the contract into effect, but they ultimately refused to complete their purchase, on the ground that the original agreement was not under the seal of the corporation, nor signed by two of their directors. The plaintiffs then filed a bill for specific performance. *Held*, that the bill must be dismissed, on the ground that the contract was originally *ultra vires*,

* In a statute authorizing a medical college to mortgage its property to enable them to raise funds, a proviso restricting the use of the premises so authorized to be mortgaged.—*Held*, not to apply to purchasers under a foreclosure of such mortgage. *Ohio Supreme Ct.* 1866, *Medical College of Ohio v. Ziegler*, 17 *Ohio St.* 53.

A person who purchases the bonds of a municipal corporation, without actual notice of any special directions given to the officers of the corporation respecting their sale, will not be found by such directions, if he neglected to make inquiries through want of caution only, and not with a design of avoiding knowledge. *Va. Ct. of Appeals*, 1868, *DeVoss v. City of Richmond*, 18 *Gratt.* 388.

not being made dependent upon obtaining the consent of the legislature. *V. Chan. Ct.* 1857, Leominster Canal Co. v. Shrewsbury & Hereford Railway Co. 29 *Law Times*, 342; 3 *Jur. N. S.* 930; 26 *Law J. N. S. Ch.* 764.

11. A contract between a projected railway company and plaintiff, a land owner, through whose land it was proposed to run the line; that, in consideration of the owner not opposing their bill, they would pay him a certain sum for the land which should be required, and further, that within three months after the passing of the bill, they would pay plaintiff 2000*l.* for compensation for the annoyance, &c., which he might or would sustain in consequence of the construction of the railway, &c.—is not *ultra vires*, and plaintiff has a good cause of action for the 2000*l.* after the time named, although none of his land be taken. *Exch.* 1866, Taylor v. Chichester & Midhurst Railway Co. 4 *Hurls. St. & C.* 409.

12. A mutual insurance company, without authority by charter, established a guarantee fund of bonds secured by mortgages. The corporation having become insolvent, an assessment was made by the court on the guaranty capital, and a bill filed to recover on the defendant's mortgage the amount of the assessment. *Held*, that as the company had no power to make the contract with the guarantors, it was absolutely void, and that the fund could not be reached in law or equity by a creditor of the company, after its insolvency. *N. J. Chancery*, 1858, Trenton Insurance Co. v. McKelway, 1 *Beasl.* 133.

13. An incorporated company having carried on their business for several years without success, finding that their resources were nearly exhausted, and that an entire reconstruction of their works was necessary, passed a resolution winding up the company. Before the resolution was confirmed, however, a proposition was made and finally accepted, in pursuance of the provisions of the deed of settlement, by a majority of more than two-thirds of the shareholders, for leasing their works upon terms apparently advantageous. Upon a bill filed by a dissenting shareholder to set aside the lease, as being inconsistent with the purposes of the incorporation, and as having been granted *ultra vires*,—*Held*, that the lease was good, as being a lawful means of making the most of the assets of the company, and that the granting of it was

not *ultra vires*. *V. Chan. Ct.* 1865, Featherstonehaugh v. Lee Moor Porcelain Clay Co. 35 *Law J. N. S. Ch.* 84.

14. A charter giving power to a municipal corporation to ascertain and establish the boundaries of streets, does not give to it power to authorize buildings to be erected within the boundaries of an established street. *N. J. Chancery*, 1867, Attorney General v. Heishon, 18 *N. J. Eq.* (8 *C. E. Green.*) 410.

15. Acts done under two charters. Where two corporations, chartered respectively by the States of Michigan and Indiana, with power to each to build and operate a railroad within in its own State, united in the business of transporting passengers over a third road in the State of Illinois, beyond the limits authorized by the charter of either,—*Held*, that notwithstanding they, in so doing might be exceeding their corporate powers, they were jointly liable for injuries to a passenger, resulting from the negligence of their employees. *N. Y. Ct. of Appeals*, 1860, Bissell v. Michigan Southern &c. R. R. Co. 22 *N. Y.* 258.

16. The acts, *ultra vires*, of a foreign corporation, which is a creature of the laws of two different States, are not made valid by a confirmatory statute, enacted by the legislature in one only of such States. *N. Y. Supreme Ct. Sp. T.* 1863, Fisk v. Chicago, Rock Island &c. R. R. Co. 4 *Abb. Pr. N. S.* 378.

17. President of a corporation,—*Held*, personally bound by his knowledge of a stipulation given by him, though it was in excess of his powers. *Ill. Supreme Ct.* 1866, Thomas v. Morgan County, 39 *Ill.* 496.

Upon the powers of Agents and Officers of corporations to act in their behalf, and to bind them by such acts, see AGENTS; OFFICERS; and the titles of the various officers.

Upon the Validity of contracts of corporations, see CONTRACTS.

For the law governing the Exercise of corporate powers, see POWERS; also CHARTERS; PROPERTY; SEAL; SUITS.

For matters relative to validity of acts of particular kinds of corporations, see the titles of the various corporations; such as BANKS; INSURANCE COMPANIES; MANUFACTURING COMPANIES; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES; TURNPIKE COMPANIES, &c.

Upon the responsibility of corporations or

of officers or agents of corporations, for Wrongful acts committed by officers or agents acting in their representative capacity, see **WRONGS**.

USER.

1. Showing corporate existence. In an action by a corporation it is sufficient to show its corporate character, for it to prove the statute charter and that the persons acting under color of it are in the peaceable enjoyment of the corporate franchises and rights thereby granted. They are to be considered as rightfully exercising the corporate power, as against wrong doers and all who have treated or acted with them in their corporate character. *N. O. Supreme Ct.* 1825, Tar River Nav. Co. v. Neal, 8 *Hawks*, 520; 1835, Buncombe Turnpike Co. v. McCarrson, 1 *Dev. & B.* 306.

2. — of insurance companies. Written applications to an incorporated insurance company for policies, policies issued thereon, and also the official bonds of the officers of the company, are admissible in evidence for the purpose of proving user under their charter, in order to show their corporate existence. In general, evidence of any acts of the corporation showing that they are doing business under their charter, is admissible to prove user. *Mich. Supreme Ct.* 1845, Cahill v. Kalamazoo Mutual Ins. Co. 2 *Dougl.* 124.

3. — of banks. A bank charter granted by the governor of one of the United States, reciting his authority by the laws of that State, to make such grants, and authenticated by the great seal thereof, in the absence of proof that its laws did not warrant such an exercise of authority on the part of the governor, is sufficient evidence, *per se*, to prove the existence of such bank. This is not a case for the application of the rule that official authority must be strictly pursued and clearly shown. *Md. Ct. of Appeals*, 1828, Agnew v. Bank of Gettysburg, 2 *Har. & G.* 478.

4. The execution of a note by defendant to a bank as a corporation, is competent to show that the bank went into operation under its charter; but of the sufficiency of this evidence, the jury should judge. *Ark. Supreme Ct.* 1852, Gaines v. Bank of Mississippi, 12 *Ark. (7 Engl.)* 769.

5. The plaintiff claiming to be a corporation by the laws of New York, sued by the name of "The Bank of Commerce." The articles of association produced to prove the plaintiff's right to sue as a corporation, declared that the name to be used should be "Bank of Commerce, in New York." *Held*, that the articles offered were not competent evidence to prove the existence of a corporation bearing the name of the plaintiff. *Mo. Supreme Ct.* 1862, Bank of Commerce v. Mudd, 32 *Mo.* 218.

6. — of plankroad company. Proof that a plankroad company, duly incorporated and organized, has build its road, and had it inspected, and has erected toll-gates, and is in the actual use of the road, is sufficient to enable them to maintain an action of trespass for an entry upon the road, against any persons who do not show a better right to the possession of it in themselves. *N. Y. Supreme Ct.* 1855, Ellicottville &c. Plankroad Co. v. Buffalo &c. R. R. Co. 20 *Barb.* 644.

7. — by corporate records. Where the defendant, sued as a corporation, pleaded that it had not organized under the acts of incorporation, the book of entries containing the articles of the association signed by the associates, and therecord of the proceedings, were held to be properly admitted in evidence, to prove the actual organization of the corporation. *Mo. Supreme Ct.* 1862, Foster v. White Cloud City Co. 35 *Mo.* 505.

8. — under *nul tiel* corporation. Under a plea of *nul tiel* corporation, to an action by a foreign corporation, the plaintiff must prove the act of incorporation, and that the corporation went into operation. To establish this latter fact, it is not necessary to show a compliance with the conditions of the charter under which it assumed to act, but that the corporation acted and transacted business as such. *Ark. Supreme Ct.* 1852, Gaines v. Bank of Mississippi, 12 *Ark. (7 Engl.)* 769.

9. If a plea of *nul tiel* corporation, under oath, be filed to a declaration by a bank on a note, and issue be joined thereon, and the bank introduce in evidence a copy of the act of its incorporation, with proof of user under the charter, it is sufficient to entitle it to recover. *Miss. Ct. of Errors*, 1846, Henderson v. Mississippi Union Bank, 6 *Smad. & M.* 314.

As to what constitutes Incorporation, see INCORPORATION.

As to Acceptance of charters, see CHARTERS.

For general Principles of procedure in suits by corporations, see SUTTS.

VISITATION.

1. The origin and nature of the power of visitation—stated. *Dartmouth Coll. v. Woodward*, 4 *Wheat*, 518; *Allen v. McKeen*, 1 *Sumn.* 276; *Amherst Acad. v. Cowles*, 6 *Pick.* 427; *St. John's Coll. v. Toddington*, 1 *Burr.* 158; 1 *Ld. Keny.* 441; 1 *W. Black.* 71.

2. The origin of the visitatorial power is the property of the donor, and the power every one has to dispose, direct, and regulate his own property; like the case of patronage, *cujus est dare, ejus est disponere*. And, therefore, if either the Crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the laws allows the founder, or his heirs, or the person specially appointed by him to be visitor, to determine concerning his own creature. If the charity is not vested in the persons who are to partake, but in trustees for their benefit, no visitor can arise by implication, but the trustees have that power. *Chancery*, 1750, *Green v. Rutherford*, 1 *Ves. sr.* 462, 472.

See BEQUESTS; DEVISES; TRUSTS.

3. Appointment. What language in a grant, devise, &c., will confer power of visitation. *King v. Bishop of Ely*, 1 *W. Black.* 83; *Attorney General v. Middleton* 2 *Ves. sr.* 327; *King v. Bishop of Worcester*, 4 *Moule & S.* 415; *Sanderson v. White*, 18 *Pick.* 338; *Attorney General v. Talbot*, 3 *Atk.* 669; 1 *Ves. sr.* 78.

4. The testator in a will making provision for the endowment of an incorporated academy, directed that vacancies in the board of trustees of an academy, founded by him, should be filled by nominations from themselves, subject to the approval of the selectmen of the town in which the charity was established, and further provided that the selectmen were "always and at all times to have and exercise the right of visitation for the purpose of looking to the security of the

funds, and that the interest or income of them be applied according to the bequest,

Held, 1. That this language, taken in connection with the rest of the will, there being no express words of limitation, and no visitatorial power being reserved, conferred general visitatorial power upon the selectmen.

2. That the selectmen, acting in the exercise of these visitatorial powers, were not to be regarded as acting as visitors, in the visitatorial powers to be exercised by the agents of the town; nor as acting directly upon the interests of the town, nor as accountable to the town; and they could not be directed, controlled, limited or restrained, in the exercise of their powers, by the act of the town; but that they exercised a special authority, created by the will of the testator, and conferred by the act of incorporation. *Mass. Supreme Ct.* 1849, *Nelson v. Cushing*, 2 *Cush.* 519, 520.

5. Powers. One appointed visitor may examine into and regulate the conduct of members who partake of the charity, correct abuses, remove officers, and, in case of a college, expel or admit a fellow, and, generally, superintend the management of the trust. *Coveny's Case*, *Dyer*, 209; *Attorney General v. Talbot*, 1 *Ves. sr.* 78; *Attorney General v. Middletown*, 2 *Ves. sr.* 327; *Philips v. Bury*, 2 *Durnf. & E.* 346; *Dartmouth College v. Woodward*, 4 *Wheat.* 518, 675; *Murdock's Appeal*, 7 *Pick.* 303, 323; *Murdock v. Phillips Academy*, 12 *Pick.* 244; *Sanderson v. White*, 18 *Pick.* 338; *Bracken v. William & Mary College*, 8 *Call.* 573.

6. That his powers are limited to enforcement of the corporate laws; he cannot take cognizance of offences consisting in violations of the general municipal law,—see *Rex v. St. John's Coll.* 4 *Mod.* 233.

7. Proceedings of visitors. That if the statutes of the foundation direct the mode in which the visitatorial power shall be exercised, that mode must be pursued, otherwise the sentence is a nullity,—see *Philips v. Bury*, 2 *Durnf. & E.* 346.

8. The proceeding before visitors, for the removal of a professor, is a judicial proceeding; and to render it binding on him, there must be a monition or citation to him to appear, a charge given to him, which he is to answer, a competent time assigned for proofs and answers, liberty for counsel to defend him, and to except to proofs and witnesses,

and a sentence after a hearing of all the proofs and answers. It is not, indeed, to be insisted on, that in exercising the powers vested in a new jurisdiction, where no forms are prescribed, any precise course as to forms is to be followed; but these rules must, in substance, be pursued by every tribunal acting judicially upon the rights of others. *Mass. Supreme Ct.* 1831, *Murdock v. Phillips Academy*, 12 *Pick.* 244, 262.

9. Courts of justice will not act as visitors in the first instance. See *Harper v. Straws*, 14 *B. Monr.* 48; *Latimer v. Eddy*, 46 *Barb.* 61. *Attorney General v. Middleton*, 2 *Ves. sr.* 327.

10. No court of law or equity can anticipate the judgment of a visitor, or take away his jurisdiction, if the case in which it is called upon to interfere appears to be within the scope of the general visitorial power. His determinations are final and conclusive. *Chancery*, 1747, *Attorney General v. Talbot*, 3 *Atk.* 662. And see *Regina v. Dean of Chester*, 15 *Q. B.* 513; *Rex v. Bishop of Ely*, 2 *Durnf. & E.* 290; 1 *W. Black.* 85; *Regina v. Dean &c. of Rochester*, 17 *Q. B.* 1; 6 *Eng. L. & Eq.* 269; *Attorney General v. Smythies*, 2 *Mylne & C.* 142.

11. Review. In what cases and to what extent the courts may review the proceedings and reverse the decisions of a visitor,—see *Matter of Dean of York*, 2 *Q. B.* 1; *Eden v. Foster*, 2 *P. Wms.* 325.

12. In Massachusetts, there is, (under Stat. 1823, ch. 50), an appeal to the Supreme Court, from a decision of visitors appointed by the founders of a charitable institution (such as the Andover Theological Seminary) removing a professor. But the jurisdiction of the court, upon such an appeal, is confined to inquiring whether the visitors have acted contrary to the statutes of the founders; and, whether they have exceeded their jurisdiction. The statute conferring the appeal is to be construed with reference to the doctrine of the common law governing visitation; according to which the visitor has the general right of inspecting the affairs of the corporation and superintending its officers, without control or revision except that of the judicial tribunals, by whose authority they may be kept within the limits of their granted powers. It is not to be implied from the use of the term "appeal," in the statute, that the court is empowered to try the whole merits of the case and overrule the judg-

ment of visitors in a matter within their cognizance. And if the charge made against the officer removed was one which, by the statutes of the charity, is a cause of removal, the case is within the jurisdiction of the visitors, and the court cannot review their decision upon the sufficiency of the evidence adduced to sustain the charge. *Mass. Supreme Ct.* 1828, *Murdock's Appeal*, 7 *Pick.* 303, 321.

WHARF COMPANIES.

1. A charter conferring upon a corporation the privilege of building docks and piers, into the river and bay opposite their premises, as far as they may deem it necessary for the improvement of said premises, or the benefit of commerce, and to appropriate the same to their own use, and with power to lay out streets and squares upon "all and every part of said premises,"—*Held*, to give a right to appropriate the whole extent of the piers so built, from high water to their extreme termination, and to lay out streets or squares, or otherwise appropriate the newly acquired land. *N. J. Ct. of Errors*, 1850, *Associates &c. v. Jersey City*, 4 *Halst.* 715.

2. A charter, incorporating persons named, "for the purpose of maintaining the dock or wharf now owned by the said company" * * * "and to extend and enlarge the same when necessary" * * * "provided that such extension or enlargement shall not interfere with the navigation," may be construed to refer to a wharf owned by the persons named, although they were not before a company: but it does not confer the power to extend the wharf, except in front of the lands of the company. *N. J. Chancery*, 1866, *Keyport Steamboat Co. v. Farmers' Trans. Co.* 18 *N. J. Eq.* (3 *C. E. Green.*) 13.

3. It is competent for the legislature to charter a company for the draining of large tracts of meadow land, and to empower commissioners to assess upon the reclaimed lands, a proportionate part of the expense. The amount of such assessment must be, however, specifically limited to the extent of the benefit conferred. If the charter is not so limited, it is void, for it assumes to authorize a taking of private property for public use without any compensation. *N. J.*

Ct. of Appeals, 1866, *Tide Water Company v. Coster*, 18 *N. J. Eq.* (3 *C. E. Green.*) 519.

4. A municipal corporation maintaining a wharf, and charging wharfage,—*Held*, liable for loss of boat through want of suitable fastenings. *Ky. Ct. of Appeals*, 1866, *Commonwealth v. Webster*, 1 *Bush*, 616.

5. The proprietor of land, on which a municipal corporation establish a wharf, is entitled to compensation for use and occupation, but not to the amount of tolls taken. *Ky. Ct. of Appeals*, 1867, *City of Columbus v. Gray*, 2 *Bush*, 476.

6. Dams. A company having a right under charter to build and maintain dams in aid of their corporate purpose of navigation, have no power to grant away the right. *Pa. Supreme Ct.* 1867, *Jessup v. Loucks*, 55 *Pa. St.* 350.

Consult FRANCHISES.

WRONGS.

[This chapter embraces the general principles governing the responsibility of corporations, or of officers or agents of corporations, to third persons for wrongs, or torts, committed by officers or agents acting in their representative capacity, so far as that liability is peculiarly dependent on corporate organization. Principles applicable equally to actions against corporations or their officers, and to actions against other individuals, are not within the scope of this work, but should be sought in works treating of the law of *Wrongs*. And the right of a corporation to recover for a wrong done towards them, is under the title of that wrong.]

1. Exercise of the corporate powers. Unless the act of incorporation provides for it, consequential damages from constructing or maintaining their works, are not recoverable from an improvement company. *Pa. Supreme Ct.* 1859, *New York & Erie R. R. Co. v. Young*, 38 *Pa. St.* 175.

2. No action can be maintained against a corporation for injuries resulting from acts done in conformity to law, for which a specific remedy is provided by charter, unless the corporation has in some way forfeited its chartered rights, or the charter remedy has been rightfully modified by statute, so as to authorize such suit. *Me. Supreme Ct.* 1857, *Gowen v. Penobscot R. R. Co.* 44 *Me.* 140.

3. A corporation invested with a franchise to do an act, is liable for consequential damages no further than as declared in the act of incorporation. *Pa. Supreme Ct.* 1863, *Monongahela Bridge Co. v. Kirk*, 46 *Pa. St.* 112.

4. Therefore, damages cannot be recov-

ered from a bridge company for losses consequent upon the location of a pier, though it may, to some extent, interfere with the navigation of the stream, where the only ground for such liability is a proviso in the act of incorporation, that the bridge shall not be erected in such a manner as to injure or interrupt the navigation of the river. If the piers authorized by the charter are injudiciously located, the State may complain, but such fact cannot avail an individual in an action for damages. *Id.*

5. A corporation, while acting within the powers granted, is not liable for any injury suffered by an individual through obstructions to the navigation, by altering the flux and reflux of the tide in a navigable stream or harbor. *Ma. Supreme Ct.* 1841, *Parker v. Cutler Mill Dam Co.* 20 *Me.* 353.

6. A gas company may be held liable for consequential damages resulting from percolation of water from their gas works into plaintiff's well on adjoining land. A corporation is exempt from consequential damages, only where, being clothed with the State right of eminent domain, it takes private property for public use, on making proper compensation, and where such damages are not part of the compensation required. *Pa. Supreme Ct.* 1861, *Pottstown Gas Co. v. Murphy*, 39 *Pa. St.* 257.

7. An act authorizing a corporation to build a dam on their own land upon and across a river which is a highway, merely protects them from indictment for a nuisance in obstructing the river; but if, in building their dam, they overflow the land of others, the act does not protect them from liability for such flowage. [18 *Pick.* 501; 5 *Cow.* 165; 2 *Johns. Ch.* 162; *Ang. on Water Courses*, § 476.] *N. H. Supreme Ct.* 1862, *Eastman v. Amoskeag Manuf. Co.* 44 *N. H.* 143; *Hooksett v. Amoskeag Manuf. Co.* 44 *N. H.* 105.

8. Thus, where a corporation, authorized by charter to erect and maintain such dams across the M. river at A. as it should deem necessary and proper for carrying on its works, erected a dam across the river at A. throwing back the water upon, and thereby destroying a bridge across the river in a public highway in the town of H,—*Held*, that the charter furnished no defence in a suit by the town of H. *N. H. Supreme Ct.* 1862, *Hooksett v. Amoskeag Manuf. Co.* 44 *N. H.* 105.

9. **Error of judgment.** A corporation is not answerable in equity for a merely erroneous exercise of a discretion it is vested with, however injurious the consequences. * *Ga. Supreme Ct.* 1856, *Semmes v. Mayor &c. of Columbus*, 19 *Ga.* 471.

10. When a municipal corporation is fully invested by law with power over the streets of the city which they represent, a private action cannot be maintained against them for consequential damages resulting from the grading of the streets, or any other improvement necessary and proper for the benefit of the city, in using the same, provided they are guilty of no excess of authority. *Ga. Supreme Ct.* 1866, *Roll v. City Council of Augusta*, 34 *Ga.* 326.

11. A corporation owning a canal are not responsible for an accident,—*e. g.* an injury to a boat by a rock falling from the bank,—if it did not arise from a want of reasonable care, or from an omission to comply with an express requirement of the act of incorporation. *N. Y. Superior Ct.* 1866, *Weitner v. Delaware & Hudson Canal Co.* 4 *Robt.* 234.

12. **Acts of public officers.** The general principle, rendering the master liable for the tortious acts of his servant committed in his service, does not apply to the wrongful acts of the officers of a municipal corporation, who are elected for a definite term, and whose duties are prescribed by statute. *Iowa Supreme Ct.* 1865, *Estep v. Keokuk County*, 18 *Iowa*, 199.

13. Towns and other public corporations are not liable for the unauthorized or tortious acts of their officers, though done in the course, and within the scope, of their employment. *Me. Supreme Ct.* 1864, *Small v. Inhabitants of Danville*, 51 *Me.* 359.

14. A town is not liable for the tortious use, by a highway surveyor, of private property, for the purpose of constructing a culvert across a highway. *Id.*

15. A municipal corporation is not liable for the wilful acts of its marshal not done in the prosecution of the corporate business, unless done by its direction. *Ala. Supreme*

Ct. 1844, *Ready v. Mayor &c. of Tuscaloosa*, 6 *Ala. N. S.* 327.

16. Individuals sustaining damage by the defects of the highways and bridges, cannot maintain an action for damages against the board of police of the county who are charged with the duty of making provision for the repair. The board discharge their duty by appointing in good faith the necessary overseers, &c.; and a person aggrieved by the default of the overseer or contractor must seek a remedy against him personally. *Miss. Ct. of Errors*, 1866, *Sutton v. Board of Police*, 41 *Miss.* 286.

17. A town is not liable for an arrest and imprisonment, by its collector, for non-payment of taxes, illegally included in his warrant and since abated, although it afterwards pays the collector's fees for serving the warrant, and the charges of the imprisonment. *Mass. Supreme Ct.* 1856, *Perley v. Inhabitants of Georgetown*, 7 *Gray*, 464.

18. A municipal corporation, which has collected a tax, erroneously assessed, but which was assessed by officers having jurisdiction of the matter, is not liable, in an action for money had and received, to refund the tax. *N. Y. Ct. of Appeals*, 1868, *Swift v. City of Poughkeepsie*, 37 *N. Y.* 511. Compare *Herzo v. City of San Francisco*, 33 *Cal.* 134.

19. A corporation is not liable to pay the damages recovered against one who has acted as judge, &c., of a corporate election, for having maliciously and fraudulently refused a corporator the right to vote—whether it makes a promise of indemnity before or after the election. *Pa. Supreme Ct.* 1831, *Weckerly v. Lutheran Congregation*, 3 *Russell*, 172.

20. The legislature has power to render a corporation not liable for any misfeasance or nonfeasance of the city officers. *N. Y. Supreme Ct.* 1868, *Gray v. City of Brooklyn*, 50 *Barb.* 865.

21. **Neglect of corporate duty.** A corporation aggregate, having, or supposed to have, a corporate fund, is liable, in an action at common law, for negligence of its duty.* *Circ. Ct. D. C.* 1827, *Fowle v. Corporation of Alexandria*, 3 *Cranch C. Ct.* 70; 3 *Pet.* 398.

* In consequence of erroneous information given in good faith by an officer of a bank, to the plaintiff, in regard to the amount of money which had been there deposited to his credit by a third person, the plaintiff incurred certain expenses. *Held*, that no action would lie against the corporation to recover the amount of such expenses. *Vt. Supreme Ct.* 1859, *Herrin v. Franklin County Bank*, 33 *Vt.* 374.

* That a bank cannot be charged with negligence in not detecting the frauds of its servants, if the examinations of books, papers, &c., are in the way usual with banks,—see *Manhattan Co. v. Lydig*, 4 *Johns.* 371.

22. Where the law imposes an obligation on a corporation, which it refuses to discharge, it may be held liable civilly, at the suit of a party, who sustains damage in consequence of its refusal. *Ill. Supreme Ct.* 1851, *Seagraves v. City of Alton*, 18 *Ill.* 366.

23. A special action on the case will lie against a private corporation, for omitting to take down the walls of their building, which had been burnt, to the injury of a person upon whom the wall fell while he was walking in the street. * *N. Y. Supreme Ct.* 1842, *Church of the Ascension v. Buckhart*, 3 *Hill*, 193.

24. A corporation may be liable for negligently keeping a dog which was accustomed to bite. But a *scienter* must be proved home to some person who had the control of the yard where the dog was kept, or of the dog itself. *Scienter* in a mere servant is not sufficient to maintain the action. *Q. B.* 1864, *Stiles v. Cardiff Steamship Nav. Co.* 38 *Law J. N. S. Q. B.* 810.

25. Where a corporate body, whether of a municipal or of a private character, owes a specific duty to an individual, an action will lie for a breach or neglect of that duty, whenever such breach or neglect has occasioned an injury to that individual; but if such corporation, owe a duty to the *public*, and neglect to perform it, although every individual composing that public, is injured, some more, and some less, yet they can have no private remedy, at the common law. † *N. J. Supreme Ct.* 1840, *Board of Chosen Freeholders of Sussex County v. Strader*, 3 *Harr.* 108.

26. Thus, a board of chosen freeholders, created by the statutes of New Jersey a corporation, is not liable to an individual for an injury sustained by a defect in a bridge, which it was the duty of such board to keep in repair. The only remedy is by presentment. *Id.* Compare *Riddle v. Proprietors of Locks*,

7 *Mass.* 187; *Mower v. Inhabitants of Leicester*, 9 *Id.* 247; *Russel v. Men of Devon*, 2 *Durnf. & E.* 667.

For duties and liabilities of Municipal Corporations in respect to streets, see MUNICIPAL CORPORATIONS.

27. A corporation which was bound by its charter to keep certain roads and bridges in repair, and made liable to indictment for neglect in this respect, entered into an agreement with the State for the exchange of certain lands. The agreement provided that the corporation should have liberty at any time to enter into arrangements with cities and towns, within which such roads and bridges were situated, for their maintenance, and that it should remain bound, as then, until such arrangements should be made, to keep the roads and bridges in repair. *Held*, that the corporation was not liable, in an action of contract upon this agreement, for a failure to keep the roads and bridges in repair. *Mass. Supreme Ct.* 1864, *Commonwealth v. Boston & Roxbury Mill Corp.* 8 *Allen*, 296. Compare *Philadelphia &c. R. R. Co. v. Philadelphia &c. Towboat Co.* 28 *How.* 209; *Memphis & Ohio R. R. Co. v. Hicks*, 5 *Sneed*, 427.

28. The proprietors of a canal were bound by their incorporation to construct their canal so deep and wide that rafts of a certain description could pass through it, when the same could pass through the river with which it was connected. A raft, which had entered the canal, upon due payment of toll, soon after grounded, and while in this position, was injured by a storm. In an action by the owner of the raft,—*Held*, that the proprietors of the canal were liable for all damages sustained by the plaintiff in consequence of the canal not being sufficient to pass the raft, without evidence that it could have passed the river. *Mass. Supreme Ct.* 1810, *Riddle v. Merrimack River Locks &c.* 7 *Mass.* 169.

29. A corporation, established with power to erect a bridge across a river, and take toll of passengers, adopted, as part of their bridge, a way made by individuals, of a few rods extent, being the only entrance from the public highway to the bridge. A traveler, on passing over this way to the bridge, where he paid toll, had his horses injured from a defect in such way. *Held*, that he was entitled to recover of such corporation the damages

* In an action against a municipal corporation for negligence in the construction of a wall, in consequence of which, the wall fell down and injured the plaintiff's mill, the damages recovered should be only for the actual injury sustained by the plaintiff, with interest from the time of the injury. If rent of the building injured is recoverable, it can only be for such time as was necessary to repair the premises and restore them to their usefulness. *N. Y. Supreme Ct.* 1865, *Ludlow v. Village of Yonkers*, 43 *Barb.* 493.

† Wherever an indictment lies against a corporation for non-repair, an action on the case will lie at the suit of the individual who is injured thereby,—see *Mayor &c. of Lyme Regis v. Henley*, 2 *Clark & F.* 631, 654.

sustained thereby; and, in addition to the value of the horse, for money prudently expended in order to effect a cure. *Me. Supreme Ct.* 1837, *Watson v. Lisbon Bridge*, 14 *Me.* (2 *Shepl.*) 201. Compare *Chase v. Cabot & West Springfield Bridge Co.* 6 *Allen*, 512.

80. A municipal corporation,—*Held*, liable for defects in its sidewalks caused by accumulated ice or snow. *Luther v. City of Worcester*, 97 *Mass.* 268; *Hutchins v. City of Boston*, *Id.* 272, *note*.

81. A town which is bound to keep in repair its highways, is not liable for injury occasioned to a vicious horse by his coming upon a defect in a highway, while in a condition of uncontrollable viciousness, unless it appears that the injury would have occurred if the animal had been under control. *Mass. Supreme Ct.* 1867, *Titus v. Inhabitants of Northbridge*, 97 *Mass.* 256; *Horton v. City of Taunton*, *Id.* 266, *note*.

82. The construction and effect of an act making municipal corporations liable for the value of property destroyed by a mob or riot,—considered. *Eastman v. Mayor &c. of New York*, 5 *Robt.* 389; *Ross v. Mayor &c. of New York*, 4 *Robt.* 49.

83. Torts of agents. In general a corporation is liable for a tortious act committed by an officer, agent or servant, in the execution of his duties as such, upon the same principles as those on which a natural person is held liable for the wrongful acts of an agent. *K. B.* 1821, *Duncan v. Proprietors of Surrey Canal*, 3 *Stark.* 50; 1834, *Smith v. Birmingham &c. Gas Light Co.* 1 *Ad. & Ell.* 526; 3 *Nov. & M.* 771; *Rex v. Medley*, 6 *Car. & P.* 292; *C. P.* 1842, *Maund v. Monmouthshire Canal Co.* 4 *Mann. & G.* 452; 3 *Eng. Railw. Cas.* 159; 2 *Dowl. N. S.* 118; 5 *Scott, N. R.* 457; *Q. B.* 1842, *Regina v. Birmingham & Gloucester Railw. Co.* 2 *Gale & D.* 236; 9 *Car. & P.* 469; *Exch. Cham.* 1851, *Eastern Counties Railw. Co. v. Broom*, 2 *Eng. L. & Eq.* 406; 6 *Exch.* 314; *Exch.* 1854, *Thompson v. Bell*, 26 *Eng. L. & Eq.* 536; 10 *Exch.* 10; *H. of Lords*, 1854, *Bargate v. Shortridge*, 81 *Eng. L. & Eq.* 44; 5 *H. of L. Cas.* 297; 1855, *National Exchange Co. v. Drew*, 82 *Eng. L. & Eq.* 1; *Mass. Supreme Ct.* 1811, *Riddle v. Proprietors of Locks &c.* 7 *Mass.* 187; 1837, *Thayer v. City of Boston*, 19 *Pick.* 511; 1854, *Stevens v. Boston & Maine R. R.* 1 *Gray*, 277; 1855, *Moore v. Fitchburg R. R. Corp.* 4 *Id.* 465; 1862, *Hew-*

ett v. Swift, 3 *Allen*, 420; *N. Y. Supreme Ct.* 1827, *Beach v. Fulton Bank*, 7 *Cow.* 485; 1829, *Hawkins v. Dutchess &c. Steamboat Co.* 2 *Wend.* 452; 1848, *Hay v. Cohoes Company*, 3 *Barb.* 42; 1851, *Watson v. Bennett*, 12 *Id.* 196; *Ct. of Errors*, 1845, *Mayor &c. of New York v. Bailey*, 2 *Den.* 433; *Superior Ct.* 1851, *Thatcher v. Bank of State of New York*, 5 *Sandf.* 121; 1857, *Blackstock v. New York & Erie R. R. Co.* 1 *Bow.* 77; 1859, *Leman v. Mayor &c. of N. Y.* 5 *Id.* 414; *N. J. Supreme Ct.* 1852, *State v. Morris & Essex R. R. Co.* 3 *Zabr.* 860; *Ohio Supreme Ct.* 1834, *Hamilton County v. Cincinnati & Wooster Turnp. Co.* *Wright*, 603; 1849, *Town Council of Akron v. McComb*, 18 *Ohio*, 229; 1854, *Carman v. Steubenville & Indiana R. R. Co.* 4 *Ohio St.* 399; *Pa. Supreme Ct.* 1818, *Chestnut Hill &c. Turnp. Co. v. Rutter*, 4 *Serg. & R.* 6; 1822, *McCready v. Guardians of the Poor*, 9 *Id.* 94; *Phil. Com. Pl.* 1846, *Bank of Kentucky v. Schuylkill Bank*, 1 *Para. Sel. Cas.* 180, 251; *Ind. Supreme Ct.* 1854, *Crawfordsville R. R. Co. v. Wright*, 5 *Ind.* 252; *Ill. Supreme Ct.* 1856, *Illinois Central R. R. Co. v. Reedy*, 17 *Ill.* 580; 1865, *Illinois Central R. R. Co. v. Read*, 37 *Ill.* 484; *Iowa Supreme Ct.* 1865, *Donaldson v. Mississippi & Missouri R. R. Co.* 18 *Iowa*, 280; *Md. Chancery*, 1828, *McKim v. Odom*, 3 *Bland, Ch.* 407, 421; *Del. Ct. of Errors*, 1839, *Whiteman v. Wilmington & Susquehanna R. R. Co.* 3 *Harring.* 514; *Ky. Ct. of Appeals*, 1844, *Underwood v. Newport Lyceum*, 5 *B. Monr.* 129; *Fla. Supreme Ct.* 1846, *Edwards v. Union Bank of Florida*, 1 *Fla.* 186; *Ga. Supreme Ct.* 1855, *McDougald v. Bellamy*, 18 *Ga.* 411; *Vt. Supreme Ct.* 1827, *Lyman v. White River Bridge Co.* 2 *Aiken*, 255; 1854, *State v. Vermont Central R. R. Co.* 27 *Vt.* 103. But compare *Philadelphia &c. R. R. Co. v. Wilt*, 2 *Am. Railw. Cas.* 254; 4 *Whart.* 143; *Foot v. City of Cincinnati*, 9 *Ohio*, 81.

84. An action against a company established for conveying passengers by omnibuses in the streets of London, charged that the company, by its servants, wrongfully, vexatiously and maliciously, did certain acts (describing them), with a view to, and which in the result did, obstruct and annoy the plaintiff in the conduct of a similar trade. *Held*, that as the acts complained of were connected with the object and purpose for which the company was incorporated, the company was responsible. *C. P.* 1859, *Gran-*

v. London &c. Omnibus Co. 7 *C. B. N. S.* 390.

85. Where a corporation gives an order to a servant to do an act which implies the use of force and personal violence to others, if the servant, in the execution of that service, goes beyond the proper limits as to the use of force, and commits a trespass by unjustifiable violence, and inflicts an injury, the corporation will be liable in an action of trespass therefor. [4 Gray, 465.] *Mass. Supreme Ct.* 1862, *Hewett v. Swift*, 3 *Allen*, 420.

86. A company is not responsible for any excess of beating or violence used by its agents, more than was necessary to carry out its orders. The agents themselves will be liable for this excess. *Ill. Supreme Ct.* 1857, *St. Louis, Alton & Chicago R. R. Co. v. Dalby*, 19 *Ill.* 858.

87. A corporation and their servant may be sued for an assault and battery committed by their servant acting under their authority.* [19 *Pick.* 511.] *Mass. Supreme Ct.* 1855, *Moore v. Fitchburg Railroad*, 4 *Gray*, 465; *Ill. Supreme Ct.* 1857, *St. Louis, Alton & Chicago R. R. Co. v. Dalby*, 19 *Ill.* 858; *Each. Ch.* 1851, *Eastern Counties Railw. Co. v. Broom*, 2 *Eng. L. & Eq.* 406; 6 *Eng. Railw. Cas.* 743; 15 *Jur.* 297; 6 *Each.* 314; 20 *Law J. N. S. Each.* 196.

88. It is not necessary that the servant should be authorized to do the act by instrument under the seal of the corporation. The company may be rendered liable by a ratification of the act. *Id.*

89. A corporation is not rendered liable for a malicious and wilful trespass committed by their servant, by the fact that it has been approved by their general agent. A general agent,—*e. g.* one who is president and general manager of a corporation,—has no implied authority to commit a trespass. Express authority to do the act must be shown. *N. Y. Ct. of Appeals*, 1849, *Vanderbilt v. Richmond Turnp. Co.* 2 *N. Y.* (2 *Comst.*) 479.

40. The captain of a boat owned by a corporation wilfully ran her into the plaintiff's boat; and his act was sanctioned and approved by the president, who was the general manager of the corporation. *Held*, that

this did not make the corporation liable for the damage. *Id.*

41. Where the plaintiff below had been taken into custody by a railway inspector of the defendants, charged with having no ticket, refusing to pay fare, intoxication, and assaulting the inspector, and the solicitor of the company attended at the hearing before the magistrate, to conduct the proceedings, —*Held*, that such attendance was no ratification by the company, it not appearing that the facts were known to the company. *Each. Cham.* 1851, *Eastern Counties Railway Co. v. Broom*, 2 *Eng. L. & Eq.* 406; 6 *Eng. Railw. Cas.* 743; 15 *Jur.* 297; 6 *Each.* 314; 20 *Law J. Each.* 196.

42. What evidence is required of instructions to the agent, when the act complained of involves a criminal offense,—see *Commonwealth v. Ohio & Pennsylvania R. R. Co.* 1 *Grant Cas.* 329.

43. — of contractor's servants. Where a person is employed to do an unlawful act, by which an injury is occasioned to a third person, the employer is liable to an action for such injury, though the party employed be a contractor, and the act that of his servants. Thus, where the defendants, a registered joint stock company, contracted with W. for the laying of their main gas pipes in certain streets, having no special powers for that purpose, and the servants of W. left a heap of earth and stones which had been thrown out of the trenches dug for receiving the pipes in one of the streets, by which the plaintiff, in passing along the street, was injured,—*Held*, that the defendants were liable to an action for the injury occasioned to the plaintiff. *Q. B.* 1853, *Ellis v. Sheffield Gas Consumers Co.* 22 *Eng. L. & Eq.* 198; 23 *Law J. N. S. Q. B.* 42; 18 *Jur.* 146.

44. Boats were furnished by a canal company to A. to transport coal, A. furnishing horses and men. *Held*, that the company were not responsible for the negligence of those managing such boats, in running against a boat of the third person. *Phil. Dist. Ct.* 1839, *Blattenberger v. Little Schuylkill Nav. Co.* 2 *Miles*, 809.

45. The liability of a limited public corporation for injuries caused by trespass, negligence, &c., of its agents, covers acts which the corporation is incapable of doing lawfully in its organized and official capacity, and cannot be confined to consequential in-

* It was held in Ohio that a corporation can not be sued in an action of assault and battery; nor can it be joined in such action with other defendants. *Ohio Supreme Ct.* 1821, *Orr v. Bank of United States*, 1 *Ohio (Ham.)* 23.

juries arising from the wrongful performance of a lawful act. *Minn. Supreme Ct.* 1862, Gould v. Sub-district No. 3 &c. 7 *Minn.* 208.

46. A corporation is liable to the same extent and under the same circumstances as a natural person, for the consequences of its wrongful acts, and will be held to respond, in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be. [7 *Wend.* 81; *Angell on Corp.* §§ 882, 898, 891; 2 *Md. Ch.* Dec. 189; 22 *Conn.* 541; 22 *N. Y.* 305-309; 1 *Wend. Black.* (note) 476; 7 *C. B.* 290 *N. S.*; 24 *Maine*, 490; 21 *How. U. S.* 309.] *N. Y. Ct. of Appeals*, 1865, *New York & New Haven R. R. Co. v. Schuyler*, 84 *N. Y.* 80.

47. But a corporation is from its nature incapable of doing any act except through agents, to whom is given, by its fundamental law, or in pursuance of it, every power of action it is capable of possessing and exercising. Hence, the rule is, that a corporation is responsible for the acts or negligence of its agents while engaged in the business of the agency, to the same extent and under the same circumstances, that a natural person is chargeable with the acts or negligence of his agent. *Id.*

48. Thus if a corporation itself issues false certificates of stock and permits the fraudulent transfer of spurious stock, it is liable to the party directly deceived and injured by that transaction. The incapacity to create the spurious stock would be no defence to an action for damages for the injury. On the contrary, that very incapacity, since it would render the certificate or transfer, a fraud and deceit, would itself be the cause of the injury and the basis of recovery. No court would hear the corporation assert that its wrongful act was beyond its chartered powers and therefore ineffective to charge it with the injurious consequences of the fraud. *Id.*

49. Where the officers of a bank have been guilty of a fraud by violating the charter or otherwise, if the directors neglect to remove such officers, and continue to intrust them with the bank funds, they will be considered as sanctioning the fraudulent act. A neglect by the officers of the corporation to inform themselves of the amount already

loaned to directors, cannot justify the violation of law. If the board of directors allow any officer to make loans or discounts in his own discretion, without having the same formally passed upon at a regular meeting of the board, the corporation is liable for the violation of its charter, or of any law, binding on such corporation, in the making of such loans or discounts. *N. Y. Chancery*, 1837, *Bank Commissioners v. Bank of Buffalo*, 6 *Paige*, 497.

50. Although a corporation itself cannot, strictly speaking, be guilty of a fraud, yet, if it can accomplish the object for which it was formed only through the agency of individuals, and these act fraudulently, the corporation is liable for the fraud. *H. of Lords*, 1854, *Ranger v. Great Western Railway Co.* 5 *H. of L. Cas.* 72.

51. Malfassance generally. An action on the case for malfassance will lie against a corporation. *Mayor &c. of New York v. Bailey*, 2 *Den.* 483; affirming 3 *Hill*, 581.

52. Infringement of patent. When a corporate body, acting in its corporate character, directs an act to be done which infringes the right of another,—*a. g.* an infringement of patent,—they may be sued in an action on the case.* *U. S. Cir. Ct. (Pa.)* 1820, *Kneass v. Schuylkill Bank*, 4 *Wash. C. Ct.* 2.

53. An action may be maintained against a corporation for the infringement of a patent, upon proof of a wrongful manufacture by agents of the corporation, with its approval and for its benefit. A corporation can only act by their agents; it can act only by those who are in their employ. And when one in the employ of a corporation, in the business of his employment, does an act for their benefit, and which they adopt and approve, and take advantage of, they will be deemed to have authorized the act, and will be as much bound by it as though expressly authorized. *U. S. Cir. Ct. (N. Y.)* 1858, *Poppenhuisen v. N. Y. Gutta Percha Comb Co.* 2 *Fisk* 63.

54. Thus, a railroad corporation, created by one State, and owning a road within the State, is liable to an action for the use of a

* The directors of a manufacturing corporation, who manage and superintend its business, and under whose direction it manufactures and sells articles which are an infringement of a patent, and its agents, who conduct its business of selling such articles, are responsible for such infringement, and may be joined as defendants in an injunction suit. *U. S. Cir. Ct. (N. Y.)* 1853, *Goodyear v. Phelps*, 3 *Blatchf.* 91.

patented improvement on cars run on that road, though another corporation, created by another State, held the stock, and furnished and worked the road, charging to the first corporation the expense of such outlays, and crediting it with the earnings. *U. S. Supreme Ct.* 1854, *York & Maryland R. R. Co. v. Winans*, 17 *How.* 30.

55. Libel. An action for libel may be maintained against a corporation aggregate.* *Minn. Supreme Ct.* 1864, *Aldrich v. Press Printing Co.* 9 *Minn.* 133; *Q. B.* 1858, *Whitfield v. Southeastern Railway Co.* 31 *Law Times*, 113; 1 *El. B. & E.* 115.

56. False imprisonment, &c. An action for false imprisonment lies against a corporation; but an action for malicious prosecution is not maintainable. *Ala. Supreme Ct.* 1861, *Owsley v. Montgomery & West Point R. R. Co.* 37 *Ala. N. S.* 560.

57. An action for malicious prosecution and false imprisonment, cannot be maintained against a corporation aggregate; it must be brought against the individuals doing the deed. *Mo. Supreme Ct.* 1853, *Childs v. Bank of Missouri*, 17 *Mo.* 313.

58. Vexatious suit. An action on the case, for a vexatious suit, may be sustained against a corporation aggregate. Thus, where the plaintiff brought an action against an incorporated bank, alleging that the defendants, without probable cause, and with a malicious intent, unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced by writ of attachment, and prosecuted against him, a certain vexatious suit, and after the plaintiff, on the trial of the cause, had produced all his evidence, upon motion of the defendants, a nonsuit was granted on the ground that the defendants were not liable for such cause of action,—*Held*, that the nonsuit must be set aside, and a new trial granted. *Conn. Supreme Ct.* 1853, *Goodspeed v. East Haddam Bank*, 22 *Conn.* 530.

59. Trespass to lands. That a corporation is liable for a trespass to lands committed by their authorized agents,—see *How v. Canal Co.* 5 *Harring.* 245; *Louisville &c. R. R. Co. v. Faulkner*, 2 *Head*, 65.

* Where the majority of a corporation concurred in placing on the corporation books a resolution libelling a court of justice,—*Held*, that the individuals composing the majority were liable to a criminal information. *K. E.* 1786, *Rex v. Watson*, 2 *Durnf. & K.* 199.

60. That a corporation is liable for damages to neighboring lands caused by blasting* (although carefully done) in constructing their works,—see *Hay v. Cohoes Co.* 2 *N. Y. (2 Const.)* 159; *Tremain v. Cohoes Co.* 12, 163.

61. Nuisance. That a private corporation creating a nuisance under municipal authority, is liable to an individual for the damage resulting to his property,—see *Terre Haute Gas Co. v. Teel*, 20 *Ind.* 181.

62. A private corporation is liable, to an action by a traveler for injuries occasioned by an obstruction placed by it in a way, which it had built and kept in repair, but which had been used by the public so as to have become a public way, although the corporation was not authorized by its charter to build it. *Mass. Supreme Ct.* 1859, *Taylor v. Boston Water Power Co.* 12 *Gray*, 415.

63. Conversion. A corporation may be guilty of a conversion of goods by their agents; and trover will lie against a corporation aggregate for such conversion. *N. Y. Supreme Ct.* 1827, *Beach v. Fulton Bank*, 7 *Cow.* 485. And see *Duncan v. Surrey Canal Proprietors*, 3 *Stark.* 50.

64. That a corporation are liable for loss of stock pledged to them, which by the error of their treasurer, in entering it, has been improperly sold upon process against him,†—see *Jones v. Portsmouth & Concord R. R. Co.* 33 *N. H.* 544.

65. Where several directors of a corporation united in fraudulent acts and representations, giving credit to bonds of the company offered in market, in reliance upon which the complainant bought some of

* For injury sustained by a landowner in consequence of the neglect of a railroad company to remove stones thrown upon his land by blasting done in a proper manner, case, and not trespass, is the proper remedy. *Vt. Supreme Ct.* 1863, *Babin v. Vermont Central Railroad Co.* 25 *Vt.* 363.

† In an action against a corporation for a conversion of plaintiff's stock, by refusing to issue or transfer it, the measure of damages is not the subscription-money, with interest, but the value of the stock, or its highest price in market, at any time after the demand and refusal to permit a transfer and issue a scrip to the owner. [20 *Wend.* 91; *Dougl.* 523.] *N. Y. Supreme Ct.* 1867, *Arnold v. Suffolk Bank*, 37 *Barb.* 424. Consult *Stoek*.

A corporation, the affairs of which are managed by a board of trustees, is not liable for the wrongful refusal of its president to surrender goods in the possession of the corporation to their rightful owner, such refusal not having been authorized by the trustees. *N. Y. Superior Ct.* 1859, *Thomson v. Sixpenny Savings Bank*, 5 *Bow.* 293. Compare *Bissell v. Michigan Southern & Northern Indiana R. R. Co.* 23 *N. Y.* 232.

them,—*Held*, that he could maintain an action in equity against any of them to annul the purchase and for repayment. Each of several wrong doers is liable for all the wrongful acts in which he participated, both at law and in equity. *N. Y. Superior Ct.* 1850, *Mayne v. Griswold*, 3 *Sandf.* 468; 9 *N. Y. Leg. Obs.* 25.

66. **Liability of officers.** Officers and agents of a corporation are personally liable for losses and defalcations occasioned by their neglect or mismanagement, as well as by their positive misconduct; and the measure of damages is the extent of the injury. *La. Supreme Ct.* 1883, *Percy v. Millaudon*, 3 *La.* 568; 1837, *Pontchartrain R. R. Co. v. Paulding*, 11 *Id.* 41.

67. A creditor of a corporation cannot sue directors for damages, on the ground that his demand was made valueless by the misconduct of the defendants. *N. Y. Supreme Ct.* 1867, *Branch v. Roberts*, 50 *Barb.* 435.

68. Whether the trustees of a company are liable *at law* to creditors for mismanagement of the funds of the corporation, in improperly declaring dividends, and paying them to stockholders, when there were no profits to divide,—see *Lexington & Ohio R. R. Co. v. Bridges*, 7 *B. Monr.* 556.

69. — for issuing spurious stock. Officers of a corporation who issue spurious stock, are liable, in an action by an individual stockholder to recover the amount of the depreciation in the market value of the stock resulting from the disclosure of the over-issue. *N. Y. Supreme Ct.* 1857, *Cazeaux v. Mali*, 25 *Barb.* 578; *S. C. sub nom. Mead v. Mali*, 15 *How. Pr.* 347. See also, *Wells v. Jewett*, 11 *Id.* 242; *Bell v. Mali*, *Id.* 254.

70. In such an action the same facts must concur as in an action for the false representation of the credit of a buyer. The pleading must state what the false representation was: it must have been false, and so known to be to the defendant, and made with the intent and with the effect of deceiving the plaintiff, and must have caused loss to him. It is not essential that the representation should be addressed directly to the plaintiff. If it were made with the intent of influencing every one to whom it might be communicated, or who might read or hear of, the latter class of persons would be in the same position as those to whom it was directly communicated; but they must have come to a knowledge of it

before their purchase. *N. Y. Supreme Ct.* 1857, *Cazeaux v. Mali*, 25 *Barb.* 578; *S. C. sub nom. Mead v. Mali*, 15 *How. Pr.* 347.

71. The officers of a corporation authorized to issue certificates to the stockholders, as evidence of title to stock, are liable not only to the immediate purchasers from them of spurious stock, falsely and fraudulently certified by them, but also to any subsequent purchaser buying them upon the faith of the false certificate, and sustaining damage thereby. *N. Y. Supreme Ct.* 1862, *Shotwell v. Mali*, 38 *Barb.* 445.

72. The purchaser's right of action against the officers of a corporation concerned in issuing certificates of spurious stock is complete upon the purchase. And that right will not be affected by any subsequent action of other directors of the corporation, in turning out other property to him, to an amount exceeding the sum paid by him for the false certificates. *Id.*

73. — for false representations. An officer of a corporation who wilfully publishes false statements about its condition, relying on which a person is induced to buy its stock, is liable to him for the damages sustained thereby. *N. Y. Supreme Ct.* 1860, *Newbery v. Garland*, 31 *Barb.* 121; *Morse v. Swita*, 19 *How. Pr.* 275. Compare *Mabey v. Adams*, 8 *Bow.* 846.

74. It is not necessary to show that the statements were made to the buyer of the stock. Statements made in a report to the corporation, which was required by law to be made and published, render the person making them liable to any one so misled. *N. Y. Supreme Ct.* 1860, *Morse v. Swita*, 19 *How. Pr.* 275.

75. Where it was enacted that, if the certificate of the condition of the company was false in any material representation, the officers signing it should be personally liable; and the certificate set forth that the capital stock had been paid in *in cash*, whereas in fact it had been paid in *in property* of an uncertain value,—*Held*, that this was a material misrepresentation, and that the officers were liable. *N. J. Supreme Ct.* 1858, *Waters v. Quimby*, 8 *Dutch.* 198.

76. The directors of a joint stock company, in order to sell their shares to advantage, represented, in their reports and by their agents, that the affairs of the company were in a very prosperous state, and declared

large dividends at a time when the affairs of the company were greatly embarrassed. A person who had been induced by those means to purchase shares of one of the directors, filed a bill against the director, praying to be repaid his purchase money, and offering to re-transfer the shares. *Held*, that the bill was maintainable; and that the other members of the company were not necessary parties. *V. Chan. Ct.* 1889, *Stainbank v. Fernley*, 8 *Law J. N. S. Ch.* 142; 8 *Jur.* 262; 9 *Sim.* 556.

77. The defendant, an officer of a mining company, by falsely representing to the Stock Exchange that two-thirds of the shares had been taken and paid upon, procured the stock to be entered in the official list. The plaintiff, a stranger, knowing the rule, that such stock was not admitted into such list unless two-thirds of the capital had been paid up, and seeing the stock so entered, and relying on the insertion having been procured by honest means, bought some shares from a jobber on the exchange. *Held*, that he had a right of action for the fraudulent representation, and that there was evidence for the jury of fraud. *Exch.* 1859, *Bedford v. Bagshaw*, 4 *Hurlst. & N.* 588.

78. An action will lie against a director of a mining company for false representations contained in a prospectus issued with his sanction, although the language might be susceptible of a meaning which would make it not literally untrue; and although the representations have not been made directly by the defendant to the plaintiff. It is enough that they are contained in a document which is meant to be circulated

amongst the class of persons who are likely to be deceived by it. *C. P.* 1859, *Clarke v. Dickson*, 6 *C. B. N. S.* 458.

79. Nor is it any defence to such an action, that the false representations contained in the prospectus were not the sole inducement to the plaintiff to buy shares in the concern. *Id.*

80. An insurance company holding themselves out as solvent, are not conclusively bound to know whether they are so or not; but if the officers neglect to use due care and diligence to know the condition of the company, and hold it out as solvent, when such care and diligence would show them the contrary, there is, *it seems*, good reason for holding them guilty of fraud in issuing policies and for avoiding promissory notes given for such insurance. *Ma. Supreme Ct.* 1861, *Brown v. Donnell*, 49 *Ma.* 421.

81. Corporators are not individually answerable for acts done in their corporate capacity, from which detriment happens; at least not without proof of malice.* *K. B.* 1801, *Harmon v. Tappenden*, 1 *East*, 555; 3 *Esp.* 278.

* The act of one having rightful possession of land, in ejecting an intruder, is not punishable as a violation of a city ordinance which prescribes a penalty against any person "who shall assault, strike or fight another, or shall be guilty of any misconduct calculated to provoke a breach of the peace." *Ill. Supreme Ct.* 1866, *Phillips v. City of Springfield*, 39 *Ill.* 83.

A common council, under the power conferred upon them, by charter, of passing any other by-laws or ordinances deemed necessary for the well being of the city, not repugnant to the laws of the State, may pass an ordinance prohibiting persons from obstructing sidewalks unnecessarily with horses. *Vt. Supreme Ct.* 1863, *State v. Bacon*, 40 *Vt.* 450.

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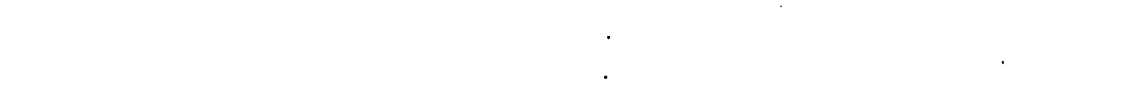
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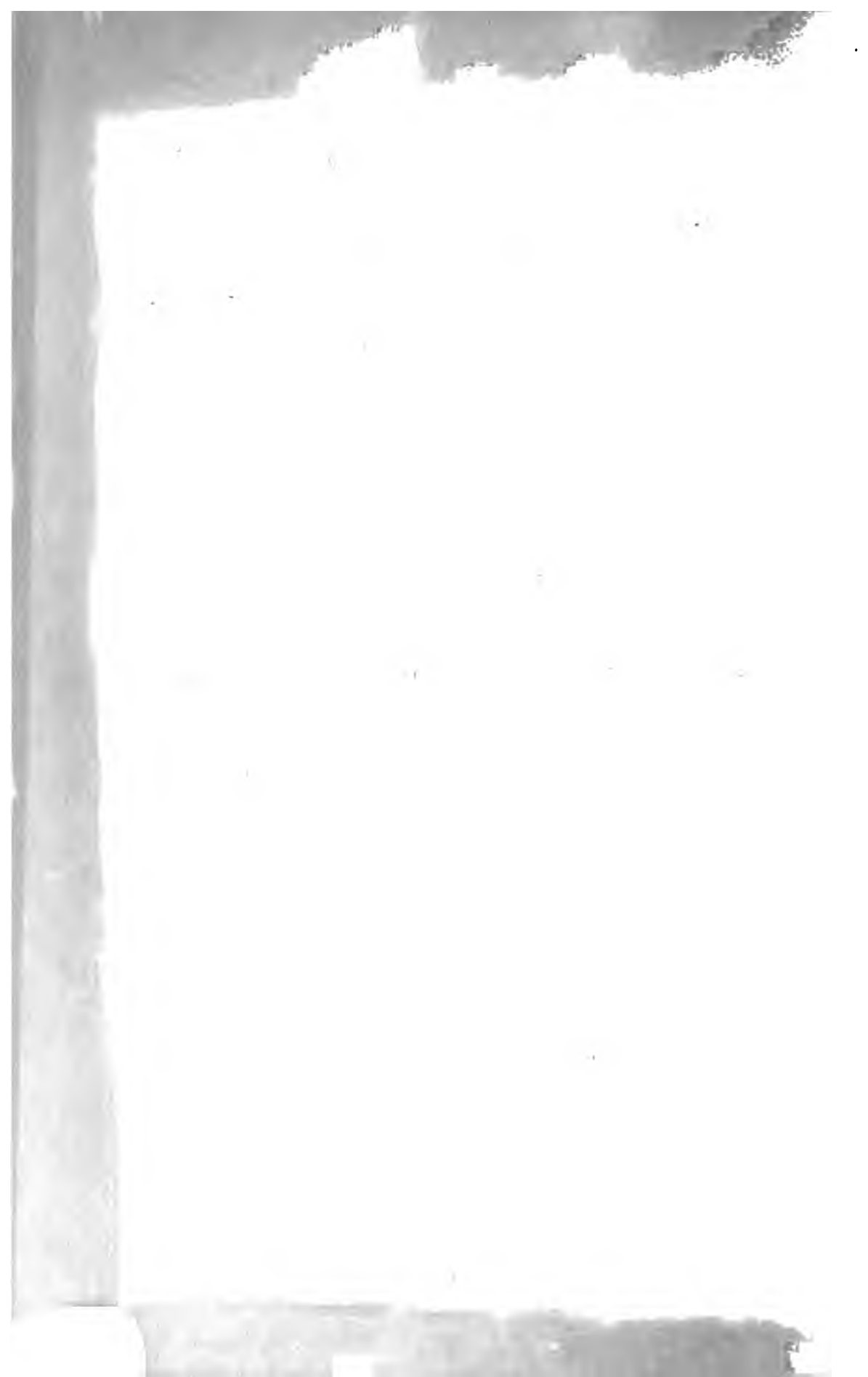
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